

A Scottish Government consultation on Implementation of the Gender Representation on Public Boards (Scotland) Act 2018:

(1) Regulations setting out reporting arrangements

(2) Statutory guidance on the operation of the Act

Contents

About this Consultation

Introduction

Part 1 – Background and Context

Part 2 – Summary and Explanation of the Draft Regulations with Consultation Questions

Part 3 – Summary and Explanation of the Draft Guidance with Consultation Questions

Annex A: Draft Gender Representation on Public Boards (Scotland) Act 2018 Reporting Regulations

Annex B: Draft Guidance

Annex C: Approach to Impact Assessment

Annex D: Respondent Information Form

Annex E: Complete list of Consultation Questions

About this Consultation

Consultation is an essential part of the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work. You can find all Scottish Government forthcoming, open and closed consultations online at <https://consult.scotland.gov.uk/>

Responding to this Consultation

We are inviting responses to this consultation by 4 August 2019.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/equality-unit/gender-representation-on-public-boards>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 4 August 2019.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send this, along with your response, to:

Gender Equality Team
Equality Unit
The Scottish Government
Area 3H-North
Victoria Quay
Edinburgh
EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy:

<https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to sean.stronach@gov.scot

Scottish Government consultation process

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review

- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Introduction

This consultation seeks views on implementation of the Gender Representation on Public Boards (Scotland) Act 2018. Specifically, it seeks views on 2 elements of implementation:

- Draft regulations setting out the arrangements for reporting on progress under the Act.
- Draft guidance on the operation of the Act.

Part 1 of this consultation document **summarises the provisions in the Act** and sets them in the context of the process for regulated public appointments.

Part 2 provides a detailed explanation of the **draft reporting regulations** with a series of questions about the scope and wording of the requirements. The draft regulations themselves are at Annex A.

Part 3 covers the **proposed guidance** and includes a series of questions on the scope and content of draft guidance for public authorities and appointing persons. The draft guidance is at Annex B.

The approach to impact assessment is discussed at Annex C.

The respondent information form and the full list of consultation questions are at Annexes D and E.

Throughout this document, all references to “the Act” are to the Gender Representation on Public Boards (Scotland) Act 2018. And all references to “appointing persons” include the Scottish Ministers in their role as an appointing person, unless otherwise stated.

Part 1 – Background and Context

The Gender Representation on Public Boards (Scotland) Act 2018

Introduction

1.1 The purpose of the Gender Representation on Public Boards (Scotland) Act 2018 is to improve the representation of women on the boards of Scottish public authorities.

1.2 The Act was made following Scottish Government consultation in 2014 on how to shape proposals on using legislation to achieve gender equality on the boards of public bodies¹ and further consultation on a draft Gender Representation on Public Boards (Scotland) Bill in 2017².

1.3 The Act sets a gender representation objective for the non-executive member component of public boards. The objective is that 50% of non-executive members are women.

1.4 Only non-executive members appointed to public boards are covered by the Act. A non-executive member of a public board is an individual who is not part of the executive structure of the organisation in question. In contrast to an executive member, non-executive members are not employees and are not involved in the day to day operational management of the organisation. Rather they act in an advisory capacity and offer leadership, direction and guidance to the organisation. Accordingly, “non-executive member” is defined in section 2 of the Act to exclude positions held by employees.

1.5 Schedule 1 of the Act lists the public authorities covered and specifies where some non-executive members are excluded from the Act’s provisions (for example, because they are elected rather than appointed to the board).

¹ <http://www.gov.scot/Publications/2014/04/1438>

² <https://consult.gov.scot/equality-unit/draft-gender-representation-on-public-boards/>

Duties and Requirements

1.6 The Act places duties on public authorities, appointing persons and Scottish Ministers in connection to their role in achieving the gender representation objective. For many public authorities, Scottish Ministers are the appointing person. But the Act covers Scottish Ministers and appointing persons separately as the duties on Scottish Ministers extend beyond their role as the appointing person and cover functions which other appointing persons don't have such as laying reports before the Scottish Parliament.

1.7 The Act requires that appointments must be made on merit. But where the board has not already met the gender representation objective and there are two or more equally qualified candidates for an appointment, the Act requires the appointing person to appoint a candidate who is a woman, unless there are specific circumstances which would justify appointment of another candidate.

1.8 In addition, public authorities, appointing persons and Scottish Ministers must take such action as they consider appropriate to encourage applications from women. And, where the gender representation objective has not been achieved, they must take such additional steps as they consider appropriate with a view to achieving it by the end of December 2022.

1.9 These duties are not yet in force. Scottish Ministers will specify in due course the date (or dates) when the duties will come into force.

Implementation

1.10 An important element of the legislation is a requirement to report on progress. The purpose of reporting is to highlight action that is being taken and ensure transparency. Reporting duties are placed on public authorities, appointing persons and Scottish Ministers in relation to their functions under the Act. Scottish Ministers are under an additional duty to lay a report before the Scottish Parliament on the operation of the Act. The detailed arrangements for reporting, such as timing, frequency and content, are not specified in the Act. Regulations must be made setting out these arrangements.

1.11 To support the implementation of the Act, Scottish Ministers must publish guidance and those with duties under the Act must have regard to the guidance.

1.12 This consultation seeks views on a draft set of reporting regulations and draft guidance. When the regulations and guidance have been finalised, the Scottish Ministers will bring the duties in the Act into force.

The Public Appointments Context

Regulated Appointments

1.13 Many public appointments are made under a system regulated and monitored by the Ethical Standards Commissioner. It is the Commissioner's role to ensure that appointments are made on merit, using methods that are fair and open. Whether or not a public body is regulated by the Commissioner depends on the type of body it is, and decisions made at the time it is established.

1.14 The appointment process for regulated appointments is run by Scottish Government officials on behalf of the Scottish Ministers. The appointment process for unregulated appointments, including those to the boards of colleges (except regulated chair appointments) and Higher Education Institutions, is run by the public bodies concerned (see paragraphs 1.21-1.23).

1.15 Appointments are only made on merit. The definition of merit is not fixed; it is determined by the appointing person at the start of each appointment round and set out in the person specification. The person specification is a clear and accurate description of the skills, personal qualities, knowledge and experience a person will need to be effective in the role.

1.16 Selection panel members assess the merit of applicants against the person specification using the methods they have agreed. Applicants are not assessed against each other. New requirements cannot be introduced during the appointment round.

1.17 The Commissioner has produced a [Code of Practice](#) underpinned by three principles: merit, integrity, and diversity and equality and there is [guidance](#) on the application of the Code.

1.18 The Commissioner's strategy, entitled Diversity Delivers, is intended to enhance equality of opportunity and to increase the diversity of the boards of Scotland's public bodies.

1.19 The requirements of the Act are consistent with the Code of Practice. The Commissioner will produce guidance on how the requirements of the Act should operate in the context of the Code.

1.20 The Commissioner does not have a role in determining compliance with the Act.

Non-Regulated Appointments

1.21 For the purposes of the Act, colleges and Higher Education Institutions are defined as "public authorities" in schedule 1. Appointment of non-executive members of the boards of colleges and Higher Education Institutions (HEIs) are not regulated by the Commissioner.

1.22 The HE Code of Good Governance sets out arrangements for appointments to Higher Education Institutions. Appointments are made by the governing bodies of HEIs in accordance with arrangements set out in their governance documents, and in accordance with section 10 of the Higher Education Governance (Scotland) Act 2016 (which contains provisions on the composition of governing bodies) and, in the case of the ancient universities, with the Universities (Scotland) Acts. In addition, the Scottish Code of Good Higher Education Governance sets out provisions on Higher Education Governance, including best practice in relation to governing body membership and appointments.

1.23 College boards with responsibility for board appointments must ensure a formal and open procedure is in place for recruiting and selecting new non-executive board members. Boards must have regard to all relevant Ministerial Guidance on

board appointments such as the *College Sector Board Appointments: 2014 Ministerial Guidance* and the *Code of Good Governance for Scotland's Colleges*.

1.24 In relation to the college sector, appointments are made in accordance with schedule 2 of the Further and Higher Education (Scotland) Act 1992 (which contains provisions on the composition of incorporated college boards, both for regional and assigned colleges) and with schedule 2B of the Further and Higher Education (Scotland) Act 2005 (which contains provisions on the composition of Regional Boards). In addition, the Scottish Code of Good Governance for Scotland's Colleges, and the 2014 College Sector Board Appointments Ministerial Guidance, sets out provisions on Further Education Governance, including best practice in relation to governing body membership and appointments. Regarding Newbattle Abbey College, Sabhal Mòr Ostaig, and West Highland College UHI, appointment of board members are made by the company.

Part 2 – Draft Reporting Regulations

Overview

2.1 This consultation seeks comments on draft regulations which set out arrangements for reporting on progress under the Act. **You will find these at Annex A to this document.**

2.2 The Act contains 4 reporting duties as follows:

- 1: Scottish Ministers must report on the carrying out of their functions under sections 3-6 of the Act.
- 2: Appointing persons must report on the carrying out of their functions under sections 3-6 of the Act.
- 3: Public authorities must report on the carrying out of their functions under sections 5 and 6 of the Act.
- 4: Scottish Ministers must report to the Scottish Parliament on the operation of the Act.

2.3 The first 3 of these 4 reporting duties are similar. In order to avoid repetition this consultation document combines its consideration of these duties where appropriate. The 4th reporting duty is distinct and is treated separately. The draft regulations cover all 4 of the reporting duties.

2.4 Throughout this document, the term “appointing person” includes the Scottish Ministers in their role as an appointing person unless otherwise stated.

2.5 This consultation document asks questions on:

- The overall timeframe for reporting
- Appointing persons’ and public authorities’ reports on their functions under sections 3-6 of the Act
- Scottish Ministers reports to the Scottish Parliament
- Alignment with reporting under the public sector equality duty specific duties

Detailed Proposals

Timescales for Reporting

2.6 Different public authorities will have different timetables for making appointments. For many authorities, appointment rounds are infrequent and will arise less than once a year. Making progress will therefore take time.

2.7 The approach in the draft regulations is that public authorities and appointing persons will be required to report on the carrying out of their functions under sections 3-6 of the Act at intervals of no more than 2 years, with the first reports being published not later than the end of April 2021.

2.8 This timetable aligns reporting with the timescales already established for reporting progress under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended). This is discussed further at paragraphs 2.22-2.27 below.

Question 1 Do you think that public authorities and appointing persons should be required to report on the carrying out of their functions under the Act at intervals of no more than 2 years, with the first reports being published not later than the end of April 2021?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

2.9 The draft regulations also require Scottish Ministers to report to Parliament on a 2 year timetable, with the first report due by the end of December 2021. The intention is that Scottish Ministers must use the information published by public authorities and appointing persons in their reports on the carrying out of their functions under the Act. The deadline set for these reports is no later than the end of April 2021. This will provide Scottish Ministers with around 8 months to produce their report to Parliament.

Question 2 Do you think that Scottish Ministers should report to the Scottish Parliament on the operation of the Act at intervals of not more than 2 years, with the first report being laid before Parliament not later than the end of December 2021?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

Content of Appointing Persons' and Public Authorities' Reports on their Functions under Sections 3-6 of the Act

2.10 The Act refers to “Scottish Ministers” and to “appointing persons” and requires each to report on their duties under sections 3-6. For the purposes of sections 3-6, the Scottish Ministers *are* appointing persons. Their functions under these sections are the same as those of other appointing persons.

2.11 The draft regulations require reports on the carrying out of functions under the Act. The regulations are intended to balance flexibility for individual public authorities to reflect their own position against a common framework that will allow a degree of comparability. It is not therefore the intention to specify precisely and exhaustively what reports should contain. But the draft regulations do set out a number of requirements as follows:

Sections 3 and 4 of the Act and whether the gender representation objective has been met

2.12 Sections 3 and 4 of the Act set out duties in relation to the appointments process. These duties fall on the appointing person. The draft regulations specify that the reports must contain a statement containing 3 elements:

- stating whether the gender representation objective has been met;
- providing information on any training received by or on behalf of an appointing person on the operation of sections 3 and 4 of the Act; and
- providing information on:
 - how many vacancies for a non-executive member of the board arose during the period covered by the report
 - for each such vacancy:
 - how many competitions were run to fill the vacancy,
 - for each competition:
 - how many applications were received and the percentage of those which were from women, where the numbers will not identify individuals

- whether an appointment was made, and if so, whether a woman was appointed.

2.13 Where the Scottish Ministers are the appointing person, their statement must provide this information for each authority to which Scottish Ministers make appointments.

2.14 Statements should be published in accordance with guidance (see Part 2 of this document).

Question 3 Do you think that appointing persons should include within their reports a statement containing the following 3 elements:

1. Stating whether the gender representation objective has been met.

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

2. Providing information on any training received by or on behalf of an appointing person on the operation of sections 3 and 4 of the Act.

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

3. Providing information on:

- *how many vacancies for a non-executive member of the board arose during the period covered by the report'*
- *for each such vacancy:*
 - *how many competitions were run to fill the vacancy,*

- *for each competition:*
 - *how many applications were received and the percentage of those which were from women, where the numbers will not identify individuals*
 - *whether an appointment was made and if so, whether a woman was appointed.*

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answers.

Sections 5 and 6 of the Act

2.15 Sections 5 and 6 of the Act cover appointing persons and public authorities. Section 5 sets out duties in relation to encouraging applications by women and section 6 covers additional steps that may be taken. The draft regulations specify that reports should include the following:

- Details of any activity undertaken by appointing persons and public authorities to encourage applications from women. Where the Scottish Ministers are the appointing person, their report must provide this information for each authority to which Scottish Ministers make appointments.
- Details of any other steps taken by appointing persons and public authorities with a view to achieving the gender representation objective by 31 December 2022. Where the Scottish Ministers are the appointing person, their report must provide this information for each authority to which they make appointments.

Question 4 Do you think that appointing persons and public authorities should report on the activity they have undertaken to encourage applications from women?

Yes	<input type="checkbox"/>
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No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Question 5 Do you think that appointing persons and public authorities should, if the gender representation objective has not been met, report on the details of any other steps taken with a view to achieving the gender representation objective by 31 December 2022?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

Publication

2.16 The draft regulations state that publication must be in a manner which is accessible to the public and must be in accordance with guidance issued by Scottish Ministers.

2.17 Appointing persons and public authorities may meet their reporting duty by setting their report within other published documents if they wish. This provision is intended to permit, but not to require, publication within reports made under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended). It will also allow publication within annual reports or other corporate documents. And it will allow a public authority and appointing person to publish a joint report, if they wish to.

Question 6 Do you think that appointing persons and other public authorities should be able to publish their reports on carrying out their functions under the Act within another document if they wish to do so?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Scottish Ministers reports to the Scottish Parliament

2.18 The regulations specify that Scottish Ministers must lay reports before the Scottish Parliament at intervals of not more than 2 years. The date of the first report should be no later than the end of December 2021.

2.19 The draft regulations state that Scottish Ministers' reports should provide an overview of the operation of the Act by relevant public authorities and appointing persons. The draft regulations do not specify any further what the content of these reports should be, but do state that in producing their reports Scottish Ministers must use information published by public authorities and appointing persons in their reports on carrying out their functions under sections 3-6 of the Act.

Question 7 Do you think that Scottish Ministers, in preparing their report to Parliament, must use information published by public authorities and appointing persons in their reports on carrying out their functions under sections 3-6 of the Act?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Question 8 The draft regulations do not specify the content of Scottish Ministers' reports to Parliament other than that they contain an overview of the operation of the Act. Do you have suggestions on the content of these reports? If so, please tell us.

2.20 “Laying” a report before the Scottish Parliament means that it is sent to the Presiding Officer who then makes it available to MSPs in the Scottish Parliament Information Centre. The Parliament does not make the report publicly available.

2.21 The draft regulations therefore require Scottish Ministers to make their reports accessible to the public and to do so as soon as practicable after the report is laid before Parliament.

Alignment with reporting under the Public Sector Equality Duty

2.22 The Equality Act 2010 places a duty on public authorities to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations – referred to as the “public sector equality duty”. To enable Scottish public authorities to do this more effectively the Scottish Ministers made the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) (the 2012 Regulations)³ setting out a framework of activities and reporting obligations. Most, but not all, of the public authorities covered by 2018 Act are also covered by the 2012 Regulations.

2.23 The 2012 Regulations also contain provisions under Regulation 6A relating to the gathering and use of information on the protected characteristics of board members⁴. They require listed public authorities to publish details of the number of men and women who are members of the board of the authority; and to publish details of how they have used, and how they plan to use, any information provided to them by Scottish Ministers on the protected characteristics of their board. (This latter provision has not yet been implemented). In both cases the details are required to be published within reports on how the public sector equality duty is being mainstreamed across the functions of the public authority.

2.24 It is the intention that reporting under the Act can be aligned with reporting under the 2012 Regulations if authorities think that is appropriate. The timescale for

³ <https://www.legislation.gov.uk/ssi/2012/162/contents/made>

⁴ <http://www.legislation.gov.uk/ssi/2016/159/contents/made>

reporting under the Act has therefore been set to coincide with that under the 2012 Regulations. The intention is to be flexible. If a public authority wants to report on its functions under the Act within the reporting regime for the 2012 Regulations it can do so, but it is not required to. In addition, the reporting proposals for the Act do not duplicate any of the requirements of the 2012 Regulations.

2.25 A very small number of the public authorities that are subject to the 2012 Regulations operate to a different cycle for reporting under those Regulations. The use of the wording “not later than the end of April 2021” will allow those authorities to publish in alignment with their specific duties reporting in April 2020 if they wish to.

2.26 Scottish Ministers have indicated that they wish to review the operation of the 2012 Regulations. Preparations for the review are underway, and the intention is to assess how effective the specific duties are and how they might be improved. Given the desire for close alignment between the reporting regimes for the 2012 Regulations and the Act, the impact of any changes made to the 2012 Regulations will need to be considered in due course.

2.27 The public sector equality duty in the Equality Act 2010 and the 2012 Regulations which were made to support it can be enforced by the Equality and Human Rights Commission (EHRC). This is a Non-Departmental Public Body (NDPB) established by the UK Government. It operates across GB but it is not a “cross-border public authority”⁵. Its remit and functions are set out in the Equality Act 2006. Scottish Ministers cannot place additional duties on the EHRC. The EHRC does not therefore have an enforcement role for the Act or the reporting regulations made under it.

Question 9 What, if any, comments do you have on the relationship between the proposals for reporting on the Act and reporting under the 2012 Regulations in relation to the public sector equality duty specific duties.

⁵ Cross border public authorities must be designated as such by an Order made under [section 88 of the Scotland Act 1998](#).

Conclusion

2.28 The draft regulations set out a framework for reporting under the Act which is intended to be flexible and to align with other reporting cycles. There is provision to allow reports to be published in combination should particular appointing persons and public authorities wish to do so.

2.29 Reports must state whether the gender representation objective has been met and must include details of action being taken to meet obligations under the Act.

Question 10 Please tell us any other comments you have on the draft regulations.

Part 3 – Draft Guidance

Introduction

3.1 Scottish Ministers must publish guidance on the operation of the Act. This consultation explores a draft of the guidance which **you will find at Annex B to this document.**

3.2 Section 7(2) of the Act sets out what the guidance must in particular cover; and sections 7(3) and (4) require an appointing person and a public authority to have regard to the guidance in carrying out their functions under the Act. The Act specifies that guidance must in particular cover:

- An appointing person’s functions in:
 - Appointing non-executive members under sections 3 and 4,
 - Encouraging applications by women under section 5(1),
 - Taking any steps under section 6(2),
 - Reporting under section 8(4),
- A public authority’s functions in:
 - Encouraging applications by women under section 5(2),
 - Taking any steps under section 6(3),
 - Reporting under section 8(5).

3.3 Guidance can cover additional areas not specified in section 7(2), but cannot be used to create new duties or requirements that are not prescribed by the Act.

3.4 During the Act’s parliamentary passage, the Scottish Government committed to include a number of specific issues within the guidance:

- More information on the meaning of “a characteristic or situation particular to that candidate” in section 4(4) of the Act;
- Confirmation of the appointing person or persons for each of the public authorities in schedule 1;
- Examples of good practice.

Structure of Draft Guidance

3.5 The draft guidance is attached at Annex B of this consultation document. It is structured in 8 main sections:

- An introduction, providing background and context
- Terminology used in the Act
- The appointment process set out in the Act
- Encouraging applications by women
- Taking other steps
- Reporting progress
- Achieving the gender representation objective
- Good practice guide

3.6 There is also a section containing references to other guidance material produced by the Commissioner for Ethical Standards in Public life, the Equality and Human Rights Commission and others.

3.7 The guidance ends with a list of who is covered by the Act – public authorities and appointing persons.

Content of Draft Guidance and Consultation Questions

Introduction

3.8 This section sets out the purpose of the guidance and places it in the wider context of public appointments. The status of the guidance is also explained.

Terminology used in the Act

3.9 The draft guidance explains the meaning of a variety of terms used in the Act:

- The “gender representation objective”
- “Public authority” and “appointing person”
- “Public board”
- “Non-executive member” and “excluded position”
- The definition of “woman” for the purposes of the Act

Question 11 Do you have any comments on the terminology section of the guidance? If so, please let us know.

The appointment process

3.10 The draft guidance discusses how the provisions at sections 3 and 4 of the Act can be used within the public appointments process. This includes consideration of the term ‘equally qualified’ and of when a ‘characteristic or situation’ particular to a candidate who is not a woman may be used to select that candidate (section 4(4) of the Act).

Question 12 Do you have any comments on the guidance on meeting the duties under sections 3 and 4 of the Act? If so, please let us know.

Question 13 Do you have any comments on the guidance on section 4(4) of the Act which considers when a ‘characteristic or situation particular to a candidate who is not a woman may be used to select that candidate? If so, please let us know.

Encouraging applications by women

3.11 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. While it is for appointing persons and public authorities to determine what steps are appropriate, the guidance discusses how this might be approached.

3.12 Appointing persons and public authorities may also refer to the Scottish Government's Succession Planning Guidance and Toolkit⁶ which seeks to help public bodies to develop effective succession plans for their boards.

3.13 Section 5(3) provides, for the avoidance of doubt, that subsections 5(1) and 5(2) do not prevent an appointing person or public authority from taking such steps as it considers appropriate to encourage persons with other protected characteristics (within the meaning of section 4 of the Equality Act 2010) to apply to become non-executive members of the public board.

Question 14 Do you have any comments on the guidance on meeting the duties under section 5 of the Act? If so, please let us know.

Taking other steps

3.14 Section 6 places a duty on appointing persons and public authorities to take such steps as they consider appropriate, in addition to anything done under sections 3 to 5 in the case of appointing persons, and in addition to anything done under section 5 in the case of public authorities, with a view to achieving the gender representation objective by 31 December 2022. Under subsection (1), section 6 applies whenever the gender representation objective is not achieved in relation to a public board.

Question 15 Do you have any comments on the guidance on meeting the duties under section 6 of the Act? If so, please let us know.

⁶ 'Guidance on Succession Planning for Public Body Boards', January 2017, <http://www.gov.scot/Topics/Government/public-bodies/BoardChairs> [accessed 13 June 2017]

Reporting

3.15 Arrangements for reporting progress under the Act will be set out in regulations – and this document includes consultation on draft regulations. The draft guidance provides further information on how reporting should take place. This includes the content of reports, the approach to publication and how reports should be submitted to Scottish Ministers.

Question 16 Do you have any comments on the guidance on meeting the reporting requirements? If so, please let us know.

Achieving the gender representation objective

3.16 Achievement of the gender representation objective is not a one-off event and for some bodies this will fluctuate. The draft guidance discusses how the Act applies when the gender representation objective has been achieved.

Question 17 Do you have any comments on the guidance on how the Act applies when the gender representation objective has been achieved? If so, please let us know.

Examples of good practice

3.17 The draft guidance concludes with some examples of good practice, including examples of steps to encourage women to apply to become non-executive members and examples of other steps that could be taken.

Question 18 Do you have any comments on the guidance on good practice examples of steps to encourage women to apply to become non-executive members and examples of other steps that could be taken? If so, please let us know.

Question 19 Please tell us any other comments you have on the draft guidance.

SCOTTISH STATUTORY INSTRUMENTS

2019 No.

EQUALITY

PUBLIC BODIES

The Gender Representation on Public Boards (Scotland) (Reports)
Regulations 2019

<i>Made</i> - - - -	2019
<i>Laid before the Scottish Parliament</i>	2019
<i>Coming into force</i> - -	2019

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 8 and 12(1) of the Gender Representation on Public Boards (Scotland) Act 2018⁽⁷⁾ and all other powers enabling them to do so.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Gender Representation on Public Boards (Scotland) (Reports) Regulations 2019 and come into force on [] 2019.

(2) In these Regulations—

“the Act” means the Gender Representation on Public Boards (Scotland) Act 2018,

“gender representation objective” has the same meaning as in section 1 of the Act, and

“relevant authority” means a public authority listed, or within a description listed in the first column of the table in schedule 1 of the Act, for which the Scottish Ministers are the appointing person.

Report published by Scottish Ministers as appointing person

2.—(1) The Scottish Ministers must publish a report under section 8(3) of the Act not later than 30 April 2021, and subsequently at intervals of not more than 2 years beginning with the date on which they last published a report under this regulation.

(2) The report under paragraph (1) must contain in respect of each relevant authority—

(a) a statement of whether at the date of publication that authority has achieved the gender representation objective,

(b) a statement confirming the number of vacancies for non-executive members which arose during the period covered by the report,

⁽⁷⁾ 2018 asp 4.

- (c) a statement confirming for each vacancy referred to in sub-paragraph (b) how many recruitment competitions were held with a view to fill the vacancy and, for each competition—
 - (i) the number of applications received and, where applications were received, the percentage which were from women, and
 - (ii) confirmation of whether an appointment was made, and where an appointment was made, whether a woman was appointed,
- (d) details of any steps taken by the Scottish Ministers under section 5(1) of the Act to encourage applications from women to become non-executive members of the public board, and
- (e) details of any other steps taken by the Scottish Ministers under section 6(2) of the Act with a view to achieving the gender representation objective by 31 December 2022.

(3) The report under paragraph (1) must include a statement setting out whether any training on the requirements of sections 3 and 4 of the Act has been received by or on behalf of the Scottish Ministers during the period covered by the report.

Report published by appointing person (other than Scottish Ministers)

3.—(1) This regulation applies to public authorities where the appointing person is not the Scottish Ministers.

(2) The appointing person must publish a report under section 8(4) of the Act not later than 30 April 2021, and subsequently at intervals of not more than 2 years beginning with the date on which it last published a report under this regulation.

- (3) The report under paragraph (2) must contain for each public authority—
 - (a) a statement of whether at the date of publication the gender representation objective has been achieved,
 - (b) a statement confirming the number of vacancies for non-executive members which arose during the period covered by the report,
 - (c) a statement confirming for each vacancy referred to in sub-paragraph (b) how many recruitment competitions were held with a view to fill the vacancy and, for each competition—
 - (i) the number of applications received and, where applications were received, the percentage which were from women, and
 - (ii) confirmation of whether an appointment was made and, where an appointment was made, whether a woman was appointed,
 - (d) a statement setting out whether any training on the requirements of sections 3 and 4 of the Act has been received by or on behalf of the appointing person during the period covered by the report,
 - (e) details of any steps taken by the appointing person under section 5(1) of the Act to encourage applications from women to become non-executive members of the public board, and
 - (f) details of any other steps taken by the appointing person under section 6(2) of the Act with a view to achieving the gender representation objective by 31 December 2022.

Report published by public authority

4.—(1) Each public authority must publish a report under section 8(5) of the Act not later than 30 April 2021, and subsequently at intervals of not more than 2 years beginning with the date on which it last published a report under this regulation.

- (2) The report under paragraph (1) must contain—
- (a) details of any activity taken by the public authority under section 5(2) of the Act to encourage applications from women to become non-executive members of the public board, and
 - (b) details of any other steps taken by the public authority under section 6(3) of the Act with a view to achieving the gender representation objective by 31 December 2022.

Requirements of publication and notification

- 5.**—(1) The requirement to publish in regulations 2 to 4—
- (a) is a requirement to publish in a manner that is accessible to the public, and
 - (b) may be complied with by publishing the information within another published document.
- (2) A report under regulation 3(2) or regulation 4(1) must be prepared in accordance with any guidance issued by the Scottish Ministers under section 7 of the Act.
- (3) A copy of a report published under regulation 3(2) or regulation 4(1) must be provided in electronic form to the Scottish Ministers within 7 days of publication.

Scottish Ministers' report to Scottish Parliament

- 6.**—(1) The Scottish Ministers must lay a report before the Scottish Parliament under section 8(1) of the Act not later than 31 December 2021, and subsequently, at intervals of not more than 2 years, beginning with the date on which they last published a report under this regulation.
- (2) In preparing the report under paragraph (1) the Scottish Ministers must—
- (a) consider all published reports by appointing persons and public authorities, under these Regulations, and
 - (b) include an overview of the operation of the Act by all appointing persons and public authorities with duties under the Act.
- (3) The Scottish Ministers must, as soon as practicable after a report has been laid before the Scottish Parliament under paragraph (1), publish the report in a manner that is accessible to the public.

St Andrew's House,
Edinburgh

2019

Name
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations make provision for the reports to be published, and the report to be laid before the Scottish Parliament, under section 8 of the Gender Representation on Public Boards (Scotland) Act 2018.

The Scottish Ministers (regulation 2), other appointing persons (regulation 3) and public authorities (regulation 4) are required to publish reports, in the manner set out in regulation 5, which also requires that certain reports be prepared in accordance with guidance issued by Scottish Ministers and for electronic copies to be provided to the Scottish Ministers. Regulation 6 provides for a report to be made by the Scottish Ministers to the Scottish Parliament.

A Business and Regulatory Impact Assessment has been prepared and placed in the Scottish Parliament Information Centre. Copies may be obtained from the Scottish Government, [insert name and address of relevant Directorate], and online at www.legislation.gov.uk.

Gender Representation on Public Boards (Scotland) Act 2018

Draft Guidance

Contents

1. Introduction	
2. Terminology used in the Act <ul style="list-style-type: none"> • The gender representation objective • Public authority and appointing person • Public board • Non-executive member and excluded position • The definition of ‘woman’ for the purposes of the Act 	
3. The appointment process <ul style="list-style-type: none"> • Background • The role of the Commissioner • Appointment on merit • Meaning of “equally qualified” • The “tie-break” provision 	
4. Encouraging applications by women	
5. Taking other steps	
6. Reporting on progress <ul style="list-style-type: none"> • Overview • Reporting on sections 3 and 4 • Reporting on section 5 • Reporting on section 6 • Publication of reports • Connections to the public sector equality duty • Scottish Ministers’ reports to the Scottish Parliament 	
7. Achieving the gender representation objective <ul style="list-style-type: none"> • Requirements • Reporting • Future action 	
8. Good practice guide <ul style="list-style-type: none"> • Good practice in encouraging applications by women • Good practice in taking other steps 	
9. Further reading	
Annex – List of public authorities and appointing persons	

Introduction

1.1 This guidance has been prepared by the Scottish Government on behalf of Scottish Ministers in accordance with section 7 of the Gender Representation on Public Boards (Scotland) Act 2018 (referred to in this guidance as “the Act”)⁸ .

1.2 Guidance is intended to support appointing persons and public authorities to carry out their functions under the Act and, in doing so, appointing persons and public authorities must have regard to this guidance.

1.3 The Act is an Act of the Scottish Parliament and received Royal Assent on 9 March 2018. The Act sets a “gender representation objective” for the boards of listed Scottish public authorities that 50% of the board’s non-executive members are women, and it requires appointing persons and public authorities to take certain steps towards achieving the objective.

1.4 The Ethical Standards Commissioner regulates appointments to the boards of many of Scotland’s public bodies. Many, but not all, of the appointments covered by the Act are regulated by the Commissioner.

1.5 The requirements of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012⁹ apply to many of the public authorities covered by the Act. Under these regulations there are a range of duties relating to the advancement of equality including in relation to board diversity.

What is covered by this guidance?

1.6 Section 7 of the Act requires Scottish Ministers to publish guidance on the operation of the Act. The guidance must in particular cover:

- (a) an appointing person’s functions in—
 - (i) appointing non-executive members under sections 3 and 4,
 - (ii) encouraging applications by women under section 5(1),
 - (iii) taking any steps under section 6(2),

⁸ <http://www.legislation.gov.uk/asp/2018/4/contents/enacted>

⁹ <https://www.legislation.gov.uk/ssi/2012/162/contents/made> and as amended by (and add in 2016 Regulations)

- (iv) reporting under section 8(4),
- (b) a public authority's functions in—
 - (i) encouraging applications by women under section 5(2),
 - (ii) taking any steps under section 6(3),
 - (iii) reporting under section 8(5).

1.7 To ensure that this guidance is as useful as possible, a number of additional areas are also covered, including good practice.

Terminology used in the Act

2.1 This section considers some of the key terms and concepts in the Act.

The gender representation objective

2.2 Section 1 of the Act sets a “gender representation objective” that a board has 50% of non-executive members who are women. Where a board has an odd number of non-executive members, the objective applies as if the board has one fewer non-executive member.

- If a board has 12 non-executive members, the gender representative objective is that the board has 6 non-executive members who are women.
- If a board has 9 non-executive members, the gender representation objective applies as if the board has one fewer non-executive member – in other words as if the board has 8 non-executive members. Consequently, the gender representation objective is that the board has at least 4 non-executive members who are women.

2.3 The gender representation objective is not a cap. The Act does not require board non-executive membership to be precisely 50:50 men and women and it does not prevent a board having more than 50% of non-executive members who are women. A board with more than 50% of non-executive members who are women has met the objective.

Public Authority and Appointing Person

2.4 The Act places duties on public authorities and appointing persons to take action to achieve the gender representation objective.

2.5 For the purposes of the Act, “public authority” means an authority listed, or within a description listed, in schedule 1. This list is reproduced in the Annex to this guidance.

2.6 The “appointing person” is the person who has the function of appointing a non-executive member of a public board. In this context, the word “person” may mean the organisation or position which makes the appointment. For many public authorities, the appointing person is “the Scottish Ministers”. The Annex lists who the appointing person is for all of the public authorities covered by the Act.

Public Board

2.7 The gender representation objective applies in relation to the non-executive members of public boards. The Act defines a public board as:

- if the public authority is a company, the directors;
- if the public authority has a statutory board or other equivalent statutory management body, that board or body;
- in relation to any other public authority, the membership of the authority.

Excluded Positions

2.8 The gender representation objective only covers certain non-executive members of a board. Section 2 of the Act defines “non-executive member”, in relation to a public authority, as “a position on its public board-

- (a) that is not an excluded position,
- (b) that is not held by an employee of the authority”

2.9 Section 2 of the Act defines an “excluded position”, in relation to a public authority, as “a position mentioned in the second column of the table in schedule 1 which corresponds with the public authority mentioned in the first column”.

2.10 Public authorities listed in schedule 1 of the Act and appointing persons for public authorities listed in schedule 1 of the Act, should determine which members of their board are “non-executive members” for the purposes of the Act. It is important that there is no ambiguity about whether or not an individual board member is a

“non-executive member” as this forms the basis on which the gender representation objective is calculated.

2.11 Moreover, no action is required under the Act in relation to members who are not “non-executive members” for the purposes of the Act.

The definition of ‘woman’ for the purposes of the Act

2.12 Section 2 of the Act provides that for the purposes of the Act, “woman” includes “a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010¹⁰) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female”.

2.13 To be included, a trans woman without a UK Gender Recognition Certificate or without gender recognition from another EU Member State¹¹ must therefore meet the 3 following criteria:

1. have the characteristic of gender reassignment as defined in the Equality Act 2010.

The definition of gender reassignment in the Equality Act 2010 is – “*a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex*”. This definition includes those reassigning their sex from male to female as well as those reassigning their sex from female to male. A person who meets this definition is not covered by the definition of “woman” in the Act unless they also meet the following two criteria. The person does not need to have undergone any specific treatment or surgery¹²

¹⁰ <http://www.legislation.gov.uk/ukpga/2010/15/section/7>

¹¹ A trans woman with a UK Gender Recognition Certificate or with gender recognition from another EU Member State is legally a woman.

¹² See <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination#what>

2. be proposing to undergo, undergoing or undergone a process (or part of a process) for the purpose of becoming female

This element of the definition means that the person has taken a decision to undergo a process for the purpose of becoming female.

3. be living as a woman

This would not require the person to dress, look or behave in any particular way. However, it would be expected that there would be evidence that the person was continuously living as a woman, such as – always using female pronouns; using a female name on official documents such as a driving licence or passport, or on utility bills or bank accounts; describing themselves and being described by others in written or other communication using female language.

2.14 This definition in section 2 provides clarity that, for the purposes of applying the provisions of the Act, “woman” includes a trans woman who meets the definition set out. This provision only relates to the meaning of “woman” in the Act. This does not have the effect of creating a new legal definition of woman in any other context.

2.15 The Act does not require an appointing person to ask a candidate to prove that they meet the definition of woman in the Act.

The appointment process

3.1 Sections 3 and 4 of the Act set out the duties on appointing persons when appointing non-executive members under the Act.

Background

3.2 Many public appointments are made under a system regulated and monitored by the Ethical Standards Commissioner. It is the Commissioner's role to ensure that appointments are made on merit, using methods that are fair and open. Whether or not a public body is regulated by the Commissioner depends on the type of body it is, and decisions made at the time it is established¹³.

3.3 The appointment process for regulated appointments is run by Scottish Government officials on behalf of the Scottish Ministers. The appointment process for unregulated appointments, including those to the boards of colleges (except regulated chair appointments) and Higher Education Institutions, is run by the public bodies concerned. The description of the appointments process here refers to regulated appointments.

3.4 In relation to higher education institutions (HEIs) appointments are made by the governing bodies of HEIs in accordance with arrangements set out in their governance documents, and in accordance with section 10 of the Higher Education Governance (Scotland) Act 2016 (which contains provisions on the composition of governing bodies) and, in the case of the ancient universities, with the Universities (Scotland) Acts. In addition, the Scottish Code of Good Higher Education Governance sets out provisions on Higher Education Governance, including best practice in relation to governing body membership and appointments.

3.5 For the college sector, appointments are made in accordance with schedule 2 of the Further and Higher Education (Scotland) Act 1992 (which contains provisions on the composition of incorporated college boards, both for regional and assigned colleges) and with schedule 2B of the Further and Higher Education (Scotland) Act 2005 (which contains provisions on the composition of Regional Boards). In

¹³ <https://www.ethicalstandards.org.uk/regulated-bodies>

addition, the Scottish Code of Good Governance for Scotland's Colleges, and the 2014 College Sector Board Appointments Ministerial Guidance, sets out provisions on Further Education Governance, including best practice in relation to governing body membership and appointments. Regarding Newbattle Abbey College, Sabhal Mòr Ostaig, and West Highland College UHI, appointment of board members are made by the company.

3.6 Appointments are only made on merit. The definition of merit is not fixed; it is determined at the start of each appointment round by the appointing person and set out in the person specification. The person specification is a clear and accurate description of the skills, personal qualities, knowledge and experience a person will need to be effective in the role.

3.7 Selection panel members assess the merit of applicants against the person specification using the methods they have agreed. Applicants are not assessed against each other. New requirements cannot be introduced during the appointment round.

The Role of the Commissioner

3.8 The Commissioner regulates 75 of the 122 public bodies in Scotland. In this role they have produced a Code of Practice underpinned by three principles: merit, integrity, and diversity and equality. The Commissioner has also published statutory guidance on the application of the Code.

3.9 The requirements of the Act are consistent with the Code of Practice. The Commissioner will produce guidance on how the requirements of the Act should operate in the context of the Code. The Commissioner does not have a role in determining compliance with the Act.

Appointment on merit when the Act applies

3.10 Where the Act applies, and the gender representation objective has not been achieved, the appointment must be made on merit and the most able candidate should always be appointed. However, in circumstances where there are two or more equally qualified candidates, at least one of whom is a woman, then section

4(2) of the Act requires the appointing person to give preference to a woman if doing so will result in the board achieving (or making progress towards achieving) the gender representation objective. This is, however, subject to section 4(4).

Meaning of equally qualified

3.11 Section 4(2) of the Act refers to candidates being “equally qualified”. To determine whether candidates are equally qualified the appointing person should conduct a full and objective assessment of each applicant against the criteria which have been determined for the role.

The ‘tie-break’ provision

3.12 If there are at least 2 equally qualified candidates, one of whom is a woman, then the appointing person must appoint the woman if doing so would result in the board achieving (or making progress to achieving) the gender representation objective. This is subject to the provision at section 4(4) of the Act which requires the appointing person to consider whether the appointment of a candidate who is not a woman would be justified on the basis of a “characteristic or situation” particular to that candidate, and allows appointment of that candidate.

3.13 The inclusion of section 4(4) in the Act, which provides that an appointing person may over-ride the requirement to give preference to a woman in the circumstances described in sections 3 and 4 of the Act, is required by the jurisprudence of the European Court of Justice which provides that such a requirement cannot be absolute.

3.14 In a tie-break situation, where candidates are identified as equally qualified under section 4(2), the appointing person must then consider, under section 4(4), whether appointing a candidate who is not a woman is justified on the basis of a characteristic or situation particular to that candidate. If so, they may appoint that candidate.

3.15 The Act does not define “characteristic or situation” but does provide, at section 4(5), that a “characteristic” referred to under section 4(4) includes a protected characteristic within the meaning of section 4 of the Equality Act 2010. These

characteristics are – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

3.16 A characteristic or situation particular to a candidate may be another protected characteristic or a factor such as socio-economic background, caring responsibilities or employment sector. This will be for the appointing person to determine based on the board's skills and diversity requirements, which should be expressed in the information packs for any appointment round.

3.17 Where a characteristic or situation particular to a candidate has not been implicitly or explicitly expressed in the appointment round information pack it should not form part of the decision making process for selection.

3.18 Where a public board has targeted a specific protected characteristic in addition to sex, then the appointing person or the panel to whom their appointing authority has been delegated will require access to sensitive personal data (under the meaning of the General Data Protection Act) of the candidate.

Encouraging applications by women

4.1 Section 5 requires appointing persons and public authorities to take such steps as they consider appropriate to encourage women to apply to become non-executive members.

4.2 The Act does not specify what steps should be taken by appointing persons or public authorities. This is because the relevant appointing person and public authority are best placed to determine the appropriate steps to take. It may be that appointing persons and public authorities will take different steps given their different functions.

4.3 Ensuring that women apply for non-executive member appointments is key to the achievement of the gender representation objective. The *Good Practice* section of this guidance focusses on the practical steps that can be taken by both appointing persons and public authorities to encourage women to apply to become non-executive members. It includes examples of good practice to illustrate the kinds of steps that could be taken. A key starting point in the process may be to analyse the available data on the diversity of applicants and their progress through competitions.

Culture and behaviours on boards are also crucial in achieving and maintaining the gender representation objective. Boards will wish to consider how and in what way new board members are welcomed and any practices that may support or alienate members with different skills, experiences and backgrounds.

4.5 The Act requires appointing persons and public authorities to take such steps *as they consider appropriate*. If it is considered appropriate that no steps need be taken, the Act allows that. However, even if the gender representation objective has already been achieved, it would be good practice to continue to encourage applications from women.

4.6 Section 5(3) states that “for the avoidance of doubt, nothing in subsections (1) and (2) prevents an appointing person or a public authority from taking such steps as it considers appropriate to encourage persons with other protected characteristics (within the meaning of section 4 of the Equality Act 2010) to apply to become non-

executive members of the public board”. There is no requirement in the Act to take such steps, but appointing persons and public authorities will want to ensure that wider equality and diversity continue to be considered.

Taking other steps

5.1 If the gender representation objective has not yet been achieved, section 6 of the Act requires appointing persons and public authorities to take any other steps that they consider appropriate with a view to achieving the objective by 31 December 2022. “Other steps” means steps taken in addition to those required to meet sections 3 and 4 of the Act and any steps taken to encourage applications by women.

5.2 This requirement is in place until 31 December 2022. After that date, it no longer applies.

5.3 Any other steps taken must be lawful under equality legislation¹⁴. Some examples of other steps include positive action measures such as:

- Targeted outreach to women’s groups and organisations with a focus on encouraging women into public life
- Providing training or coaching to women candidates prior to application and/or interview.
- Providing networking opportunities for women candidates and existing women board members.
- Offering opportunities to women candidates to shadow or be mentored by existing board members or observe board proceedings.

Other steps may include working on the culture and conditions of the board so that the right environment is created for people with diverse backgrounds and experiences to succeed once they are appointed.

5.4 The Act requires appointing persons and public authorities to take such other steps *as they consider appropriate*. If it is considered appropriate that no steps should be taken, the Act allows that. However, in order to meet the gender representation objective by 31 December 2022, appointing persons and public authorities will wish to do all that they can. Additional steps taken under section 6 could have a significant impact.

5.5 The *Good Practice* section of this guidance includes more suggestions for practical steps that can be taken by both appointing persons and public authorities.

¹⁴ <https://www.legislation.gov.uk/ukpga/2010/15/section/159>

Reporting on progress

Overview

6.1 Section 8 of the Act makes provision for reporting arrangements as follows:

- Scottish Ministers must lay reports before the Scottish Parliament on the operation of the Act at intervals of no more than two years.
- Scottish Ministers must publish reports on the carrying out of their functions under the Act.
- Appointing persons must publish reports on the carrying out of their functions under sections 3-6 of the Act.
- Public authorities must publish reports on the carrying out of their functions under sections 5 and 6 of the Act.

6.2 Scottish Ministers may specify public authorities and appointing persons for the purposes of reporting and may make further provision about reports.

6.3 The arrangements for all of these reports are set out in regulations¹⁵. These arrangements include details of the content, timing and frequency of reports and how they should be published.

6.4 Public authorities, appointing persons and the Scottish Ministers must act in accordance with the arrangements set out in these regulations. They are not obliged to publish any additional material under the Act.

Reporting on sections 3 and 4

6.5 Sections 3 and 4 set out obligations when selecting candidates for appointment as non-executive members. The regulations require an appointing person, including Scottish Ministers in their role as an appointing person, to publish a statement containing the following elements:

¹⁵ The Gender Representation on Public Boards (Scotland) (Reports) Regulations 2019

- stating whether the gender representation objective has been met;
- providing information on any training received by or on behalf of an appointing person on the operation of sections 3 and 4 of the Act; and
- providing information on:
 - how many vacancies for a non-executive member of the board arose during the period covered by the report,
 - for each such vacancy:
 - how many competitions were run to fill the vacancy,
 - for each competition:
 - how many applications were received and the percentage of those which were from women, where the numbers will not identify individuals
 - whether an appointment was made, and if so, whether the appointment made was a woman.

6.6 There is no requirement for appointing persons, or those acting on their behalf, to be provided with training on the operation of sections 3 and 4, however, appointing persons will want to ensure that they are fully aware of their obligations. The term “training” here could include written, online, verbal or other training options.

6.7 It is not necessary to publish any additional information in the statement. No reference should be made to whether or not the tie-break provision has been used.

Reporting on section 5 Encouragement of applications by women

6.8 Section 5 requires appointing persons and public authorities to take such steps as they consider appropriate to encourage applications by women. The regulations require that reports should include details of any steps taken.

6.9 Since the Act requires appointing persons and public authorities to take such steps *as they consider appropriate* it is possible that no steps will have been taken. In these circumstances the report should state that no steps were taken in relation to section 5.

6.10 The Act is clear that nothing in section 5 prevents an appointing person or a public authority from taking such steps that they consider appropriate to encourage applications from people with other protected characteristics (as defined in the

Equality Act 2010). But there is no obligation within the Act to report on any such activity.

Reporting on section 6 Duty to take steps towards achieving objective

6.11 Section 6 requires appointing persons and public authorities to take such other steps as they consider appropriate with a view to achieving the gender representation objective by 31 December 2022. In this section “other steps” means any steps in addition to those taken to encourage applications by women. The regulations require that reports should include details of any steps taken.

6.12 Since the Act requires an appointing person and public authorities to take such steps as they consider appropriate, it is possible that no steps will have been taken. In these circumstances the report should state that no steps were taken in relation to section 6.

6.13 This section applies until 31 December 2022. After this date, the requirements under section 6 will no longer apply, even where an authority has not met the gender representation objective.

Publication of reports

6.14 The regulations require reports to be published in a manner which is accessible to the public. This can be a standalone report. They also make clear that reports can be published within another published document e.g. an annual report or within public sector duty mainstreaming report. This would allow publication as a joint report by an appointing person and relevant public authority. A joint report would need to make clear what the public authority had done and what the appointing person had done in respect of this legislation. It is for appointing persons and public authorities to make decisions about any joint reporting.

6.15 Publication within another published document could also include within an annual or other corporate report, or within a report under the public sector equality duty (see paragraphs 6.20-6.23). Again, it is for appointing persons and public authorities to make this decision.

6.16 The regulations require appointing persons and public authorities to submit a copy of any report under the Act to the Scottish Ministers within 7 days of publication.

6.17 The submission to Scottish Ministers should be sent to [mailbox] and should include:

- A pdf copy of the report itself (or another format such as MS Word)
- A link to the publication on a relevant website.

6.18 Scottish Ministers will consider the content of reports when making their own reports to the Scottish Parliament on the operation of the Act across Scotland (see paragraph 6.23 below).

Connections to the Public Sector Equality Duty

6.19 Many of the public authorities subject to the requirements of the Act are also subject to the requirements of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, as amended¹⁶ (the 2012 Regulations). Under regulation 3

¹⁶ [https://www.legislation.gov.uk/ssi/2012/162/contents/made, as amended by \[add link to the 2016 Regs\]](https://www.legislation.gov.uk/ssi/2012/162/contents/made, as amended by [add link to the 2016 Regs])

(reporting on mainstreaming) of the 2012 Regulations, public authorities must publish a regular progress report. If a public authority wishes to combine its reports on progress under the Act within its reports under the 2012 Regulations it can do so.

6.20 The 2012 Regulations were amended in 2016¹⁷ to include new regulation 6A on the use of member information. Under regulation 6A public authorities covered by that regulation must publish in their mainstreaming reports details of the number of men and women who have been members of the authority during the period covered by the report (“members of the authority” means members of the board).

6.21 Public authorities subject to regulation 6A must also use information provided to them from time to time by Scottish Ministers on the relevant protected characteristics of members of the authority in order to take steps to improve diversity amongst the authority’s members. This particular aspect of regulation 6A has not yet been implemented¹⁸.

6.22 Given the connection between the requirements of the Act and the reporting requirements under the 2012 Regulations, it may be helpful to combine reporting. Doing so would provide a complete picture, in one place, of action to meet legal obligations on board diversity. But there is no requirement to publish a combined report – it will be for appointing persons and public authorities to make this decision.

Scottish Ministers’ reports to the Scottish Parliament

6.23 Scottish Ministers must report to the Scottish Parliament on the operation of the Act at intervals of not more than 2 years. It is for Scottish Ministers to determine the content of these reports. But, in preparing their reports to Parliament, Scottish Ministers must consider the reports published by appointing persons and public authorities on their functions under the Act.

¹⁷ <http://www.legislation.gov.uk/ssi/2016/159/contents/made>

¹⁸ As at August 2018

Achieving the gender representation objective

7.1 Achievement of the gender representation objective is not a one-off event and for some bodies this will fluctuate.

7.2 For some public boards, the gender representation objective will have been achieved prior to the provisions in the Act coming into force; others may achieve the objective in advance of 31 December 2022. It is possible that some boards will not achieve the gender representation objective until after 2022. But because membership of boards can fluctuate over time, and appointments to boards must be made on merit it is possible that the gender representation objective, having been achieved, subsequently lapses.

Requirements

7.3 If, at the time of recruitment, the gender representation objective has been achieved, the requirements at section 3 and 4 of the Act will not apply. There would therefore be no obligation to appoint a woman in a tie break situation. The requirement at section 6, to take other steps towards achieving the objective, would also not apply.

7.4 However, even when the gender representation objective has been achieved at the time of recruitment, section 5 would continue to apply. Section 5 is the duty to encourage applications by women and this duty is not affected by whether or not the gender representation objective has been met. This section requires appointing persons and public authorities to take such steps as they consider appropriate. Some public authorities or appointing persons might consider that if the gender representation objective has been achieved they do not need to take any steps under section 5. However, in order to maintain the achievement of the objective it would be sensible to continue to take action under section 5.

Reporting

7.5 When the gender representation objective has been achieved reporting on progress is only required under section 5, since the relevant appointing person or public authority would have no functions under sections 3, 4 and 6. Even where an

appointing person or public authority had chosen not to take steps under section 5 it would still have to report on progress in relation to its functions under that section, so it would be required to report that it had not taken any steps. This report would be subject to the same publication requirements as any other report (see paragraphs 6.15-6.18 above).

7.6 An appointing person or public authority reporting only on section 5 would need to state that it was doing so because it had already met the gender representation objective.

Future action

7.7 Given that appointments to boards must be made on merit, and are made on a regular basis, achievement of the gender representation objective could lapse at a future date. In those circumstances, section 3 and 4 of the Act would again come into effect and an appointing person would, if all the conditions of sections 3 and 4 are met, be required to appoint a woman in a tie-break situation (subject to section 4(4)). Section 3 and 4 would apply in relation to an appointment round seeking to fill a vacancy created by a woman demitting office, if that departure would result in the board having less than 50% of non-executive members who are women.

7.8 If an achieved gender representation objective subsequently lapses prior to 31 December 2022 then section 6 of the Act will apply until that date. (After that date section 6 will no longer apply even if the gender representation objective has not been achieved).

Good practice guide

8.1 Board recruitment is an aspect of public bodies' more general engagement with communities. Work to improve the gender balance and diversity of Scotland's public boards has been on-going for a number of years and pre-dates the introduction of the Act. As a result, there is a wealth of evidence and good practice examples to support appointing persons and listed public authorities to fulfil their duties under the Act and to achieve the gender representation objective.

Encouraging applications by women

8.2 The following paragraphs in this guidance suggest some practical steps that can be taken by appointing persons and public authorities to encourage women to apply to become non-executive members. It is important to understand that these practical steps may not, on their own, lead to more women on boards – achieving that requires a culture and environment within organisations that enables and promotes their participation in public and corporate life. It is also important to recognise that women are not a homogeneous group, and appointing persons and public authorities should keep in mind that what encourages one group of women may not resonate with others.

Planning and use of data

- Planning for an appointment should begin early, 6 months to a year before a post becomes vacant. When an appointment process is rushed and there is pressure to get people into roles quickly, there is less opportunity and scope to create a process that will attract a diverse range of applicants.
- Succession planning: Public authorities should make sure they understand and develop a strategy for meeting the board's future requirements for skills, knowledge, experience and personal qualities and the board's diversity requirements over the medium to long term, to address the future challenges and strategic priorities of the public body. This should be part of the corporate planning process.
- A succession planning strategy could involve providing mentoring and other development opportunities to potential candidates – please see 'Taking other steps' on p.X.

- The Scottish Government has published Succession Planning guidance ([available here](#)) to support this.
- Those involved in succession planning and planning for appointment rounds will find it helpful to understand the current profile of the board in terms of diversity of skills, knowledge, experience and personal qualities as well as the diversity of protected characteristics.
- In order to design an appointment round, it is helpful to understand the profile of previous applicant pools in terms of who was attracted (applicants) and who was successful (those interviewed and appointed), as well as knowing the previous methods of attraction and assessment.
- For example, if a particular form of advertising seemed to generate an applicant pool of mostly men, it could indicate trying a different form of advertising in the next appointment round to see if that increases the number of applications from women.

Good practice in planning case study: [sportScotland](#)

Good practice in planning case study: [Scottish Funding Council](#)

Person specifications and role descriptions

- What a new board member will be required to do on the board should form the role description. This should then determine the skills, knowledge, experience and personal qualities that the new appointee will need to be effective in that role: this leads to the person specification.
- The person specification should reflect the needs of board. The needs should be worked out by good succession planning. Where more than one position is to be filled, it is acceptable to have different person specifications to meet the board's needs. Just as the strategic priorities of the board will change over time, person specifications are also unlikely to stay the same.
- A person specification should set out clear criteria for selection. Guidance on what the sort of evidence that will meet the criteria should look like ('a set of descriptors') will help applicants.
- Over-specifying will lead to a reduced pool of candidates and limited diversity. Selection panels should ask for what the board needs and avoid 'nice to haves'.
- The language used in person specifications and role descriptions can inadvertently create barriers for potential applicants. For example, saying 'cultural

fit' may put off applicants who do not see someone who looks like them on the existing board.

- A reference list of wording that may be off-putting or attractive to people based on their genders can be found on p.17 of [this document](#).
- Always seeking prior or current board or governance experience as one of the criteria will mitigate against diversity. Use of less traditional selection criteria should help panels to attract applicants from different, non-traditional backgrounds.
- Selection criteria can be 'weighted', to give more or less importance to different criteria while still being 'essential' criteria. That means that less traditional selection criteria could be given more weight over other more traditional criteria for selection.
- Role descriptions and person specifications should be simple to understand and should avoid jargon or terminology that is only understood within the sector.
- Encouraging people to apply from different sectors is particularly important where sectors have challenges in gender balance in the workforce.
- Role descriptions should be clear about the anticipated time commitment and how this will be broken down between meetings, preparatory reading and other duties. It can also be helpful to set out any support for board members to meet these commitments, for example attending meetings via tele- or video-conference. Role descriptions should be clear on where and when the board meets.

Good practice in person specification case study: [Creative Scotland](#)

Attraction and outreach

- The selection panel should aim to design positive and inclusive advertising material which explicitly encourages applications from candidates from underrepresented groups. Statements naming the groups to encourage to apply are helpful e.g. we would particularly welcome applications from disabled women.
- Advertising which appeals to someone's passion for a particular subject or area can encourage non-traditional applicants. Think about the headline rather than the job description for advertising purposes.
- Information material on the appointment should include the contact details of someone who can answer questions and have informal discussions with potential

applicants. An existing board member and a member of the public authority staff team can be good contacts.

- Selection panels should use positive action measures. These might include outreach through networks like the Ethnic Minority Women's Network or SWAN LGBT, or more specific targeting of individuals from underrepresented groups to encourage applications.
- Individual approaches can be powerful in encouraging applications from women. This is because women may self-select themselves out of a process based on misperceptions of the level of skills, knowledge or experience required.
- Consider how to reach out to people who are not actively seeking a board position or those who may not have considered that a board role was a potential opportunity for them. Social media can be helpful here.
- Consider holding outreach sessions to demystify the role and the appointment process.

Good practice in attraction: [NHS Greater Glasgow and Clyde](#)

Good practice in attraction: [Scottish Housing Regulator](#)

Application and assessment

- The selection panel should have a shared understanding of exactly what the board's needs are and exactly how people will be assessed to see if they meet the board's needs.
- Different criteria may need to be tested in different ways, at assessment. The selection panel should plan for methods of assessment that will match the criteria for selection. How the criteria will be assessed should be made clear to applicants.
- Match the assessment method to the criteria. For example, if a criteria includes analytical skills then a selection panel could use a board paper exercise to allow candidates to demonstrate those skills rather than asking for an example of when they have used them.
- Not all of the criteria have to be tested at the initial application stage. The number tested at that stage should be the lowest number practical for shortlisting decisions to be made.

- Selection panels have a responsibility to identify and recognise their own biases and understand how they may impact on selection.
- At each stage of the appointment round panels should discuss how they can mitigate bias. For example, a selection panel may find they were anticipating one type of response when they specified a particular skill in a criterion. Candidates who come from a private sector background may interpret the skill differently compared to candidates from a public sector background and panels should be open and responsive to answers and skills framed in a different way.
- Selection panels should make a conscious decision to use intentionally positive behaviour (or micro-affirmations) to help counteract micro-inequities during interviews.
- During interviews selection panels should take notes of people's responses. This is to ensure the panel does not assess on the basis of general impressions of the applicant. Panels should also evaluate after each interview, and build in time to do so, rather than evaluating all candidates at the end of the interviews.

Good practice in assessment: [Judicial Appointments Board for Scotland](#)

Good practice in assessment: [VisitScotland](#)

Taking other steps

8.3 If the gender representation objective has not yet been achieved, section 6 of the Act requires appointing persons and public authorities to take any other steps that they consider appropriate with a view to achieving the objective by 31 December 2022. “Other steps” means steps taken in addition to those required to meet sections 3 and 4 of the Act.

Raising awareness

- Public authorities should raise the profile of the board and board members so potential applicants can understand what the board does, how members contribute and therefore why they might want to be involved.
- Public authorities can challenge perceptions of ‘traditional board members’ by featuring profiles of the current board on websites or in other materials, focusing on the members’ diversity and the value it adds.
- Public authorities and appointing persons could encourage board members to volunteer as role models and take part in outreach and awareness raising activity.
- Appointing persons, the staff of public authorities and board members should be ambassadors for the work of the board, using their networks and contacts to raise awareness.
- Public authorities and appointing persons could engage with equalities organisations to seek their expert advice on reaching underrepresented groups and understanding real and perceived barriers.

Building a pipeline

- Identify potential applicants from committees, working groups or stakeholder groups who frequently engage with the board.
- Offer opportunities to potential applicants to shadow existing board members or observe board proceedings.
- Ask board members to mentor potential applicants.
- Provide targeted networking opportunities e.g. for women applicants with existing board members.

- Use co-option to board committees, to draw on non-board members expert skills and to give people different experiences of being on a board.
- Providing training or coaching to women applicants prior to interview.
- Engage with organisations whose purpose is to increase diversity on boards e.g. Changing the Chemistry, Women on Boards.

Creating a culture

- Set up a Succession Planning Committee to keep the needs of the board under review, plan awareness raising and pipeline building activity, and offer advice to appointing persons when a vacancy arises. The Scottish Government has published [succession planning guidance](#) and [a toolkit](#).
- Identify and address potential barriers created by the board culture, for example the timing and location of meetings, how papers are presented and how far in advance. Arrange training for board members on structural and systemic bias.
- Identify and address barriers that might prevent access to appointments for diverse groups of women such as disabled women and minority ethnic woman. Consider also the needs of women who are pregnant or have children.

Further reading

9.1 There are a number of existing guidance documents and codes of practice relating to the recruitment of board members and the use of positive action. The guidance on the operation of the Act has been drafted to align with these.

- The Ethical Standards Commissioner – 2013 Code of Practice¹⁹ and Revised Guidance on Application of the 2013 Code of Practice²⁰;
- The Ethical Standards Commissioner – Diversity Delivers²¹ and [Guidance on running an appointment round](#);;
- The Scottish Code of Good Higher Education Governance²²;
- College Sector Board Appointments: 2014 Ministerial Guidance²³;
- The Equality and Human Rights Commission – How to improve board diversity: a six step guide to good practice²⁴;
- The Equality and Human Rights Commission – Appointments to Boards and Equality Law guidance²⁵;
- Scottish Government Public Bodies Unit – Guidance on Succession Planning for Public Body Boards²⁶.

9.2 The Ethical Standards Commissioner will update the Guidance on the Application of the 2013 Code of Practice in order to reflect the requirements of the Act.

¹⁹ <http://www.ethicalstandards.org.uk/publications/publication/222/2013-code-of-practice-for-ministerial-appointments-to-public-bodies-in-scotland>

²⁰ <http://www.publicappointments.org/publications/publication/781/revised-guidance-on-application-of-the-2013-code-of-practice>

²¹

<http://www.publicappointments.org/site/uploads/publications/9081470494a9d103ac08481.79691631.pdf>

²² <http://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2013/07/Scottish-Code-of-Good-HE-Governance.pdf>

²³ <http://www.gov.scot/Topics/Education/post16reform/hefegovernance/CollegeSectorBoardAppointments2014>

²⁴ <https://www.equalityhumanrights.com/en/advice-and-guidance/how-improve-board-diversity-six-step-guide-good-practice>

²⁵ <https://www.equalityhumanrights.com/en/publication-download/appointments-boards-and-equality-law>

²⁶ <http://www.gov.scot/Topics/Government/public-bodies/BoardChairs>

Annex

List of public authorities with appointing person and excluded positions

Schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018 lists the public authorities covered by the Act and provides details of any excluded positions. This Annex lists public authorities and also states who the appointing person is for each authority.

Public Authority	Appointing Person	Excluded positions
Accounts Commission for Scotland	The Scottish Ministers	
Architecture and Design Scotland (company number SC267870)	The Scottish Ministers	
Board of Trustees for the National Galleries of Scotland	The Scottish Ministers	
Board of Trustees of the National Museums of Scotland	The Scottish Ministers	
Board of Trustees of the Royal Botanic Garden, Edinburgh	The Scottish Ministers	
Bòrd na Gàidhlig	The Scottish Ministers	
British Waterways Board	The Scottish Ministers	
Cairngorms National Park Authority	The Scottish Ministers	Members elected under article 5(2) of the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 (S.S.I. 2003/1)
		Members nominated under article 5(4) of that Order
Caledonian Maritime Assets Limited (company number SC001854)	The Scottish Ministers	
Children's Hearings Scotland	The Scottish Ministers	
A college of further education other than a regional college (within the meanings given to those terms by the Further and	The regional strategic body	All members other than those appointed under paragraph 3A(2)(a) and (f) of schedule 2 of that Act

Higher Education (Scotland) Act 1992)		
A regional college (within the meaning given by the Further and Higher Education (Scotland) Act 1992)	Scottish Ministers appoint the chairing member. Non-executive members are appointed by the college board and approved by Scottish Ministers.	All members other than those appointed under paragraph 3(2)(a) and (f) of schedule 2 of that Act
Common Services Agency for the Scottish Health Service	The Scottish Ministers	
Community Justice Scotland	The Scottish Ministers	
Creative Scotland	The Scottish Ministers	
Crofting Commission	The Scottish Ministers	Members elected by virtue of paragraph 7 of schedule 1 of the Crofting Reform (Scotland) Act 2010
Crown Estate Scotland (Interim Management)	The Scottish Ministers	
David MacBrayne Limited (company number SC015304)	The Scottish Ministers	
Food Standards Scotland	The Scottish Ministers	
A Health Board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978	The Scottish Ministers	Councillors appointed under paragraph 2(1)(b) of schedule 1 of that Act
		Members of Health Boards mentioned in regulation 3 of the Health Boards (Membership and Procedure) (Scotland) Regulations 2001 (S.S.I. 2001/302) who hold a post in a university with a medical or dental school
		Members appointed only by virtue of being nominated for membership
Healthcare Improvement Scotland	The Scottish Ministers	The member mentioned in paragraph 2(1)(b) of schedule 5A of the National Health Service (Scotland) Act 1978 (the person appointed to chair Social Care and Social Work Improvement Scotland)
A higher education institution (within the meaning given by the Higher Education Governance (Scotland) Act 2016)	The Governing Body	All members other than those appointed by the governing body (which has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992) (for this purpose a member is not appointed by

		the governing body if that member is appointed only by virtue of being the winning candidate in an election for membership or by virtue of being nominated for membership by another person)
Highlands and Islands Airports Limited (company number SC097647)	The Scottish Ministers	
Highlands and Islands Enterprise	The Scottish Ministers	
Historic Environment Scotland	The Scottish Ministers	
ILF Scotland (company number SC500075)	The Scottish Ministers	
Judicial Appointments Board for Scotland	The Scottish Ministers	
Local Government Boundary Commission for Scotland	The Scottish Ministers	
Loch Lomond and the Trossachs National Park Authority	The Scottish Ministers	Members elected under article 5(2) of the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 (S.S.I. 2002/201)
		Members nominated under article 5(4) of that Order
Mental Welfare Commission for Scotland	The Scottish Ministers	
Mobility and Access Committee for Scotland	The Scottish Ministers	
National Confidential Forum	The Scottish Ministers	
National Library of Scotland	The Scottish Ministers	The member mentioned in paragraph 2(2) of schedule 1 of the National Library of Scotland Act 2012 (the member who is selected from persons nominated by the Dean of the Faculty of Advocates)
Newbattle Abbey College (company number SC262968)	Company appointment	A director nominated by the University of Aberdeen, the University of Edinburgh, the University of Glasgow or the University of St. Andrews
		A director who is also a member of the college
Quality Meat Scotland	The Scottish Ministers	

Regional Board for Glasgow Colleges	<p>Scottish Ministers appoint the chairing member.</p> <p>Non-executive members are appointed by the Regional Board and approved by Scottish Ministers</p>	All members other than those appointed under paragraph 3(2)(a) and (f) of schedule 2B of the Further and Higher Education (Scotland) Act 2005
A regional Transport Partnership created under section 1(1) of the Transport (Scotland) Act 2005	The Scottish Ministers	Councillor members (mentioned in section 1(2)(b) of that Act)
		Members appointed only by virtue of being nominated for membership by a Health Board mentioned in section 6(1)(a)(ii) of that Act
		A member appointed only by virtue of being nominated for membership by Highlands and Islands Enterprise
		A member appointed only by virtue of being nominated for membership by Scottish Enterprise
Revenue Scotland	The Scottish Ministers	
Risk Management Authority	The Scottish Ministers	
Sabhal Mòr Ostaig (company number SC361752)	Company appointment	A director who is also a student of Sabhal Mòr Ostaig
Scottish Advisory Committee on Distinction Awards	The Scottish Ministers	All members other than the Chair, the Medical Director and the lay representatives
Scottish Agricultural Wages Board	The Scottish Ministers	Persons nominated or elected under paragraph 1(a) of schedule 1 of the Agricultural Wages (Scotland) Act 1949 (persons representing employers and workers)
Scottish Charity Regulator	The Scottish Ministers	
Scottish Children's Reporter Administration	The Scottish Ministers	
Scottish Commission for Human Rights	The Scottish Parliament	The member appointed to chair the commission under paragraph 1(1)(a) of the Scottish Commission for Human Rights Act 2006
Scottish Courts and Tribunals Service	The Scottish Ministers	The Lord President

		The Lord Justice Clerk
		The President of the Scottish Tribunals
Scottish Criminal Cases Review Commission	The Scottish Ministers	
Scottish Enterprise	The Scottish Ministers	
Scottish Environment Protection Agency	The Scottish Ministers	
Scottish Fire and Rescue Service	The Scottish Ministers	
Scottish Fiscal Commission	The Scottish Ministers	
Scottish Further and Higher Education Funding Council	The Scottish Ministers	
Scottish Futures Trust Limited (company number SC348382)	The Scottish Ministers	
Scottish Housing Regulator	The Scottish Ministers	
Scottish Land Commission	The Scottish Ministers	
Scottish Legal Aid Board	The Scottish Ministers	
Scottish Legal Complaints Commission	The Scottish Ministers	
Scottish Natural Heritage	The Scottish Ministers	
Scottish Police Authority	The Scottish Ministers	
Scottish Qualifications Authority	The Scottish Ministers	
Scottish Social Services Council	The Scottish Ministers	The member mentioned in regulation 2(3) of the Scottish Social Services Council (Appointments, Procedure and Access to the Register) Regulations 2001 (S.S.I. 2001/303) (the person who is the chair or a member of Social Care and Social Work Improvement Scotland)
Scottish Sports Council	The Scottish Ministers	
Scottish Water	The Scottish Ministers	
Skills Development Scotland Co. Limited (company number SC202659)	The Scottish Ministers	
Social Care and Social Work Improvement Scotland (known as “the Care Inspectorate”)	The Scottish Ministers	The member mentioned in paragraph 2(1)(b) of schedule 11 of the Public Services Reform (Scotland) Act 2010 (the person appointed to chair Healthcare Improvement Scotland)

		The member mentioned in paragraph 2(1)(c) of that schedule (the person appointed as convener of the Scottish Social Services Council)
A Special Health Board constituted under section 2(1)(b) of the National Health Service (Scotland) Act 1978		Councillors appointed under paragraph 2(1)(b) of schedule 1 of that Act
	The Scottish Ministers	Members appointed only by virtue of being nominated for membership
Standards Commission for Scotland	The Scottish Parliament	
VisitScotland	The Scottish Ministers	
Water Industry Commission for Scotland	The Scottish Ministers	
West Highland College UHI (company number SC153921)	Company appointment	A director who is also a student of the college

Impact Assessments

Introduction

This Annex summarises the approach towards 3 impact assessments:

- **Equality Impact Assessment**

A single assessment covering both the guidance and the reporting regulations.

- **Business and Regulatory Impact Assessment**

An assessment covering the reporting regulations only.

- **Data Protection Impact Assessment**

A single assessment covering both the guidance and the reporting regulations.

Final versions of these impact assessments will be produced to accompany the final set of regulations when they are introduced to the Scottish Parliament.

Draft Equality Impact Assessment – Summary of Approach

The equality impact assessment process helps to identify the impact of a policy on people who share certain ‘protected characteristics’: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Who is affected by the proposals?

The Act primarily affects women by requiring a range of activities to be undertaken to increase the representation of women on the boards of Scottish public authorities.

The Act affects people who are not women to the extent that, in a tie-break situation where there are 2 candidates of equal merit, the appointing person must select the candidate who is a women (unless the appointment of a candidate who is not a women can be justified on the basis of a characteristic or situation particular to that candidate). People who are not women are also affected to the extent that the Act requires steps to be taken to encourage applications from women and does not require steps to encourage applications from people who are not women.

The focus on increasing the representation of women is lawful positive action. Equality legislation permits interventions and resources to address disadvantage on the basis of protected characteristics where that disadvantage results in under representation or lack of participation.

Although the Act addresses the under-representation of women it does not prevent action to tackle the under-representation of people with any other protected characteristics.

Given that the Act primarily affects women, the guidance to support the Act and the regulations setting out reporting requirements will focus on women.

Wider opportunities to promote equality

Women are not a homogeneous group – they are diverse and have other protected characteristics. Women have an age and an ethnicity; some are disabled, are of different faiths and none, and have differing sexual orientations. It is important that action ensures that all women can benefit from the new requirements for gender representation.

In particular, the barriers experienced by women from minority ethnic communities, disabled women, young women and women of different faiths and of differing sexual orientations need to be identified and addressed. Pregnant women and women with childcare responsibilities may also have particular needs.

The good practice section of the guidance can explore these wider diversity issues in more detail. But it is not possible to use the guidance to introduce new requirements over and above those set out in the Act.

Draft Business and Regulatory Impact Assessment – Summary of Approach

The Business and Regulatory Impact Assessment helps the Scottish Government to analyse the costs and benefits of proposed legislation. This impact assessment only covers the draft regulations, it does not cover the guidance.

Options considered

Option 1 – Do nothing

The Act states that Scottish Ministers, appointing persons and public authorities must publish reports in accordance with provisions made in regulations. They must also publish reports on carrying out their functions under all relevant sections of the Act.

Doing nothing would mean that Scottish Ministers, appointing persons and public authorities would not be able to meet their statutory obligation to report.

Option 2 – Require annual, stand-alone reports

The regulations could require reports every year on a specified date. However, appointing rounds are not regular and for many public authorities they will not occur every year. It will take time for progress to be made. Reporting every year therefore may be too frequent for meaningful progress to be seen.

Option 3 (**recommended**) – Align with other reporting timeframes and with the flexibility to publish within another document

The regulations could align reporting with existing frameworks. For example, most public authorities covered by the Act are subject to the public sector equality duty and must report progress on that every two years under arrangements set out in the Equality Act 2010 (Public Sector Equality Duty) (Scotland) Regulations 2012 (as amended).

Costs

The BRIA is expected to take the following approach to costs:

- Costs estimated for gathering and analysing information and writing text.
- Costs estimated for publication.

Where the gender representation objective has already been achieved, Scottish Ministers, appointing persons and public authorities need only to report on section 5 of the Act. Section 5 requires them to take such steps as they consider appropriate to encourage women to apply to become non-executive members of the public board. It is estimated that reporting here would consist of one page of material.

Where the gender representation objective has not been achieved, Scottish Ministers, appointing persons and public authorities must report on their functions under sections 3-6 of the Act. It is estimated that reporting here would consist of up to 3 pages of material.

Progress over time

An estimated one third of public boards will have achieved the gender representation objective by the time of the first set reports (April 2021). For these, the appointing person and public authority will only report on section 5. As time passes, more public boards are expected to meet the gender representation objective meaning that the cost of reporting is expected to decrease in subsequent years.

Business

The regulations require public authorities to publish reports. There are no anticipated costs for business or impacts on business.

Legal Aid

The draft regulations create no new rights or responsibilities. Nor do they create any new procedure or right of appeal. The policy requirement is only that a report is published.

Enforcement, sanctions and monitoring

The regulations do not include enforcement mechanism or sanctions. They do require appointing persons and public authorities to submit a copy of their report to the Scottish Ministers within 7 days of publication. Scottish Ministers must use the information in these reports to produce an overview of the operation of the Act. This overview must be laid before Parliament.

Draft Data Protection Impact Assessment – Summary of Approach

The data protection impact assessment looks at data protection issues that arise in relation to the guidance and the reporting arrangements for the Gender Representation on Public Boards (Scotland) Act 2018.

Current procedures for gathering and using diversity data during the public appointments process largely will not change. Details of these procedures are available here: <http://www.publicappointments.org/delivering-diversity/overview/>

Changes to existing practice

Publication of a report will use data in a different way and this in particular means that privacy issues must be considered.

Identification of issues

Involvement of multiple organisations

Multiple organisations are not involved. The duty to publish falls on the appointing person (in most cases this will be the Scottish Ministers) and it is also the appointing person who will process data.

Anonymity and pseudonymity

Individuals will not be identifiable. There will be no new database, nor will data from other data sources be combined.

Technology

Reporting on progress does not require any new technology.

Identification methods

There are no new identification methods.

Sensitive/Special Category personal data

Sex is not classed as sensitive/special category personal data.

Changes to data handling procedures

Data on gender is already gathered and processed as part of the public appointments process. No changes will be made to how data is gathered or stored.

Statutory exemptions/protection

Data must be processed in order to meet the statutory requirements set out in the Gender Representation on Public Boards (Scotland) Act 2018.

Justification

The public appointments process already requires the processing of diversity data, including gender. The 2018 Act makes two changes to how gender data is used. The changes are lawful under EU equality legislation.

Conclusion

This Annex sets out the intended approach to a range of impact assessments.

Question 20 If there is any information that you would like to highlight that you think would be helpful for the Equality Impact Assessment, the Business and Regulatory Impact Assessment, or the Data Protection Impact Assessment then please let us know.

Annex D

Title: A Scottish Government consultation on Implementation of the Gender Representation on Public Boards (Scotland) Act 2018:

(1) Regulations setting out reporting arrangements

(2) Statutory guidance on the operation of the Act

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

- Publish response with name
- Publish response only (without name)
- Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

Consultation Questionnaire

Draft Regulations

Question 1 Do you think that public authorities and appointing persons should be required to report on the carrying out of their functions under the Act at intervals of no more than 2 years, with the first reports being published not later than the end of April 2021?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

Question 2 Do you think that Scottish Ministers should report to the Scottish Parliament on the operation of the Act at intervals of not more than 2 years, with the first report being laid before Parliament not later than the end of December 2021?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

Question 3 Do you think that appointing persons should include within their reports a statement containing the following 3 elements:

- Stating whether the gender representation objective has been met

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

- Providing information on any training received by or on behalf of an appointing person on the operation of sections 3 and 4 of the Act.

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

- Providing information on:
 - how many vacancies for a non-executive member of the board arose during the period covered by the report'
 - for each such vacancy:
 - how many competitions were run to fill the vacancy,
 - for each competition:
 - how many applications were received and the percentage of those which were from women, where the numbers will not identify individuals
 - whether an appointment was made, and if so, whether the appointment made was a woman.

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answers.

Question 4 Do you think that appointing persons and public authorities should report on the activity they have undertaken to encourage applications from women?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Question 5 Do you think that appointing persons and public authorities should, if the gender representation objective has not been met, report on the details of any other steps taken with a view to achieving the gender representation objective by 31 December 2022?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer.

Question 6 Do you think that appointing persons and other public authorities should be able to publish their reports on carrying out their functions under the Act within another document if they wish to do so?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Question 7 Do you think that Scottish Ministers, in preparing their report to Parliament, must use information published by public authorities and appointing persons in their reports on carrying out their functions under sections 3-6 of the Act?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Please tell us the reason for your answer

Question 8 The draft regulations do not specify the content of Scottish Ministers' reports to Parliament other than that they contain an overview of the operation of the

Act. Do you have views suggestions on the content of these reports? If so, please tell us.

Question 9 What, if any, comments do you have on the relationship between the proposals for reporting on the Gender Representation on Public Boards (Scotland) Act 2018 and reporting under the public sector equality duty specific duties.

Question 10 Please tell us any other comments you have on the draft regulations.

Draft Guidance

Question 11 Do you have any comments on the terminology section of the guidance? If so, please let us know.

Question 12 Do you have any comments on the guidance on meeting the duties under sections 3 and 4 of the Act? If so, please let us know.

Question 13 Do you have any comments on the guidance on section 4(4) of the Act? If so, please let us know.

Question 14 Do you have any comments on the guidance on meeting the duties under section 5 of the Act? If so, please let us know.

Question 15 Do you have any comments on the guidance on meeting the duties under section 6 of the Act? If so, please let us know.

Question 16 Do you have any comments on the guidance on meeting the reporting requirements? If so, please let us know.

Question 17 Do you have any comments on the guidance on how the Act applies when the 50% gender representation objective has been achieved? If so, please let us know.

Question 18 Do you have any comments on the guidance on good practice examples of steps to remove the barriers that women face when applying to become non-executive members and examples of other steps that could be taken? If so, please let us know.

Question 19 Please tell us any other comments you have on the draft guidance.

Impact Assessment

Question 20 If there is any information that you would like to highlight that you think would be helpful for the Equality Impact Assessment, the Business and Regulatory Impact Assessment, or the Data Protection Impact Assessment then please let us know.



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Any enquiries regarding this publication should be sent to us at
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St Andrew's House
Edinburgh
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