

From: [REDACTED]
Equality Unit
24 February 2020

Cabinet Secretary for Social Security and Older People
Minister for Older People and Equalities

GENDER REPRESENTATION ON PUBLIC BOARDS (SCOTLAND) ACT 2018 - CONSULTATION RESULTS AND IMPLEMENTING REGULATIONS

Purpose

1. To provide you with a summary of the consultation analysis on the proposed regulations and guidance for the implementation of the Gender Representation on Public Boards (Scotland) Act 2018; and invite you to agree to the next steps required.

Priority

2. Routine. However an early response would help meet the timetable milestones set out below.

Background

3. As you are aware, the Gender Representation on Public Boards (Scotland) Act 2018 (the Act) aims to increase the representation of women to 50% of non-executive members on Scottish public boards. The Act places duties on public authorities and appointing persons including Scottish Ministers in connection to their role in achieving the gender representation objective.
4. Public authorities and appointing persons including Scottish Ministers must take such action as they consider appropriate to encourage applications from women. Where the gender representation objective has not been achieved in respect of a particular board, the relevant appointing person and public body must take such additional steps as they consider appropriate with a view to achieving it by the end of December 2022.
5. 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. 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. A final set of Commencement regulations is also required to bring the remaining provisions of the Act into force.
6. To support the implementation of the Act, Scottish Ministers must publish guidance and those with duties under the Act must have regard to it.

Consultation results

7. The Scottish Government launched a consultation on the draft regulations and implementation of the Act which opened on 13 May 2019 and closed on 4 August

2019. The consultation sought views on two elements of implementation of the Act:

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

8. An independent analysis was carried out by EKOS consultants, with a final report completed on 18 November 2019. A summary of the results is available in Annex A and a table of the consultation numerical data is available at Annex B.

Support for the proposals

9. There was overall support for the majority of the proposals in the consultation, including:

- The proposed reporting timescales for appointed persons and Scottish Ministers reporting to Parliament
- The proposals for what should be included in the content of the reports from appointed persons and Scottish Ministers.
- The proposed guidance on:
 - the report
 - the appointment process.
 - encouraging more applications from women.
 - further steps to meet the gender objective by 31 December 2022.
 - examples of best practice to be included in the guidance; and
 - for bodies that have achieved gender balance on their non-executive board.

Reporting

10. There was a mixed response to aligning the reporting timescales with the Public Sector Equality Duty (PSED) and within the PSED mainstreaming report. Only 42% of respondents supported the inclusion of the reports required by the Act within another report. This compared with 24% of respondents that did not support this proposal with the majority of the respondents expressing concern that including these reports within another report may reduce the accessibility and transparency of them.

11. Conversely, comments regarding including the report in the same document as the report relating to the Public Sector Equality Duty were in general welcomed as it would may reduce administrative burdens and encourage mainstreaming of gender Equality. Given these results the weight of evidence suggests support for this proposal, however, additional efforts to ensure accessibility and transparency will be considered.

12. Another factor that must be taken into consideration is the outcome of the forthcoming review of the operation of the PSED in Scotland.

Additional comments on guidance

13. There were additional comments from respondents that:

- the language in some parts of the draft could be made simpler and clearer.
- the examples in the guidance put ‘a considerable amount of onus on women applicants and do not significantly reflect the need for organisational and structural changes to address structural barriers to employment’
- it should be made clearer that additional efforts to reach gender balance should extend beyond the target of Dec 2022 where balance has not been achieved.

14. These comments have been taken into account and will be reflected in the revised guidance document to be published.

Sex and Gender

15. As you know, the Scottish Government worked with the Parliament’s Equality & Human Rights Committee member Mary Fee MSP and the Scottish Trans Alliance to develop a stage 2 amendment which ensured that as far possible, the legislation would be trans inclusive and was within the competence of the Parliament.
16. The amendment, for the purposes of the Act and regulations, defines “woman” to include a person with the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010), 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.
17. The vast majority of consultation respondents were individuals and highlighted their concerns regarding the definition of ‘woman’ and the use of the term ‘gender’ in the Act and the draft regulations. This concern was repeated in most sections of the consultation despite the fact that it was not relevant to the questions being asked as the definition is part of the Act and not in the regulations.
18. It was the opinion of those respondents that, generally, the Act has extended the legal definition of woman far beyond the Equality Act 2010. However, the definition used only applies for the purpose of the Act and the regulations and does not alter the meaning of the word in any other legal context. It was recommended by most respondents that the Act should replace the term “gender” with “sex” giving the effect that it would apply to trans persons according to their sex recorded at birth and not their gender identity.
19. In those respondents’ opinion the use of the term gender in place of sex in the Act would:
- not comply with the Equality Act 2010 which provides that sex, not gender, is a protected characteristic
 - be open to abuse and disadvantage women
 - make the data collected less reliable.
20. To accede to the approach suggested by these respondents would directly contradict Scottish Government policy to ensure inclusion and equality for trans people. There are no hard estimates of the size of the trans population.

However, it seems unlikely that trans people represent more than 1% of the population. Given this, it is unlikely that the definition of woman in the Act will impact data collection or disadvantage women.

21. The Scottish Government is currently developing guidance to ensure that policy makers and service providers are able to collectively realise trans and women's rights. Although the primary audience will be internal Scottish Government, it will also be accessible to the wider public sector should they wish to use it, and will be publicly available. The guidance will not explicitly cover public appointments, but is expected to be generally applicable to a wide range of policy areas.
22. **It is recommended that, despite the majority view put forward by individual consultation respondents, we should proceed with making the regulations and publishing the guidance required to fully implement the Act.**

Timetable for implementation of the Regulations

23. Subject to Ministers' agreement, below is an indicative timetable for implementation of the regulations:
- **By end February** – SGLD to receive any further policy instructions, finalise drafting of the Regulations and receive policy clearance of the Regulations.
 - **By end March** – SGLD internal checks completed and instrument styled.
 - **1 April** – Regulations made (signing slot required)
 - **3 April** – Regulations laid in Parliament
 - **29 May** – Regulations come into force (this takes into account the 40 day laying period required for the reporting regulations and Easter recess)

Communications activity and support for boards and sponsor teams

24. The majority of the boards subject to the requirements of the Act have been working over the last 4-5 years on a voluntary basis to increase their board's gender diversity, via the Scottish Government's 50/50 by 2020 commitment.
25. Officials therefore suggest communications activity be timed for the regulations coming into force and targeted support given to the boards who are furthest away from meeting the 50% gender objective. Annex C gives a snapshot of the current position of the boards covered by the Act, using the most up to date data available.
26. It is also suggested that the analysis of the consultation be published at the same time.
27. **Further detailed advice on support for boards and communications activity will be sent to Ministers separately, including lines to take regarding the definition of women.**

Sensitivities

28. Two main areas of sensitivity are the **delay in the issue of the guidance and reporting** arrangements and **how 'woman' is defined** for the purposes of this Act.

29. In November 2018 Cabinet agreed that options should be investigated to free up policy and legal resource so that Brexit legislation could be progressed. Exercises to assess candidates for deferral identified a number of domestic SSIs where work could be temporarily paused to free up capacity for Brexit SSIs. These included the regulations to implement the Act. The deferral was then agreed by Ministers.

30. This deferral has impacted on the initial implementation timetable agreed by Ministers. Staffing shortages in the Gender Policy team also significantly compounded this delay. Therefore there may be criticism from Boards of the length of time it has taken for the Regulations to come into force and the guidance being issued. As stated previously our position would be that while there has been a delay, the majority of these Boards have been implementing 50/50 by 2020 for a number of years and there has been support offered to them from a range of statutory and third sector organisations to help them work towards achieving the 50% gender objective.

Current position of Boards

31. Of the Boards subject to the Bill and where information is available, 48% have achieved the 50% objective on women non-executive board members.

Recommendation

32. **Ministers are invited to:**

- **Note the results from the consultation on the implementation of the Gender Representation on Public Boards (Scotland) Act 2018**
- **Approve the making of the Regulations and guidance including final editing to ensure clarity**
- **Reject the recommendations from respondents regarding the definition of 'woman' in the Act as this is not our policy position and not in scope of the Regulations.**

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SUMMARY OF CONSULTATION RESPONSES

The Respondents

There were 310 responses to the consultation, the majority from individuals (272 responses, 88%) and the remaining from organisations (38 responses, 12%). Of the organisations that responded 25 were from the public sector and included, amongst others, Executive Non-Departmental Public Bodies (NDPB) and Further and Higher Education Institutions. There were 13 responses from third sector organisations predominantly national organisations with an equality focus.

The Responses

Sex and Gender

The vast majority of respondents highlighted their concerns regarding the definition of 'woman' and the use of the term 'gender' in the draft regulations. It was the opinion of the respondents that the Act has extended the legal definition of woman far beyond the Equality Act 2010. It was recommended by most respondents that the Act should replace the term "gender" with "sex" giving the effect that the Act would treat trans persons according to their sex recorded at birth and not their gender identity.

In the respondents opinion the use of the term gender in place of sex in the Act would:

- Not comply with the Equality Act 2010 which provides that sex, not gender, is a protected characteristic
- Be open to abuse and disadvantage non-trans women
- Make the data collected less reliable

Support for the Reporting timescales

Around two thirds of respondents supported the proposed reporting timescales which included:

- Public authorities and appointing persons be required to report on the carrying out of their functions under the Act every two years, starting not later than the end of April 2021.
- Scottish Ministers should report to the Scottish Parliament on the operation of the Act every two years, with the first report being laid before Parliament before the end of December 2021.

Respondents fed back that the reporting timescales would promote accountability, transparency and scrutiny that may in turn increase compliance. Some respondents suggested that effective monitoring and reporting arrangements for appointing persons may ensure consistent data, greater compliance and better practice.

Just over 10% of respondents did not support the proposed reporting timescales. The primary feedback from these respondents concerned the use of the term 'gender' rather than 'sex' suggesting that their concerns may not relate to the proposed reporting timescales. Wider feedback included that reporting should be more regular and that appointments should be made on merit, not gender.

Support for Report content proposals

The proposed contents of the report aimed to balance data comparability with the flexibility to still be applicable to different organisations. There was broad support from respondents on the proposed content of the reports, which included:

- A statement on whether the gender representative objective has been met.
- A statement that provides information on any training received by, or on behalf of, an appointing person on the operation of sections 3 and 4 of the Act.
- Information on vacancies including how many vacancies, how many times it was advertised, the number of applicants, the proportion of applicants that were women and whether a woman was appointed.
- What actions were taken to encourage applications from women.
- Steps taken to achieve gender balance on the respective board by 31st December 2022.
- The report must be published and accessible to the public.

Support for Scottish Ministers reports to Parliament

The draft regulations stipulate that Scottish Ministers will lay a report on the functioning of the Act in Parliament every 2 years beginning no later than the end of December 2021. The report would also be available to the public.

Respondents were broadly supportive of the inclusion of information published by public authorities in the Ministerial report.

Respondents were given the opportunity to offer suggestions of the content of these reports key examples include, amongst others:

- Reports should include information on sex, not gender.
- Where possible data should be disaggregated between protected characteristics.
- Information on the functioning of the act including:
 - Number of times there were 2 equally qualified candidates and what proportion resulted in the appointment of a woman.
 - The proportion of public authorities meeting the gender balance objective broken down by sector, size and geographical location.
 - Examination of best practice, successes and challenges.
 - Planned actions to facilitate the functioning of the act.

Alignment with reporting cycles under the Public Sector Equality Duty and other reporting cycles

Comments from respondents were, in the main, supportive of allowing public authorities to include the reports mandated by this Act within the reporting required under the Public Sector Equality Duty. While there was some concern that incorporating the 2 reporting cycles may reduce transparency it was generally accepted that this would reduce administrative burden and encourage gender mainstreaming. Issues around the terms sex and gender were also raised.

Guidance on the terms used in the Act

Respondents were concerned that the definition of 'woman' in the Act was too broad and should be limited to persons that were recorded as female at birth.

Guidance on the Appointment Process

The consultation requested perspective from respondents regarding sections 3 and 4 of the Act, including consideration of the term 'equally qualified' and when a 'characteristic or situation' of a particular candidate, who is not a woman, may be used to select that candidate.

Once again respondents raised the definition of a woman in this section of the consultation. There were also comments that the term 'equally qualified' was subjective and therefore subject to bias, however, some definitions of equally qualified may actually hinder hiring women. Emphasis was placed on training for those involved in the hiring process.

Views were mixed on a 'situation' or 'characteristic' that may be considered if selecting a candidate that is not a woman. While some respondents supported hiring persons with diverse protected characteristics the majority expressed concern that this may be misused in the hiring process and may undermine the overall aim of the act.

Guidance on encouraging applications by women

Respondents provided a range of comments on the guidance for encouraging applications from women:

- Encouraging applications based on sex and not gender.
- As well as encouraging applications from women efforts should be made to encourage applications from intersectional women.
- The hiring process should be transparent and consistent between public bodies.
- Training should be undertaken to ensure gender competence in the hiring process.
- A wide range of practical steps should be considered to encourage applications from women.
- Guidance should be robust and more prescriptive to counteract any inherent bias.
- Reporting on actions taken to encourage applications from other protected characteristics is not mandated by the Act, however, should be encouraged.

Guidance on taking further steps to meet the gender objective by 31 December 2022

Comments on the guidance on taking further steps to meet the gender objective by 31 December 2022 once again focused on the definition of a 'woman' and the use of the term 'gender'. In addition, respondents made these comment:

- The guidance should emphasise the importance of taking action and the duty of public bodies to provide evidence of actions that they are taking to achieve gender balance.
- The deadline of 31 December 2022 was welcomed as a clear target, however some were concerned that efforts may reduce after this date.
- The guidance should ensure that while efforts were made to improve gender balance that hiring should still be done on merit.
- 'Additional steps to increase gender balance' is too vague and greater specificity is required.

- The examples in the guidance place ‘a considerable amount of onus on women applicants and do not significantly reflect the need for organisational and structural changes to address structural barriers to employment’.
- Additional actions to address barriers to staying on the board.

Guidance on reporting

The consultation sought views on the guidance for the content, submission and publication of reports. As well as the previously mentioned concerns regarding use of the terms ‘sex’ and ‘gender’ respondents also commented:

- Minimum expectations and best practice standards should be more clearly defined.
- The guidance should stipulate that reports should contain details of actions taken to increase applications from women and improve gender balance. Details of why actions were not taken should also be included. This should continue to be reported post-2022.
- Guidance should strongly encourage the reporting of data on protected characteristics in the hiring process and actions taken to improve board diversity.
- Some recommendations on increasing the clarity of the guidance.
- The guidance should stress the importance of accountability and that the publication of the report must be done in an accessible and transparent way.

Guidance for bodies that have achieved gender balance

The guidance makes clear that gaining gender balance is not a one-off event and will require efforts to maintain. Respondents broadly agreed that gender balance is a long term commitment and noted that even once gender balance has been achieved efforts should be taken to increase diversity more broadly. Bodies should be encouraged to take regular reviews to record and share learning.

Guidance examples of good practice

Respondents were broadly supportive of the provided examples. There were suggestions for additional examples including working with women’s groups, advertising methods, considering unpaid employment (caring, volunteering etc.) and changing culture. The need to periodically review the guidance and include examples from other organisations was also highlighted.

Final comments

Respondents were given the opportunity to express any final comments that they had for all sections of the consultation. As with prior questions the issue of sex and gender was a prominent theme in response to this opportunity. Respondents were also keen that the draft documents were reviewed to ensure that they were easy to understand and should contain greater reference to unconscious bias. Some respondents also suggested that further consultation should be undertaken, particularly with women’s groups.

CONSULTATION NUMERICAL DATA

Question		Support	Oppose	Don't Know	Didn't answer
Section 1 – Timescales for Reporting					
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 two years, with the first reports being published not later than the end of April 2021?	67%	12%	11%	10%
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 two years, with the first report being laid before Parliament not later than the end of December 2021?	65%	10%	12%	13%
Section 2 - Report Contents					
3a	Do you think that appointing persons should include within their reports a statement whether the gender representative has been met?	59%	14%	10%	17%
3b	Do you think that the appointing persons should include within their reports a statement that provides information on any training received by, or on behalf of, an appointing person on the operation of sections 3 and 4 of the Act?	56%	10%	14%	19%
3c	Do you think that appointing persons should include within their reports a statement that provides information on vacancies? Including the number of vacancies and applicants, the proportion of applicants that were women (where there are sufficient data to ensure anonymity) and the gender of the appointment, if made.	65%	9%	10%	15%
4	Do you think that appointing persons and public authorities should report on the activity they have undertaken to encourage applications from women?	74%	8%	6%	12%
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	61%	17%	11%	12%

	gender representation objective by 31st December 2022				
6	Do you think that appointing persons and other public authorities should be able to publish their reports on carrying out their functions under that Act within another document if their wish to do so?	42%	24%	21%	14%
Section 3 - Scottish Ministers Reports to the Scottish Parliament					
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 2-6 of the Act?	60%	8%	18%	14%

[REDACTED – OUT OF SCOPE]