Equality and Human Rights Commission Consultation Response to Gender Representation on Public Boards (Scotland) Bill

Creating a fairer Britain
Equality and Human Rights Commission
Response to Gender Representation on Public Boards (Scotland) Bill

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Contact details:

Chris Oswald, Head of Policy
Equality and Human Rights Commission
2nd Floor 151 West George Street
Glasgow
G2 2JJ

0141 228 5964

Chris.Oswald@equalityhumanrights.com
The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).
Question 1: General Comments

When the original Bill was consulted on earlier in the year, the Commission had a number of concerns, particularly around the definitions used in the Bill. The current draft of the bill has clarified these earlier potential concerns of how protected characteristics are defined, and are now more in line with the Equality Act 2010 provisions.

The EHRC remains concerned that this Bill is restricted solely to gender equality. As we argued in our consultation submission we believe that there is sufficient monitoring evidence to support the extension of this clause to disabled people and in some circumstances ethnic minorities.

The previous version of the Bill was gender neutral, so that it required positive action in relation to either gender depending on which one was in the minority on any particular Board. Similar provisions across many EU Member States are framed in gender-neutral terms, for example a requirement that a company board comprises at least 40 per cent of each sex within the next 10 years. The Commission believes that the Bill should be drafted to be gender neutral, which will help ensure that the provisions of the Bill meet the requirements of EU law.

Question 2: The impact, if any, on people applying for an appointment as a non-executive member of a public board

The Bill is likely to have some impact on people applying for non-executive positions on public boards.

The Bill provisions in relation to the gender representation objective only apply when two candidates of different sexes have tied scores and there is no material differences in their skills and abilities as set out in the appointment criteria. In such circumstances the Bill requires public boards to appoint the woman, unless there is a particular characteristic or situation that the man possesses that means he should be appointed.

Women are currently underrepresented on public boards. Positive and robust action is needed to achieve equality and what this Bill sets out is a driver to achieve that equality. The Bill only has effect until a Board has 50% women and meets its gender representation objective.

It might be helpful for the Scottish Government to dispel inaccurate reports that the Bill introduces positive discrimination across all public
appointments or that the system is somehow “loaded” against male candidates. We believe that the use of the “tie breaker” will only apply in a limited set of circumstances.

Question 3: The impact, if any, for those public authorities responsible for encouraging and recruiting women to public boards as non-executive members;

We believe that the impact on the public authority making appointments will be minimal and is outweighed by the positive benefits of sex parity on the Board. Whilst appointment panels will need to be trained in the use of the power this will not be a burdensome requirement.

The Bill also requires bodies to take other appropriate action to help achieve the 50% goal. There will be a need for public bodies to look at wider action such as improvement in recruitment practices to achieve this.

Question 4: The Bill requires public boards to report on the operation of the Act, although Scottish Ministers can regulate how this should happen; what should any reporting requirements cover and why;

The majority of public authorities covered by the Bill are already subject to The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, which (amongst other things) require those authorities to gather and use information on the protected characteristic make up of their Board members and to report on the gender make up of that Board.

We would recommend that the reporting duty under the Gender Representation on Public Boards (Scotland) Bill should only apply to those bodies not already subject to the “Use of members information” Specific Duty and that the reporting regulation under this Bill should be in similar terms to the specific duty requirements.

The content of the report is a matter for the Government. We would suggest that any reporting requirements that are considered should relate to the make-up of the Board, in line with the specific duty requirements rather than to the use of the tie breaker as this runs the
risk of identifying individuals. We also suggest that consideration is
given to public bodies reporting on other measures that they are
undertaking to increase the representation of women and other
underrepresented groups.

Question 5: Whether there should be penalties for non-compliance with the
Bill and what these should be and why

It is important that the Bill complies with European law relating to
positive action. If it goes further than the EU permits and leads to
positive discrimination, appointments made under the Bill may be open
to legal challenge.

Sanctions or penalties which are imposed without sufficient regard to
particular circumstances increase the risk of promoting unlawful
discriminatory action to achieve targets. This should be avoided.

Any sanctions or penalties imposed on bodies for breaching the gender
representation objective must not violate equality law. This means that
sanctions or penalties must be applied proportionately and effectively,
so that bodies can in fact meet the objective through lawful means and
do not feel pressured by the threat of punitive sanctions and/or risk of
reputational damage to take unlawful shortcuts. Such shortcuts might
include, for example, appointing women without an objective
assessment of all candidates.

Sanctions currently in place in other EU states vary from the duty to
publish figures and explain the reasons for failing to reach objectives to
the imposition of financial penalties and the revocation of appointments.
Some regimes involve a progression of sanctions depending on the
scale and extent of non-compliance.

The European Commission has proposed a new EU directive on
improving the gender balance among non-executive directors of
companies listed on stock exchanges. The directive has been drafted
to accord with EU law as explained above.

Member States would be given the power to issue sanctions for
breaching the requirements of the draft directive, including the
imposition of financial fines and the revocation of appointments.

The draft directive states sanctions or penalties for infringing national
measures implementing the directive should be ‘effective, proportionate
and dissuasive’.

The Committee may wish to consider whether similar sanctions would be appropriate in relation to this Bill.