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## **Equalities and Human Rights Committee Comataidh Co-ionannachd agus Còraichean Daonna**

# **Stage 1 report on the Gender Representation on Public Boards (Scotland) Bill**



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# Contents

<b>Executive Summary</b>	<b>1</b>
<b>Introduction</b>	<b>4</b>
Parliamentary scrutiny	4
Committee consideration	4
Policy and financial memoranda	4
<b>Background to the Bill</b>	<b>6</b>
Further powers	6
Purpose of the Bill	6
<b>Gender Representation on Public Boards (Scotland) Bill</b>	<b>8</b>
Scope of the Bill	8
Gender representation objective	9
Key definitions	11
Duty when appointing non-executive members and consideration of candidates	12
Other protected characteristics	15
Reports on operation of Act	16
Power to modify Schedule 1	18
<b>Other comments</b>	<b>22</b>
Guidance	22
Financial impact	24
<b>Conclusions</b>	<b>26</b>
<b>Annexe A - Minutes of meetings</b>	<b>27</b>
<b>Annexe B - written evidence and Official Reports</b>	<b>29</b>
Written evidence	29
Official Reports	30

# Equalities and Human Rights Committee

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**Mary Fee**  
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**Jamie Greene**  
Scottish Conservative  
and Unionist Party



**Gail Ross**  
Scottish National Party



**David Torrance**  
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**Annie Wells**  
Scottish Conservative  
and Unionist Party

# Executive Summary

1. Women make up over 50% of the Scottish population, but have been consistently under-represented on public boards in Scotland. Although voluntary measures have moved the needle towards gender parity, this legislation will put in place a statutory target (also known as the “gender representation objective”) that women should make up 50% of non-executive board membership by 31 December 2022.
2. Jamie Greene MSP and Annie Wells MSP do not support the general principles of the Bill. This report therefore reflects the views of the majority of the Committee who support the Bill.
3. We welcome the decision to legislate in this area, and appreciate the efforts made to ensure that the Bill encourages positive action and appointment based on merit rather than encroaching into positive discrimination.
4. We also welcome the news that currently 45.8% of non-executive positions on public boards are held by women, and consider the Bill necessary to avoid this progress regressing. We are convinced that boards which accurately reflect Scotland’s rich tapestry of life are better able to serve all of Scotland’s citizens, ensuring better outcomes and better use of public resources.
5. Our support for the Bill is mirrored by the evidence received, which by and large supported the general principles of the Bill. We were heartened to learn of the number of initiatives and the level of support offered by the Scottish Government’s Public Appointments Team and the Commissioner for Ethical Standards in Public Life in Scotland (CESPLS) to public bodies seeking to make their boards more representative of society as a whole.
6. However, as the Bill stands, and on the basis of evidence received, we believe that there are a number of areas where questions remain unanswered or issues require further exploration. Throughout our evidence, three key questions cropped up time and again:
  - does the focus on one protected characteristic ahead of others help or hinder in making public boards more diverse?
  - what guidance will be introduced or updated to put the theory of the Bill into practice?
  - how will these measures be reported on and enforced?
7. Although the first question is, perhaps, one which requires further thought and may perhaps require another legislative vehicle in the future, the other two questions lie at the heart of this Bill’s effectiveness and value.
8. The Bill provides for the use of a tiebreaker. In other words, where there are two equally qualified candidates and one is a woman, the appointing person must give preference to the woman if it contributes to achieving the gender representation objective. We anticipate its use will be relatively uncommon.

9. However, some of those who provided written and oral evidence to us were supportive of the Bill but apprehensive of what they called the potential “unintended consequences” of the Bill. Some cited a hypothetical example of a middle-class professional woman being appointed to a public board over a man who was disabled, gay or from an ethnic minority if both were considered to be equally qualified.
10. Evidence we received highlighted the under-representation of many groups on public boards, and we are keen to explore what can be done within this Bill to support diversity in its widest sense.
11. We acknowledge the wealth of support and guidance offered already to public boards as part of their recruitment process, in particular the Code of Practice from CESPLS which the Scottish Government must follow when making regulated appointments. We also welcome the hard work of the Scottish Government’s Public Appointments Team in making the process of joining a public board more transparent and accessible.
12. Given the increased profile of the system of public appointments system, we believe it would be appropriate for the Code of Practice and/or guidance produced by CESPLS to be updated if the legislation is passed to ensure a clear, common and consistent approach is taken. We also believe that similar guidance should be applied to non-regulated appointments, and that guidance should, where possible, be consolidated. Most importantly, we believe that guidance should be statutory.
13. We consider the range of bodies covered to be appropriate. We support the inclusion of higher education institutions (HEIs) in the Bill, given the vast sums of public money they receive and the relatively few positions within their governing structure covered by this Bill. The Committee believe that clarity is required within Schedule 1 for whom the appointing person is for each authority.
14. In our view, a Bill without the appropriate teeth risks the appearance of legislation for legislation’s sake. We ask the Scottish Government to commit to meaningful monitoring and reporting to ensure action is taken, and continues to be taken in future years whatever the Government of the day.
15. We note with interest that many of the boards listed in Schedule 1 are “regulated” – in other words, appointed by Scottish Ministers. We therefore consider it vital that the Scottish Parliament plays a role in monitoring progress towards the objective, and that Scottish Ministers are openly held to account for the boards to which they appoint.
16. Although many public boards are already close to, or have already met, the objective, there are others which will need to undertake some considerable work to keep pace. We believe the Scottish Government should consider what further financial resources or other support can and should be given to these boards to enable them to meet their prospective legislative requirements.
17. We heard compelling evidence that retention of female board members is as important and requires as much consideration as their recruitment in the first place. The Scottish Government should consider how it can support new board members in their new role, paying particular regard to ensuring traditionally gendered considerations, such as childcare, are addressed.

18. The “golden skirts” phenomenon, whereby a small number of women are in the advantageous position of holding a number of board positions, was raised by some witnesses.
19. Some witnesses made intriguing suggestions for other measures which could be included in the Bill to further boost gender parity; for example, applying the gender representation objective to board chairs on an aggregate basis as well as to individual board members, loosening the strict parameters of a 50% objective to a 40:40:20 target to allow public boards some flexibility, and legislating for balanced interview panels.
20. Some specific concerns were raised about the language used in certain parts of the legislation. Suggestions were made by witnesses as to how this language could be made inclusive of trans people and remove loopholes in the appointment process. We support these suggestions, and ask the Scottish Government to work with the Scottish Trans Alliance to bring forward appropriate amendments at Stage 2.
21. We believe the Bill could be improved by introducing a duty on the appointing person and the public authority to report on the steps they have taken to encourage applications from women.
22. We support any constructive moves to tackle inequality and promote diversity, and as such we support the general principles of the Bill at Stage 1. However, we believe that the Bill can be improved at Stage 2, and look forward to working with the Scottish Government and other stakeholders to ensure that this Bill can be effective in achieving its aims. Given the Bill’s focus on gender, we also look forward to continuing to make the case for other protected characteristics to benefit from similar measures.



# Introduction

## Parliamentary scrutiny

23. The [Gender Representation on Public Boards \(Scotland\) Bill](#) was introduced to the Scottish Parliament on 15 June 2017 and referred to the Equalities and Human Rights Committee as lead committee at Stage 1. We are required to report to the Scottish Parliament on the general principles of the Bill. The Bill was accompanied by-
- [Policy Memorandum](#);
  - [Explanatory Notes](#);
  - [Financial Memorandum](#);
  - [Statement of Legislative Competence](#); and
  - [Delegated Powers Memorandum](#).

## Committee consideration

24. In order to inform our scrutiny of the Bill, we issued a [call for written evidence](#) on Friday 23 June 2017, and this resulted in 21 responses. Links to the submissions received are available at [Annexe B](#).
25. We also took oral evidence from key stakeholders in September and October 2017. Links to the Official Reports of those meetings are also available at [Annexe B](#).
26. We would like to thank everyone who provided written and oral evidence.
27. Our report covers the sections of the Bill which have provoked discussion during our consideration of the Bill, and therefore does not comment on sections of the Bill where we have nothing to add.

## Policy and financial memoranda

28. The lead committee is required under [Rule 9.6.3 of Standing Orders](#) to report on the Policy Memorandum, which accompanies the Bill.
29. We wrote to the Scottish Government on 3 August 2017 to seek clarification on a number of issues raised by the Policy Memorandum. The Scottish Government's response is available at [Annexe B](#).
30. We considered the information provided across the Policy Memorandum and the Scottish Government's response to be helpful in understanding the background and objective of the Bill.

31. We however ask that future policy memorandums provide sufficient background to enable wider participation from individuals and groups of people who would not ordinarily engage with commenting on Government legislation.
32. The same rule requires the lead committee to report on the Financial Memorandum. The [Finance and Constitution Committee](#) did not consider the Financial Memorandum, as it received very few responses to its call for evidence. We therefore incorporated scrutiny of the financial implications of the Bill into our Stage 1 inquiry. Our findings are set out later in the report at paragraphs [98 - 104](#).

# Background to the Bill

## Further powers

33. The power to legislate for gender quotas on public boards was proposed by the [Smith Commission](#). The [Scotland Act 2016](#) devolved the power to legislate about equal opportunities in relation to non-executive appointments to the boards of Scottish public authorities. This provision commenced on 23 May 2016.
34. It should be noted that this provision applies to any protected characteristic under the [Equality Act 2010](#), and is not restricted to gender, as was proposed by the Smith Commission.

## Purpose of the Bill

35. The Bill introduces the "gender representation objective" which is that 50% of non-executive members of public boards are women. It will require certain public authorities and Scottish Ministers to try and achieve the gender representation objective. Women currently make up over 50% of the population, but only 45.8% of public board membership, including chairs<sup>i</sup> (however, it should be noted that, at the time of the Bill's introduction, this figure was 42%).

### Changing demographic profile of board members (inclusive of chairs)

Target group	2013/14 %	2014/15 %	2015/16 %	2016/17 %	Sept 2017 %	Scottish population (Census 2011) %
Women	35	38.4	42	45.1	45.8	51.5
Disabled people	13.1	15.3	11.8	9.2	7.9	19.6
Ethnic minority people	2.2	2.9	3.5	3.6	3.3	4

### Performance against Diversity Delivers Targets

Regulated appointments	2013 %		2014 %		2015 %		2016 %		Target %	Population %
	Applicants	Appointed	Applicants	Appointed	Applicants	Appointed	Applicants	Appointed		
Women	34.1	34.5	37.9	45.6	40.8	53.6	42.9	58.6	40	51.5
Disabled people	12.6	10.9	10.4	7.4	12.7	10.3	9.8	10.1	15	19.6
Ethnic minority people	3.8	*	4.9	*	5.3	5.2	5.5	*	8	4
Aged under 50	24.6	20	29.4	24	27.4	24.7	27.1	31.4	40	54.3**
Lesbian, gay and bisexual people	2.6	*	3.9	*	4.1	5.2	4.4	7.1	6	6***

\* Values of less than 5 have been suppressed to avoid the risk of disclosure.

\*\* Scottish population aged 18 to 49 as a percentage of whole population 18 and over

\*\*\* Estimate based on information from Stonewall Scotland website

36. The Bill aims to achieve the gender representation objective by using "positive action" measures.<sup>ii</sup> Where there are two candidates, a man and a woman, and they are "equally qualified"; preference *must* be given to the woman. However, there is an exception in the Bill that allows the position to be given to someone who is not a woman, where it can be justified on the basis of a "characteristic" or "situation" particular to another candidate.
37. The Bill also requires positive action to be taken by public authorities and Scottish Ministers to encourage women to apply for non-executive public board positions, and to take further steps to try and meet the objective by 31 December 2022.
38. Public authorities will be required to report on the operation of the Act, but the detail of this will be set out in regulations, subject to the negative procedure.

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ii In short, positive action involves offering targeted assistance to those with protected characteristics under-represented or disadvantaged, as opposed to positive discrimination, where an individual is chosen on the basis of their protected characteristic. For further explanation, please read the [SPICe briefing on the Bill](#).

# Gender Representation on Public Boards (Scotland) Bill

## Scope of the Bill

39. The Gender Representation on Public Boards (Scotland) Bill contains 13 sections and 2 schedules –
- Section 1: sets a gender representation objective for a public board that it has 50% of non-executive members who are women;
  - Section 2: Defines the Bill’s key terms – “appointing person”, “excluded position”, “non-executive member”, “public authority” and “public board”;
  - Sections 3 and 4: set out the steps to be taken when appointing non-executive members and how candidates should be considered;
  - Section 5: places a requirement on appointing persons and public authorities to take such steps as they consider appropriate to encourage women to apply to become non-executive members of public boards;
  - Section 6: places a general duty on appointing persons and public authorities to take such steps as they consider appropriate with a view to achieving the gender representation objective by 31 December 2022;
  - Section 7: explains that reporting on the Act will be specified by regulations;
  - Section 8: allows Ministers to add new bodies or remove disbanded bodies from Schedule 1;
  - Section 9: gives effect to Schedule 2;
  - Section 10: disapplies Sections 158 and 159 (positive action) of the Equality Act 2010 to actions taken under the Bill if enacted;
  - Section 11: Describes the regulations which may be made in connection to this Bill if enacted;
  - Section 12: Describes the commencement of the Bill;
  - Section 13: Contains the short title;
  - Schedule 1: Lists the public authorities subject to the Bill if enacted;
  - Schedule 2: makes special provision for certain public authorities covered by the Bill where this is required.<sup>iii</sup>

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<sup>iii</sup> [Explanatory notes for the Bill](#)

## Gender representation objective

40. The Bill sets a gender representation objective for a public board to have 50% of non-executive members who are women by 31 December 2022.
41. In his opening statement to the Committee, the Commissioner for Ethical Standards in Public Life in Scotland helpfully set out the most up to date figures in relation to women on regulated boards:

” As of September 2017, the percentage of women in regulated posts is 45.8 per cent of the total. If you break that down to the level of chairs, where there are far fewer women, women represent 25 per cent of the total. However, excluding chairs, the percentage of board members who are women is 48.9 per cent.<sup>iv</sup>

Source: [Official Report](#), 28 September 2017, col. 2



42. These figures demonstrate, contrary to some evidence given to the Committee, that the number of women applying to and joining public boards in Scotland has increased significantly in recent years despite the lack of any legislative target. This suggests that the voluntary measures and initiatives undertaken in recent years have been successful, and could be seen to call into question the necessity of legislation in this area.
43. However, despite this progress, CESPLS observed:

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<sup>iv</sup> It should also be noted that the above figure only cover posts on regulated boards, and does not cover those on non-regulated boards.

” I think that the bill is trying, given that there is momentum towards gender diversity, to ensure that there is no backsliding and we do not lose the gains that have been made.

Source: [Official Report](#), 28 September 2017, col. 11

44. The precision of the objective was also investigated by the Committee. Some witnesses questioned whether establishing a 50% target for women on boards was too inflexible, and could, in fact, inhibit progress towards more diverse boards. The Coalition for Racial Equality and Rights (CRER) gave the following example of how adherence to this target could play out:

” a white woman may need to be appointed over an equally qualified black man or disabled man who would also contribute to the diversity of the board but who might not meet the requirements within the narrow confines of the bill.

Source: [Official Report](#), 5 October 2017, col 2.

45. We explored alternative suggestions, such as a 40:40:20 target; in other words, setting a minimum of 40% women on each board, but including some flexibility on the exact figures. Witnesses argued that this additional leeway could help to redress imbalances in overall board membership caused by executive or otherwise appointed members. It would also allow boards in sectors with a high percentage of women in the workforce to better reflect who they represent. However, we remain unclear if such an approach would fall foul of rules preventing positive discrimination.

46. CRER interpreted the wording of the objective as a strict 50% cap<sup>v</sup>; as we understand it, the objective is a minimum target to be met, given that Section 6 of the Bill only applies when the objective has not yet been reached. Nevertheless, the difference in interpretation was noted.

47. The Cabinet Secretary reiterated in evidence that the Bill focuses on non-executive members and “takes targeted action in response to our new powers”<sup>vi</sup>, and that there are broader equality issues for boards. However, it was unclear to us whether the Scottish Government had considered how a more flexible target could be used to promote further positive action in areas where it was deemed necessary.

**We wholeheartedly support putting measures in place to protect the gains made towards greater equality and ensuring that public boards are representative of the general population.**

**However, we are open minded as to what level and structure the objective should be set at, and are mindful of the potential for a 50% objective to unintentionally work against greater diversity. We therefore ask the Scottish Government to weigh up the arguments made by witnesses at Stage 1.**

v [Official Report](#), 5 October 2017, Col. 16

vi [Official Report](#), 26 October 2017, Col. 15

**We would also welcome absolute clarity from the Scottish Government on whether the 50% objective is an exact target, or if it is a minimum percentage to be met by public boards. If it is the latter, then we would encourage the Scottish Government to make that clear in guidance to better encourage boards who wish to improve the overall balance of their board by making its non-executive appointments more than 50% women.**

## Key definitions

48. The bill defines a number of terms used in the legislation in section 2. Although no issues were raised with most of the definitions provided, we believe that further efforts could be made as to whether the term “women” is inclusive of trans people who identify as women, including those who do not hold a gender recognition certificate.
49. We heard compelling arguments from witnesses about ways in which the language used in the Bill could be tweaked to ensure the inclusion of trans people. James Morton of the Scottish Trans Alliance said:

” We would like a bit of extra information to be included [in the Bill] for the avoidance of doubt. We propose that the bill should say that the definition of “woman” included a person with the protected characteristic of gender reassignment who is living in the female gender and does not include a person with the protected characteristic of gender reassignment who is not living in the female gender.

Source: [Official Report](#), 5 October 2017, col. 4

50. It was suggested by the Scottish Trans Alliance that the objective is set for women, including trans women, with trans men and non-binary trans people included in the proportion outside of the objective, given the small percentage of trans people in society. We view this as a sensible solution to ensure inclusivity.



## James Morton of the Scottish Trans Alliance gives evidence



51. The Cabinet Secretary said that the Scottish Government are “certainly open to making improvements to how the bill is drafted” in this regard, and are “looking closely at the suggestion from the Scottish Trans Alliance”<sup>vii</sup>.

**Although the exact nature of these changes would be a matter for Stage 2, we would expect the Scottish Government to address the issues raised by the Scottish Trans Alliance.**

## Duty when appointing non-executive members and consideration of candidates

52. The Bill sets out at sections 3 and 4 the processes which must be followed by the appointing person for considering candidates and making appointments.
53. These sections of the Bill prompted a lot of debate, particularly with regards to what we have called the “tie-breaker” provision laid out in Section 4.
54. As was mentioned in the executive summary, the tie-breaker applies to situations where there are two equally qualified candidates. In these situations, and where one candidate is a woman and one is not, the appointing person must give

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vii [Official Report](#), 26 October 2017, col. 10

preference to the woman if it contributes to achieving the gender representation objective.

55. The "tie-breaker" provision is subject to an exception (section 4 (4)). The Bill allows the position to be given to someone who is not a woman, where it can be justified on the basis of a "characteristic" or "situation" particular to another candidate. For example, this *might* mean that where a man and a woman are equally qualified, the man may be given the position if he has another under-represented protected characteristic.
56. Some written submissions expressed concerns about this exception. While welcoming the exception, the Law Society of Scotland said further clarity is needed on what would justify such a decision<sup>viii</sup>. CRER said that the exception needs to be more robust as it is not clear what "characteristics" or "situation" mean.<sup>ix</sup>

CRER give evidence to the Committee



57. The Scottish Trans Alliance and Engender noted that the wording of this exception has changed since the draft Bill was consulted on, where the test was "there are exceptional circumstances". The Scottish Trans Alliance suggested this seems like a reduction on the threshold and that language should be added to the provision indicating that it is expected only to be used exceptionally<sup>x</sup>. Engender said:

” “At issue is whether this subsection provides a loophole for the appointing person to forego compliance with the gender representation objective. It is not clear to us the rationale for amending this section of the Bill, and in particular the reasoning for such a broad exemption”.

Source: [Written submission](#)

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viii [Written submission](#)

ix [Written submission](#)

x [Written submission](#)

58. In evidence, Prof. Muriel Robison also referred to a change in the language of this section:
- ” “I think that the change in language from “exceptional circumstances” to a scenario involving a much broader justification perhaps gives too much scope to the appointing board in terms of when it can say that it is not going to follow the requirement to achieve the objective.”
- Source: [Official Report](#), 21 September 2017, Col. 34
59. The Cabinet Secretary said that section 4 has been drafted within the confines of European Union legislation, and that to use the phrase “protected characteristic” “would have a narrowing effect in a tie-break situation”<sup>xi</sup>, but committed to reflecting on whether the exact parameters of this could be reflected in guidance.
60. More generally, the Cabinet Secretary also made clear in her evidence that “the bill will mean that we continue to appoint on merit” and that “taking positive action and appointing on merit are not mutually exclusive”<sup>xii</sup>. We would echo those sentiments.
61. In evidence, witnesses suggested that there were two other areas where amendments to the Bill could further enhance gender representation on public boards, namely, board chairs and multiple board positions held by one individual.
62. As was mentioned [above](#), although 45.8% of positions on regulated boards are held by women, only 25% of chairs on regulated boards are women. Given the role played by chairs in driving the work of boards and instilling the culture and ethos, we consider this to be an area worthy of similar attention.
63. Some witnesses referred to the experience of Norway, where elite women occupy positions on more than one board in what has been dubbed the ‘golden skirts’ phenomenon. Although it was pointed out that this phenomenon “has been exaggerated to quite an extent”<sup>xiii</sup>, with approximately 15 per cent of board members who are women holding more than one position compared to 10 per cent of men, we still feel that this phenomenon is a potential barrier to greater diversity of thought and lived experience on public boards regardless of gender.

**While we recognise that this piece of legislation has been drafted to avoid contravening EU legislation, we request that the Scottish Government clarifies the tie-breaker situation described in paragraphs [53-63](#) in any guidance issued alongside the Bill.**

**We ask the Scottish Government to consider putting in place an aggregate gender representative objective across all public boards for chair positions, which matches the ambition for boards more generally.**

xi [Official Report](#), 26 October 2017, Col. 4

xii [Official Report](#), 26 October 2017, Col. 4

xiii [Official Report](#), 21 September 2017, Col. 3

## Other protected characteristics

64. The letter from the Scottish Government states:

” The Bill has been made possible by the Scotland Act 2016 which transfers competence to the Scottish Parliament to legislate on "equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards on Scottish public authorities with mixed functions or no reserved functions".

Source: [Letter from the Scottish Government to the Convener, 11 September 2017](#)

65. The protected characteristics referenced above are the nine set out in the [Equality Act 2010](#): age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.
66. This Bill only seeks to address imbalances on public boards for one of these nine protected characteristics. We appreciate that, of these characteristics, sex has been chosen as over half of Scotland’s population are women and the small number of places on public boards can make it difficult for each board to be fully representative of the population at large.
67. However, we cannot help but observe, as it was put by Inclusion Scotland, that “the unintended consequence of gender representation becoming a legislative requirement may be that that is all that boards will focus on”<sup>xiv</sup>. Other organisations, such as CRER, said that they were not calling for “a homogenisation of the Bill across the protected characteristics”, but did want to see provisions put in place “to ensure that groups who are already quite under-represented are not unintentionally left to fall further behind”<sup>xv</sup>.
68. The Cabinet Secretary was of the opinion that “addressing the under-representation of women also results in gains for other groups”, and warned of “getting into a situation of pitching women against BME [black and minority ethnic] communities or people with disabilities”<sup>xvi</sup>. She also stated that she accepts that specific action is required for addressing the under-representation of other protected characteristics on boards, and noted other Scottish Government work on race and disability.

**We understand the Scottish Government’s position is that this Bill may not be the legislative vehicle for each and every protected characteristic. However, we seek reassurances from the Scottish Government on how it will ensure that this Bill does not have any unintended consequences for other protected characteristics.**

**We would welcome the Government’s view on the suggestion from Inclusion Scotland that Section 5 of the Bill could be expanded to place a duty on boards to encourage applications from all under-represented groups.**

xiv [Official Report](#), 5 October 2017, col. 12

xv [Official Report](#), 5 October 2017, col.1

xvi [Official Report](#), 26 October 2017, col.14

## Reports on operation of Act

69. Our call for evidence sought views on whether there should be penalties for non-compliance with the Bill, what these should be and why. Currently the Bill contains a provision requiring public authorities to report on the operation of the Act under section 7, with further details to be set out in regulations provided for by section 7.

70. Views ranged from those who said there must be sanctions in place to ensure compliance with the Bill, to those who said sanctions were not necessary.

71. In favour of sanctions, Women's Enterprise Scotland said:

” The pace of change is far too slow and, if no penalties are proposed, and no policing is planned for the implementation of the Bill, then it is unlikely that the situation will change quickly – if at all - despite the Bill being a positive step towards addressing the lack of women on boards and women in decision making roles.

Source: [Written submission](#)

72. Engender made a similar comment and also referred to powers in other countries, such as France, where a board appointment can be nullified if it violates the gender balancing measure:

” ...robust enforcement is essential, and without a meaningful recourse for non-compliance, there is a significant possibility that gender balancing measures will not be taken seriously by those charged with implementing them.

Source: [Written submission](#)

73. Those not in favour of sanctions included Changing the Chemistry who said that public authorities should be supported to comply, not penalised:

” The general view of members is that penalising non-compliance could lead to a quota-driven approach which would not be helpful in encouraging/increasing diversity at board level. Public reporting on the failure to attract and appoint women could stigmatise a body, making women even less likely to apply.

Source: [Written submission](#)

74. The Equality and Human Rights Commission (EHRC) are concerned that introducing sanctions could lead to positive discrimination, and leave public authorities open to legal challenge.

” 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.

Source: [Written submission](#)

75. The EHRC also said that, as a regulator, they are not against sanctions and that issuing a compliance notice might be the answer, but warned that a financial sanction would be excessive.<sup>xvii</sup>
76. These views were explored in oral evidence, where it became clear to the Committee that particular consideration should be given on what sanctions would be proportionate. In oral evidence, CESPLS pointed out that, in the case of regulated boards, “it would be very difficult sensibly to apply any penalty to a board, given that the appointments are made by somebody else”<sup>xviii</sup>.
77. We share the view of many witnesses that financial sanctions on public boards would be both unfair and illogical, given the public nature of their work. Many witnesses suggested that 'naming and shaming' was a powerful tool which would be both proportionate and effective.
78. The Cabinet Secretary echoed the view of others that reputational damage in itself is a strong sanction, while also stating that the Scottish Government “will continue to listen with an open mind” for other sanctions which could be applied. She also noted that “60 per cent of the boards are also subject to ministerial appointments”<sup>xix</sup>.
79. Given the role played by ministers in making many appointments to public boards, we believe that some form of report to Parliament and specific opportunity to question the Scottish Government on progress towards the objective would be an appropriate and transparent part of the wider process of monitoring progress.
80. There was broad support for the reporting requirement, and several submissions referred to existing reporting requirements, such as is required under the Public Sector Equality Duty (PSED). For example, the EHRC, Universities Scotland, Close the Gap and Engender all referred to the PSED and suggested that reporting on the Bill could be aligned with existing reporting requirements. However, it should be noted that the public authorities required to report on the PSED are not entirely the same as those who will be subject to the Bill.

**We are convinced of the need for the Bill to be strengthened to ensure action is taken to improve equality and diversity on public boards. We believe that a crucial element of this Bill lies in the reporting duty and therefore believe it is necessary to include a new reporting duty under section 5 of the Bill.**

**We consider it vital that the Parliament plays a role in monitoring progress towards the objective, and that Ministers are openly held to account for the boards to which they appoint.**

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<sup>xvii</sup> [Official Report](#), 28 September 2017, Col. 8

<sup>xviii</sup> [Official Report](#), 28 September 2017, col. 9

<sup>xix</sup> [Official Report](#), 26 October 2017, col. 7

**We therefore ask the Scottish Government to take forward amendments at Stage 2 to require Scottish Ministers to lay before the Parliament an annual report which draws together the gender balance within both regulated and non-regulated boards so that comparative progress and sharing of best practice can be easily identified.**

## Power to modify Schedule 1

81. Schedule 1 (introduced by Section 2 of the Bill) lists all of the public authorities which fall under the auspices of the Bill, as well as listing any excluded positions which will not count towards the objective.
82. The Scottish public sector landscape is complex, and understanding which bodies' boards would be covered – or, in some cases, not covered - by this legislation, and why this would be the case, was challenging. We therefore welcomed the clarification provided by the [Scottish Government in its letter](#), which set out the different types of public body and more clearly defined the parameters for inclusion.
83. 78 of the 122 public bodies listed in the National Public Bodies Directory, and a further 50 bodies are listed in Schedule 1. Of these 50 bodies, 24 are colleges, 18 are Higher Education Institutions (HEIs), seven are regional transport partnerships and one is the National Confidential Forum.<sup>xx</sup>
84. Throughout our scrutiny of the Bill, only two areas of potential contention for inclusion emerged. One was the exclusion of Integration Joint Boards (IJBs), in Schedule 1, and the other was the inclusion of HEIs in Schedule 1.
85. In evidence, Universities Scotland disagreed with the inclusion of HEIs, stating:  
 We are not public bodies and do not have public boards; we are autonomous, not-for-profit charitable institutions.

Source: [Official Report](#), 28 September 2017, col. 18

Universities Scotland gives evidence to the Committee.



86. However, the Universities and Colleges Union Scotland (UCU Scotland) pointed out:

” They [universities] receive £1.5 billion of Scottish Government money...that is why it is important that they are accountable and why they should be included in the bill.

Source: [Official Report](#), 28 September 2017, col. 23

87. When asked about the inclusion of universities, the Cabinet Secretary set out the Government’s position:

” It is very clear that universities are considered to be public authorities under equality legislation. They are listed public authorities under schedule 19 to the Equality Act 2010, and it would be utterly inconsistent if they were not considered to be public authorities for the purpose of the bill given that they are considered to be public authorities for other equality legislation.

Source: [Official Report](#), 26 October 2017, col. 16

88. We heard from Glasgow City Integration Joint Board, who said that they support gender parity on boards, including their own, and were surprised not be listed in Schedule 1. When asked about this, the Cabinet Secretary confirmed that she was “not unsympathetic” to their inclusion, but that:

” There are complexities around integration joint boards and the solution as to how we could include them in the bill is not obvious.

Source: [Official Report](#), 26 October 2017, col. 18



## Evidence session on 28 September



89. In addition to the bodies listed at Schedule 1, we are aware of the [Delegated Power and Law Reform Committee's view](#) that the power to amend Schedule 1 should be by affirmative procedure rather than by negative procedure. When asked about this, the Cabinet Secretary said that the Scottish Government still believes a negative instrument would be proportionate, but retains an open mind on this point.
90. We also asked the Cabinet Secretary about the role of the appointing person for any public authority, and questioned whether Schedule 1 or another part of the legislation could be amended to make clear who is responsible in each authority for the duties included in the Bill. The Cabinet Secretary responded, saying that “if there are ways in which we can flesh that out a bit better, we will endeavour to do that”.<sup>xxi</sup>

**Given the sums of public money granted to universities, and that the Bill is strictly drawn to non-executive members, we are not persuaded by the argument made by the higher education sector for its exclusion from this Bill, particularly when the argument is made on principle rather than on the merits of the aims of the Bill itself.**

**Conversely, we consider the omission of Integration Joint Boards from the public authorities listed to be notable. However, in recognition of the complex**

<sup>xxi</sup> [Official Report](#), 26 October 2017, col. 18

**governance arrangements of IJBs, we ask the Scottish Government to consider how Local Authorities and Health Boards can be encouraged to consider diversity when appointing members of IJBs.**

**We support the suggestion by the Delegated Powers and Law Reform Committee that the Bill's regulations under section 8 should be subjective to the affirmative procedure rather than the negative procedure as is currently drafted.**

**We also ask the Scottish Government to define the appointing person for each authority to ensure greater accountability. We would also seek clarity as to who is accountable for performing the duties in public authorities (ie. Chief Executive Officer or the existing board).**

# Other comments

## Guidance

91. Paragraphs 16 and 17 of the [Financial Memorandum](#) set out the “number of existing guidance documents and codes of practice relating to the recruitment of board members and the use of positive action”, also stating that the Scottish Government therefore does not plan to produce additional guidance but will instead ensure its current guidance remains up to date.
92. Throughout evidence, witnesses reiterated the importance of guidance, with the Law Society of Scotland stating that:
- ” guidance on how it [the legislation] is meant to be interpreted can be incredibly useful and can provide subtle guidance for the people who are required to implement it daily—in this case, the appointing person or the board in general.
- Source: [Official Report](#), 21 September 2017, Col. 22
93. Close the Gap said they are undertaking research on the recent requirement for public bodies to publish diversity data under the Public Sector Equality Duty. Of the bodies assessed so far, 43% have published board diversity data, and only 17% have published succession plans<sup>xxii</sup>. They argue that this shows public bodies are likely to require clear guidance to support progress. Women’s Enterprise Scotland and Engender cite this Close the Gap research as evidence for needing published guidance under the Bill.
94. The Commissioner for Ethical Standards in Public Life in Scotland referred to his own guidance on the appointment process for Ministers, stating that “quite a lot of guidance is available already”.<sup>xxiii</sup>
95. The Cabinet Secretary reiterated this point in evidence, and reflected that
- ” the question is whether that guidance [regarding the appointments process for public boards] should be statutory or non-statutory. At this point, our plan is to update our existing guidance and to be fully transparent and consultative in how we go about that.
- Source: [Official Report](#), 26 October 2017, col. 3
96. Witnesses suggested a number of areas which could be covered in guidance, most notably an explanation of the tie-breaker and how to encourage women to apply. Other suggestions were for gender-balanced interview panels, which Women 50:50 argued would ensure that biases would not “get in the way of good decision making”<sup>xxiv</sup>, and for those involved in board recruitment to receive unconscious bias training, as already occurs in the university sector. A compelling argument was put forward for positive action to be described with lots of examples to assure those recruiting to public boards on what steps would be appropriate.

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xxii [Written submission](#)

xxiii [Official Report](#), 28 September 2017, col. 15

xxiv [Official Report](#), 21 September 2017, col. 9

## Women 50:50 gives evidence to the Committee



97. We are aware that working practices, such as the timing of board meetings, can prove to be a barrier to those wishing to join a board or to new members. We were reassured by the Cabinet Secretary's suggestion of a non-exhaustive list of measures for the Bill which could set out some of the ways in which public boards meet their section 5 duty to encourage applications from women, but also recognise that this could be contained within statutory guidance for the Bill.

**We are strongly of the view that the measures in this Bill must be accompanied by renewed statutory guidance which applies equally to regulated and non-regulated appointments.**

**We are acutely aware that there is a lot of pre-existing guidance, and do not wish to see unnecessary duplication of guidance created. We would therefore welcome confirmation from the Scottish Government on how it will ensure that clear and cohesive statutory guidance is established.**

**We would expect any statutory guidance to provide examples of best practice to better highlight what steps could be taken to meet the duties within the Bill. This guidance should also cover steps that boards could take to ensure their working practices do not deter potential candidates or lead to new members leaving at an early juncture.**

**We believe that it makes sense for this guidance to flow from the pre-existing guidance from the Commissioner for Ethical Standards in Public Life in Scotland.**

## Financial impact

98. The Finance and Constitution Committee received four responses to [its call for evidence on the Bill's Financial Memorandum](#) (FM). Of the responses received, three raised no questions in regard to the estimates set out in the FM.

99. However, the submission from [Changing the Chemistry](#), a Scottish organisation whose aim is to improve diversity on boards, wrote that:

” the estimated costs are not accurate because the costs of the time involved in the outreach work has not been included nor has the support...provided by other bodies such as CtC been taken into account.

Source: [Written submission](#)

Tanya Castell of Changing the Chemistry gives evidence to the Committee.



100. Changing the Chemistry believe that the cost of supporting each public sector organisation would “be in the range of £500-£5,000.”<sup>xxv</sup>

101. We questioned witnesses on their views of the anticipated costs associated with the Bill. The Law Society of Scotland and Professor Muriel Robison had no concerns

about the cost,<sup>xxvi</sup> citing the existing public sector equality duty as requiring similar work. Other witnesses suggested there may be greater financial implications for those boards that were quite far from achieving gender parity<sup>xxvii</sup>.

102. Other witnesses spoke of the business benefits of diverse boards.<sup>xxviii</sup> Lynn Welsh of the Equality and Human Rights Commission said:

” “I would not want the potential cost to be overstated. ...I do not think that the monetary cost would be that substantial and, when you weigh it against equality and the huge benefits of having women on the board, it would be reasonable.”

103. We sought assurances from the Cabinet Secretary that the estimated costs were sufficient, and included such things as additional childcare costs. The Cabinet Secretary assured us that the FM was fully costed:

” I would suggest that the financial memorandum is generous, given that the vast majority of boards are already on this journey. If you look at the margin, the financial memorandum goes from a minimum to a maximum cost. It has that flexibility and already covers a range of potential situations. From memory, the lower end of the scale of the costs set out in the financial memorandum was around £30,000 and the upper end of the scale goes up to around £250,000. That is a big scale. My view is that the financial memorandum is ample and generous.

Source: [Official Report](#), 26 October 2017, col.11

104. The Cabinet Secretary further confirmed that the estimate did include childcare costs.

**We are content that the financial memorandum estimated costs are sufficient, and ask that the Scottish Government monitor these costs if the Bill is passed.**

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xxvi [Official Report](#), 21 September 2017, col.30

xxvii [Official Report](#), 28 September 2017, col. 5

xxviii [Official Report](#), 28 September 2017, col. 30

# Conclusions

**We support any moves which could contribute to a more equal society, particularly if these moves are within the remit of the Scottish Government and can be monitored, reported and resourced.**

**However, we consider the Bill and its accompanying documents as they currently stand to be a work in progress, capable of making greater strides towards equality and providing further direction and clarity on the measures within the Bill itself.**

**We urge the Scottish Government to act on our recommendations and to commit to working with the Committee and the wider Parliament to strengthen and refine the proposed legislation at Stage 2.**

**We agree to the general principles of the Bill and look forward, pending Parliament's agreement at Stage 1, to considering amendments at Stage 2<sup>xxix</sup>.**

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<sup>xxix</sup> **Jamie Greene MSP and Annie Wells MSP dissented from this paragraph and do not support the general principles of the Bill. The Committee, including these two members, agreed to include a paragraph in the executive summary noting that they do not support the general principles of the Bill and stating that the report reflects the views of those on the Committee who support the Bill.**

# Annexe A - Minutes of meetings

## 26th Meeting, 2017 (Session 5) Thursday 9 November 2017

**4. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to, and the report was agreed for publication. The Committee also agreed to delegate arrangements for publication of the report to the Convener.

## 24th Meeting, 2017 (Session 5) Thursday 26 October 2017

**1. Gender Representation on Public Boards (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

- Angela Constance, Cabinet Secretary for Communities, Social Security and Equalities;
- Eileen Flanagan, Equality Policy Manager;
- Lesley Cunningham, Gender Equality Policy Officer; and
- Lucy Galloway, Solicitor, Scottish Government.

**2. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered the evidence received.

## 23rd Meeting, 2017 (Session 5) Thursday 5 October 2017

**1. Gender Representation on Public Boards (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

- James Morton, Manager, Scottish Transgender Alliance;
- Tanya Castell, CEO, Changing the Chemistry;
- Iain Smith, Policy and Engagement Team Manager, Inclusion Scotland;
- Rebecca Marek, Policy and Parliamentary Officer, Coalition for Racial Equality and Rights (CRER).

**2. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered the evidence received.

## 22nd Meeting, 2017 (Session 5) Thursday 28 September 2017

**1. Gender Representation on Public Boards (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

- Bill Thomson, Commissioner, and Melanie Stronach, Public Appointments Officer, Commissioner for Ethical Standards in Public Life in Scotland;
- Lynn Welsh, Head of Legal for Scotland, Equality and Human Rights Commission;
- Liz Scott, Equalities Manager, Highlands and Islands Enterprise;



- Prof. James McGoldrick, Convener, Scottish Social Services Council;
- Fiona Moss, Head of Health Improvement and Inequalities, Glasgow City Integration Joint Board;
- Ken Milroy, Chair, Colleges Scotland;
- Sheena Stewart, University Secretary, University of Abertay Dundee, and Convener of Secretaries' Group, Universities Scotland;
- Stephanie Millar, Senior Policy Adviser, Equality Challenge Unit;
- Mary Senior, Scotland Official, University Colleges Union Scotland; and
- Andrea Bradley, Assistant Secretary for Education and Equalities, The Educational Institute of Scotland.

**2. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered the evidence received.

### **21st Meeting, 2017 (Session 5), Thursday 21 September 2017**

**1. Gender Representation on Public Boards (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

- Talat Yaqoob, Chair, Women 50:50;
- Suzanne Conlin, Board Member, Scottish Women's Convention;
- Lindsey Millen, Policy Manager, Close the Gap;
- Rory McPherson, Chair of Law Society of Scotland Equalities and Law Committee, Law Society of Scotland;
- Prof. Susan Deacon, Chair, Institute of Directors; and
- Prof. Muriel Robison, Guest Lecturer, School of Law, University of Glasgow.

**2. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered the evidence received.

### **17th Meeting, 2017 (Session 5), Thursday 22 June 2017**

**3. Gender Representation on Public Boards (Scotland) Bill (in private):** The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed to issue a public call for written evidence.

The Committee also agreed its approach to oral evidence taking on the Bill, including an outline timetable, subject to the approval of the Parliament on the timings for Stage 1 consideration. It was agreed to consider any further approach to consideration of the Bill, consideration of evidence received, and any draft reports or letters, in private at future meetings. Finally, the Committee agreed to delegate to the Convener responsibility for agreeing any witnesses expenses made under the SPCB witness expenses scheme.

# Annexe B - written evidence and Official Reports

## Written evidence

105. The Committee received the following submissions on the Bill -

- [Accounts Commission](#)
- [Bernie Bell](#)
- [Changing the Chemistry](#)
- [Close the Gap](#)
- [Colleges Scotland](#)
- [Coalition for Racial Equality and Rights \(CRER\)](#)
- [Equality and Human Rights Commission](#)
- [Engender](#)
- [Equality Challenge Unit](#)
- [Inclusion Scotland](#)
- [Institute of Directors](#)
- [Law Society of Scotland](#)
- [Revenue Scotland](#)
- [Roseanne Russell](#)
- [Scottish Social Services Council](#)
- [Scottish Trans Alliance](#)
- [Scottish Women's Convention](#)
- [SEStran](#)
- [Universities Scotland](#)
- [Women 50:50](#)
- [Women's Enterprise Scotland](#)
- [University and College Union Scotland](#)

106. The Committee received the following supplementary evidence on the Bill -

- [Coalition for Racial Equality and Rights \(CRER\)](#)
- [The Educational Institute of Scotland](#)
- [The Law Society of Scotland](#)
- [The Scottish Government](#) (alongside annexes [Table 1](#) and [Table 2](#))

## Official Reports

107. [Official Report of 26 October 2017](#) - evidence from the Cabinet Secretary

[Official Report of 5 October 2017](#) - evidence from stakeholders

[Official Report of 28 September 2017](#) - evidence from stakeholders

[Official Report of 21 September 2017](#) - evidence from stakeholders

