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STEP 3 – FINALISE FORMATTING AND CHECK APPLIED STYLES

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STEP 5 – UPDATE TABLE OF CONTENTS

Headings

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Comparative overview of income and staff 2012/2013

	Example 1	Example 2	Example 3	Example 4
Company 1	Result 1	Result 4	Result 7	Result 10
Company 2	Result 2	Result 5	Result 8	Result 11
Company 3	Result 3	Result 6	Result 9	Result 12

Table Styles

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Analysis of the Consultation on the Implementation of the Gender Representation on Public Boards (Scotland) Act 2018

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Introduction

About This Report

This report presents analysis of the consultation on the Implementation of the Gender Representation on Public Boards (Scotland) Act 2018 (referred to as the Act herein) which opened on 13th May 2019 and closed on 4st August 2019.

Background

The purpose of the Act is to improve the representation of women on the boards of Scottish public authorities. The Act was made following Scottish Government consultation on how to shape proposals on using legislation to achieve gender equality on the boards of public bodies (2014)¹, and further consultation on a draft Gender Representation on Public Boards (Scotland) Bill (2017)².

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.

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.

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).

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 do not have such as laying reports before the Scottish Parliament.

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 Scottish Government Consultation, [Women On Board: Quality through Diversity, Scottish Government Consultation on the Introduction of Gender Quotas on Public Boards](#), April 2014.

2 Scottish Government Consultation, [Draft Gender Representation on Public Boards \(Scotland\) Bill Consultation Analysis Report](#), June 2017.

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.

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.

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.

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.

This latest 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.

When the regulations and guidance have been finalised, the Scottish Ministers will bring the duties in the Act into force.

Analysis Methodology

The Scottish Government provided EKOS Ltd access to all responses via Citizen Space. Some responses were not submitted by respondents through Citizen Space (six) and did not always follow the consultation structure (e.g. email or letter response to the Scottish Government). Where this was the case, the Scottish Government provided responses as separate documents for inclusion in the overall analysis.

Quantitative (closed questions) and qualitative (open-ended questions) responses were exported into Microsoft Excel for subsequent analysis:

- All Yes/No questions have been presented in table format.
- Qualitative responses have been analysed to identify common themes and messages.

Note on Responses to the Consultation

An issue regarding terminology and definitions used in the Act was raised frequently throughout the Consultation question set (i.e. Question 1 to 19). This centred on the term “gender” and the definition of “woman” (see Appendix B for definition of woman) for the purposes of the Act.

In summary, the consensus among respondents was 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” (i.e. a set of stereotypes commonly associated with males and females) with “sex” (i.e. biologically male and female). The main view was that the gender representation objective should be expressed as the sex representation objective.

The vast majority of respondents felt that the terms/definitions used within the Act would “further alienate the 50% of the population it was intended to attract”. The “lived experiences” of women were considered of vital importance. It was suggested that if the aim was to improve representation of people with other protected characteristics under the Equality Act (2010), that this should not be at the expense of improving female representation. Some, however, noted the importance of the “intersectionality of characteristics” in delivering on the Act’s objectives (e.g. disabled women, LGBTI women).

Further, many respondents simply inserted the exact same feedback across multiple open-ended questions asked within the Consultation. This made it extremely difficult to identify wider common themes. In most cases, the issue regarding terminology and definitions used with the Act was the overriding theme that emerged to all questions. Wider themes reported were not always based on a large absolute number of responses.

The afore-mentioned concerns relating to the Consultation were further reflected in the relatively high proportion of respondents that reported:

- “Don’t know” or “did not answer” any or some of the closed questions. If these cases were excluded from the analysis of Yes/No questions, the level of support for the proposals would be higher than what has been reported.
- They were either slightly dissatisfied or very dissatisfied with the Consultation (50%)³.

Our overall sense from analysis of the consultation responses was that there was general support for the proposals, and of what the Act sought to achieve – but the issue around conflating sex and gender would need addressed, and further clarity provided.

³ This is a standard question included in Scottish Government consultations, with feedback used to help improve future consultation exercises.

Profile of Respondents

In total 310 responses were received to the Consultation on the Implementation of the Gender Representation on Public Boards (Scotland) Act 2018, broken down by individuals and organisations in Table 1.

Table 1: Profile of Consultation Respondents

	Number	Percentage
Individuals	272	88%
Organisations	38	12%
Total	310	100%

Note: 10 duplicate entries were removed (e.g. both electronic and hard copy submission).

Organisations made up a very small proportion of the total number of responses received. In discussion with the Scottish Government, we agreed how best to code organisations, Table 2. As the absolute number of responses was small in many cases, organisations were coded as either public or third sector.

Table 2: Further Breakdown of Consultation Respondents

	Number	Percentage
Individuals	272	88%
Public sector organisations	25	8%
Third sector organisations	13	4%
Total	310	100%

Within the public sector, the most responses were received from Executive Non-Departmental Public Bodies (NDPB), followed by Further and Higher Education Institutions. Wider responses were received from the health sector, regulatory bodies, public corporations, local government, and non-ministerial offices. Third sector responses were predominantly national organisations with an equality focus. In the remainder of the report we have sought to draw out any differences in responses across different sub-groups, where appropriate.

Report Structure

The remainder of the report has been structured in line with the Consultation Paper:

- Section 1 to Section 4 covers Questions 1 to 10, and is related to the regulations setting out reporting arrangements.
- Section 5 to Section 11 covers Questions 11 to 18, and presents feedback on the qualitative questions on the statutory guidance on the operation of the Act.
- Section 12 covers responses to Question 19, and presents details of any other comments provided on the draft guidance.

Additional information is contained with the Appendices.

Regulations Setting Out Reporting Arrangements

Section 1

Timescales for Reporting

Context

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 take time. 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 two years, with the first reports being published not later than the end of April 2021. This timetable aligns reporting with the timescales already established for reporting progress under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended).

The draft regulations require Scottish Ministers to report to Parliament on a two 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 eight months to produce their report to Parliament.

Table 3: 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 two years, with the first reports being published not later than the end of April 2021?

	Yes	No	Don't know	Not Answered	Total
Individuals	67%	12%	11%	10%	272
Organisations	68%	13%	3%	16%	38
Third sector	31%	31%	8%	31%	13
Public sector	88%	4%	0%	8%	25
Total	67%	12%	10%	11%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Around two-thirds of respondents were SUPPORTIVE of the proposal 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.

There was relatively equal levels of support among individuals and organisations. Within the organisations sub-group, there were far higher levels of support for the proposal among the public sector.

The main themes that arose from the feedback from these respondents were that:

- Public accountability and transparency were important factors. Effective monitoring and reporting arrangements should be put in place:
 - To encourage regular review.
 - To encourage compliance with the legislation.
 - To ensure regular reporting on progress, achievements, and success.
 - To identify, share, and embed good practice.
 - For organisations to identify and take additional action were required.
- That the timescales proposed for reporting were reasonable and appropriate, and that it was sensible to align reporting with other reporting cycles. It was felt that the provision of timescales for reporting would also keep the issue of improving the representation of women on the boards of Scottish public authorities front of mind. It might prompt action/change.

While the majority of respondents were supportive, a key theme that emerged centred on aspects of the terminology used in the Act. More specifically, the main comment from these respondents was on the term “gender”, and the definition of “woman” for the purposes of the Act. A quote which illustrates the point made by most respondents is as follows: “...a distinction needs to be clearly made between SEX (i.e. biologically male and female) versus GENDER (i.e. a set of stereotypes commonly associated with males and females)”.

Most respondents said that the term “gender” should be replaced by “sex” to ensure the focus was on the equal representation of females and males on public boards, and to ensure that the legislation was not “open to abuse”. Some went on to add that this would:

- Ensure compliance with the Equality Act (2010) – the main comment was that sex is a protected characteristic not gender, and that the Act has extended the legal definition of women far beyond the Equality Act (2010).
- Provide more meaningful data for progress reporting.

Indeed, this was the main point raised by respondents who DID NOT SUPPORT the proposal 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 (12%). Third sector organisations were more likely not to support the proposal.

Much of the feedback from this group of respondents therefore did not relate to the question (i.e. timescales for reporting). That being said, some felt that reporting should be more regular (e.g. annual), with a few calling for the first report to be brought forward to 2020.

Table 4: 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 two years, with the first report being laid before Parliament not later than the end of December 2021?

	Yes	No	Don't know	Not Answered	Total
Individuals	65%	10%	13%	12%	272
Organisations	63%	8%	8%	21%	38
Third sector	38%	23%	8%	31%	13
Public sector	76%	0%	8%	16%	25
Total	65%	10%	12%	13%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Almost two-thirds of respondents were SUPPORTIVE of the proposal 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. The highest level of support was among public sector organisations.

The main themes that arose from the feedback were that:

- Regular reporting to the Scottish Parliament would promote openness accountability, transparency and scrutiny. It would:
 - Encourage public authorities to comply with the legislation.
 - Increase public understanding regarding what steps had been taken to improve the representation of women on the boards of Scottish public authorities, what difference had been made, how well public authorities fulfilled their duties, and any issues/challenges experienced.
- The timescales proposed were sensible, and would allow for comprehensive reporting by Scottish Ministers on progress following reporting by public authorities. The general view was that the timescales specified would provide sufficient time for Scottish Ministers to review and collate data from public authorities and produce informed reports to the Scottish Parliament.

- The setting of timescales for reporting to the Scottish Parliament was said to be important and would help facilitate regular consideration of, and discussion on, progress towards addressing the purpose of the Act (or otherwise). Some felt that this would ensure gender equality on the boards of Scottish public authorities remained a policy priority.

A total of 10% of respondents DID NOT 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. Organisations, and more specifically, third sector organisations were most likely to be not supportive of the proposal.

The issue outlined earlier regarding the definition of “woman” for the purposes of the Act was raised strongly by these respondents (and by those in support of the proposed timescales for reporting to the Scottish Parliament). Wider feedback mentioned by a few of these respondents was that:

- Reporting to the Scottish Parliament should be more regular (e.g. annual).
- Appointments to the boards of public authorities should be based on merit not gender.

Section 2

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

Context

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. 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 the intention to specify precisely and exhaustively what reports should contain. But the draft regulations do set out a number of requirements:

1. Sections 3 and 4 of the Act and whether the gender representation objective has been met. 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 three 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.
 - Providing information on vacancies.

Where the Scottish Ministers are the appointing person, their statement must provide this information for each authority to which Scottish Ministers make appointments. Statements should be published in accordance with guidance.

2. 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:
 - 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.
 - Other steps taken by appointing persons and public authorities with a view to achieving the gender representation objective by 31st December 2022. Where the Scottish Ministers are the appointing person, their report must provide this information for each authority to which they make appointments.

3. Publication. 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. 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.

Table 5: Question 3a

Do you think that appointing persons should include within their reports a statement whether the gender representative objective has been met?

	Yes	No	Don't know	Not Answered	Total
Individuals	57%	16%	11%	16%	272
Organisations	74%	3%	3%	21%	38
Third sector	54%	8%	0%	38%	13
Public sector	84%	0%	4%	12%	25
Total	59%	14%	10%	17%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Table 6: Question 3b

Do you think that 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?

	Yes	No	Don't know	Not Answered	Total
Individuals	56%	10%	15%	19%	272
Organisations	58%	8%	11%	24%	38
Third sector	54%	8%	0%	38%	13
Public sector	60%	8%	16%	16%	25
Total	56%	10%	14%	19%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Over half of respondents were SUPPORTIVE that reports by appointing persons should include a statement:

- On whether the gender representative objective had been met (59%).
- That provided 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%).

Organisations, and more specifically public sector organisations expressed the highest level of support for both proposals.

Table 7: Question 3c

Do you think that appointing persons should include within their reports a statement that provides information on vacancies?

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

	Yes	No	Don't know	Not Answered	Total
Individuals	64%	10%	11%	15%	272
Organisations	71%	5%	3%	21%	38
Third sector	54%	15%	0%	31%	13
Public sector	80%	0%	4%	16%	25
Total	65%	9%	10%	15%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

There was STRONGER SUPPORT among respondents that appointing persons should include a statement that provided information on vacancies within their reports (65%). Organisations were slightly more likely to express support for this proposal than individuals – and in particular public sector organisations.

An open question then invited comments to Questions 3a to 3c.

We have grouped comments, where possible, across the three topic areas covered in Questions 3a to 3c – and have highlighted the most common feedback.

Firstly, the more general feedback provided by many respondents in support of the proposals emphasised the importance of robust monitoring mechanisms and regular progress reporting to help Scottish Ministers assess the overall effectiveness of its policy interventions.

Common themes that emerged was that this would be important:

- For accountability, transparency and public scrutiny purposes.
- To understand what action had been taken/would be taken to address the issue of improving the representation of women on the boards of Scottish public authorities.
- To understand progress towards achievement of the key objective/purpose of the Act – at a national and public authority level.
- To identify ways that organisations could increase the representation of women on the boards of Scottish public authorities, and share good practice.

Wider feedback from some respondents highlighted:

- The importance of public authorities having a greater understanding of the reason(s) for any imbalance in gender representation (e.g. fairness and balance in recruitment processes, whether attraction initiatives appealed to all).
- The need for clear guidance from the Scottish Government on what information would be required to be provided, and any GDPR implications.

Secondly, comments specific to Question 3a, 3b, and 3c are captured below:

- Gender representative objective:
 - the overall consensus was that reporting on whether the gender representative objective has been met should be based on sex segregation not gender. A couple of quotes which reflect much of the feedback are outlined below.

“Records to be kept on biological sex primarily and if needs be, in addition, a record of gender. Importantly clear distinction needs to be made between biological sex and gender identity as the two are not the same and should not be confused”.

“Depends on definition of woman. Biological sex is key, not some notion of gender”.

- Not mentioned by many, however, a comment raised was around the assumption that it was voluntary to declare gender during the application process. If appointees did not declare themselves to be a woman or man, either because they did not wish to declare or because they did not identify as either, a question raised was how would an organisation's gender representation be calculated and reported.
- Training:
 - Some respondents felt that there should be further clarity provided around what information on training would be required to be provided, and in particular to ensure that it is relevant and meaningful. Information provided should go beyond simply reporting on the “number” of people participating in training (e.g. type of training, training providers, quality of training, etc).
 - Appointing persons (and selection panels) must be suitably trained and experienced to ensure that appointments were made “transparently and fairly”, and that there was “effective and consistent implementation of the regulations” (e.g. operate without bias, reduce the potential for unconscious bias). A related point raised by a few respondents was the importance of having diverse selection panels, and that this could also be reported on.
- Vacancies:
 - A variety of comments were provided on the reporting of vacancies (albeit not reported a majority of respondents): how and where the vacancy was promoted, the wording used, the number of applications received by women (as a proportion of the total), status of posts taken up by women, justification in each case for not appointing a woman, barriers/challenges, and examples of what worked well.

Table 8: 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	No	Don't know	Not Answered	Total
Individuals	73%	8%	7%	11%	272
Organisations	79%	5%	0%	16%	38
Third sector	54%	15%	0%	31%	13
Public sector	92%	0%	0%	8%	25
Total	74%	8%	6%	12%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The majority of respondents were SUPPORTIVE of the proposal that appointing persons and public authorities SHOULD REPORT on the activity they have undertaken to encourage applications from women (74%). There was slightly higher support among organisations, and in particular among the public sector.

The main feedback from these respondents was that it was a reasonable request for appointing persons and public authorities to report on the activity undertaken to encourage applications from women. The following factors were considered important:

- Reporting would provide necessary evidence and show commitment to the public and wider stakeholders that public authorities had taken “appropriate”, “practical”, “positive”, and “proactive” steps to encourage more applications from women and to achieving the goals of the Act:
“Reporting on activity will provide a driver to the activity happening”.
While understanding the nature of activity undertaken by public authorities was considered important, respondents felt that the extent to which this had led to an increased number of applications from women and an increased number of women appointed were equally important considerations.
- It was felt that legislation to increase the representation of women on the boards of public authorities would be meaningless if steps were not taken by public authorities to encourage the desired result – and subsequently reported on. The requirement for reporting would ensure compliance among public authorities.
- It would provide an opportunity to share details of effective activity/practice, lessons learned, and any successes, and drive continuous improvement (as well as identify any problem areas).
- It would give confidence in the recruitment process (i.e. greater transparency) – and potentially encourage more women to consider applying for a position on the board of a public authority.

Wider feedback reported in a few cases was that:

- Reporting should not be too burdensome and/or cause additional work on top of existing reporting arrangements for public authorities regarding the fulfillment of statutory functions. A few went further to suggest that this should be proportionate to the need for additional activity in this area.
- Reporting arrangements should include efforts and steps taken by public authorities to encourage applications from “diverse women” (e.g. LGBTI women, young and older women, disabled women, minority ethnic women, women with children, and women with other diverse lived experience) and other under-represented groups.

- Appointments should be made on the best candidate for the position on the basis of merit. Here, it was felt that the main focus should be on reporting steps taken by public authorities to encourage applications from the broadest range of candidates possible, including women.

Few respondents reported that appointing persons and public authorities SHOULD NOT report on the activity they have undertaken to encourage applications from women (8%).

Over and above feedback relating to terminology and definitions used within the Act, the main comments provided by this group of respondents related to the importance of public authorities undertaking steps to encourage a wide and diverse range of candidates to apply – including women – and that appointments should be based on merit.

Table 9: 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 31st December 2022?

	Yes	No	Don't know	Not Answered	Total
Individuals	59%	18%	12%	11%	272
Organisations	74%	8%	3%	16%	38
Third sector	54%	15%	0%	31%	13
Public sector	84%	4%	4%	8%	25
Total	61%	17%	11%	12%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Some 61% of respondents reported 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 31st December 2022.

There was particularly strong support among organisations, and in particular from the public sector.

Much of the feedback provided by these respondents echoed feedback to earlier questions:

- Such reporting would support increased accountability, transparency, fairness, openness, and would “prevent inaction” among public authorities. It was considered important that appointing persons and public authorities should:
 - Take the requirement to meet the gender representation objective seriously (i.e. there needs to be continued focus/action, and oversight that progress had been/would be made).
 - Monitor the effectiveness of their activities on an ongoing basis to develop greater insight into what worked well and less well.
 - Provide an explanation for why the gender representation objective had not been met (i.e. through a regular process of self-assessment, self-reflection, identification of lessons learned, a commitment to continuous improvement).
 - Give due consideration to identifying additional steps to be undertaken to ensure that further progress is made ahead of the next recruitment round. This could include consideration of how best to overcome the barriers to participation among women (e.g. consultation with women).
- There was recognition that the reasons for not meeting the gender representation objective were likely to be varied. However, it was felt that appointing persons and public authorities had a duty to:
 - Provide commentary/analysis, as part of a formal reporting cycle, on the reasons why certain actions/steps were not as effective as others.
 - Report on any barriers encountered and/or extenuating circumstances to meeting the aims of the legislation.
 - Set out a clear plan for meeting the objective – this would demonstrate commitment to achieving the aims of the legislation.
- The information reported on could provide useful learning for other public authorities, as well as generate ideas on potential actions/steps that could be taken based on the experience of others.

Almost one-fifth of respondents reported that appointing persons and public authorities SHOULD NOT, 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 31st December 2022.

Individuals were more likely than organisations to report this.

Over and above the issue of gender versus sex terminology used in the Act⁴, a variety of comments were provided by these respondents (although most by individual respondents). A point that was raised by a few respondents related to public authorities that had more infrequent appointment rounds. This could place these organisations in a situation of potentially having to select a candidate based on gender rather than on merit. Some felt that this was “not in the spirit of the Act”.

Table 10: 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	No	Don't know	Not Answered	Total
Individuals	38%	25%	23%	14%	272
Organisations	68%	13%	3%	16%	38
Third sector	23%	38%	8%	31%	13
Public sector	92%	0%	0%	8%	25
Total	42%	24%	21%	14%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

There was relatively mixed feedback to this question.

Less than half of respondents reported 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 (42%).

Higher levels of support was expressed by organisations, and in particular among the public sector.

The main feedback in support of this proposal was that it seemed a sensible approach, and that “full transparency” and “visibility” of reporting was crucial.

Flexibility of reporting was also welcomed, including among smaller organisations, where the need for a separate report could be viewed as an “administrative burden” or be “unduly onerous” (i.e. limited resources). The option to include reporting within another document would allow for a more efficient use of resources and was generally viewed as “advantageous”.

“Being able to integrate the reporting requirements under the Act with other equality reporting requirements will help simplify information gathering and analysis and reduce duplication of effort”.

⁴ This was also raised by those respondents that answered “Don't Know” or Did Not Answer the question.

“By reducing the requirement to produce new and distinct corporate documents this arrangement minimises bureaucracy for the public authority. It also reduces the proliferation of documents that members of the public may need to search through in order to find information of this nature”.

Wider points/caveats raised by some respondents included:

- The report it is included within must be fully accessible to the public and widely promoted/disseminated/published. Some respondents specifically mentioned inclusion within the Public Sector Equality Duty (PSED) – Equality Mainstreaming Report.
- If progress reporting on the Act were to be included within another document, it should be within another report that contains similar/related statistics and information. This would provide ease of access by interested parties to wider equality-related information, including gender representation on the boards of public authorities.
- Where progress reporting on the Act was included within another report, it should be reported on clearly under its own section – “by including this report in another document it must not be lost or overlooked”.
- Linking progress reporting with other reporting mechanisms might help public authorities to mainstream and embed gender equality considerations as part of their day-to-day operations, decision making and reporting arrangements.
- It should be able to be provided separately if requested.

Almost one-quarter of respondents reported that appointing persons and other public authorities SHOULD NOT be able to publish their reports on carrying out their functions under the Act within another document if they wish to do so (24%). Third sectors organisations, followed by individuals were more likely to report this.

Over and above the issue of gender versus sex terminology used in the Act⁵, the main issues raised by these respondents included:

- A perceived risk that public authorities could “obfuscate information” or “hide their failure within the small print of another document”. A standalone document was therefore the preferred option for these respondents, with some suggesting that excerpts could be included in other documents.
- Standalone reports would result in greater visibility and clarity of reporting on progress. It was reported that the public must be able to search for, and access, reports easily. It was considered important that public authorities were held accountable for their actions, and standalone published reports would also help maintain public awareness of progress made.

⁵ This was also raised by those respondents that answered “Don’t Know” or Did Not Answer the question.

Wider comments focussed on the content and presentation of the reports, with ease of readability emphasised.

- A central repository of all the information from the public authorities would help enhance transparency by enabling the information to be easily found, aggregated and monitored.

“Enabling organisations to publish reports within other publications decreases the accessibility of information and its capacity to be used as an accountability tool”.

“The information should be published where the public would expect to find it, to avoid future accusations of having tried to hide it”.

Section 3

Scottish Ministers Reports to the Scottish Parliament

Context

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

“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.

The draft regulations 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.

Table 11: 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	No	Don't know	Not Answered	Total
Individuals	60%	8%	20%	13%	272
Organisations	63%	8%	5%	24%	38
Third sector	38%	15%	8%	38%	13
Public sector	76%	4%	4%	16%	25
Total	60%	8%	18%	14%	310

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Sixty percent of respondents reported 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. There was stronger levels of support for this proposal among public sector organisations.

The main feedback from these respondents was that this was an “appropriate” and “logical” approach to be adopted by Scottish Ministers. Using published information and data was viewed as essential from a scrutiny, transparency and openness perspective.

It was considered sensible that the primary source of information and data used by Scottish Ministers, in preparing their report to Parliament, was that produced by public authorities and appointing persons.

Further, a few respondents felt that information or data over and above that information published by public authorities and appointing persons in their reports could also be used by Scottish Ministers – as long as it came from reliable, trustworthy, and easily accessible sources. Data sources used must be clearly stated within reports.

The provision of comprehensive, accurate, verified, evidence-based, and data driven reports to the Scottish Parliament on progress was emphasised by many respondents. Some respondents went on to add that this approach would also aid consistency of reporting, and would support effective oversight by the Scottish Parliament (i.e. informed discussion of changes to legislation, policy and practice). Wider feedback, but not provided by many respondents, was that the proposed approach would: a) encourage public authorities and appointing persons to review how well (or otherwise) they were fulfilling their duties; b) present a Scottish wide picture of the processes in place to move toward greater representation of women; c) provide an assessment of progress and performance; d) allow for trend analysis; and e) flag up any issues/problems.

“It is vital that parliament is able to hold government to account and that bad-practice or individual board non-compliance is able to be publically available”.

“An overview would allow Ministers to see not only examples of what is working to achieve compliance but if there is a difference in approach and success between different Public Authorities (i.e. rural and urban women's engagement, women with additional protected characteristics)”.

“We believe that all available information published by public authorities and appointing persons should be publicly available, to allow for progress and success to be measured and recognised and non-compliance penalties implemented if necessary”.

“The report must be more than just a collection of data. If changes are to be meaningful then it is important that ministers demonstrate how the information is being used to implement policies to deliver desired aims”.

Only 8% of respondents reported that Scottish Ministers, in preparing their report to Parliament, **MUST NOT USE** information published by public authorities and appointing persons in their reports on carrying out their functions under sections 3-6 of the Act. There was stronger levels of support for this proposal among public sector organisations.

Over and above the issue of gender versus sex terminology used in the Act⁶, no common themes emerged from the feedback to this question from this group of respondents.

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.

The main feedback from respondents related to the importance of Scottish Ministers' reports to Parliament acknowledging the clear differences between sex and gender.

The general view was that, in order for reports to be truly meaningful, data should be collected (and reported on) as per the protected characteristics as outlined in the Equality Act (and definitions provided). For example, there was a strong feeling that there should be a clear distinction made in the reporting of figures of women and trans-women. If data were to be collected about gender identity then it was felt that this should be a distinct reporting function and separate targets set.

“The report should be on sex not gender. Gender reassignment is a separate issue and should be reported separately”.

“I would like to know how many biological females are in each role. Not biological males 'expressing' as females. Trans women and trans men need representation, but this should be encouraged separately to the uptake of women”.

Some respondents took the opportunity to emphasise that Scottish Ministers' reports to Parliament should be concise, accurate, meaningful, and accessible. It was further suggested by some respondents that reports should allow for comparisons across public authorities, and for identification and dissemination of shared learning. It was also suggested that the use of standardised reports would allow for a degree of comparability and for progress/changes to be tracked over time.

“Consideration given to approaches that have and have not achieved desired results to build a picture of what constitutes a successful approach”.

There was a sense from some respondents that the reports should be sufficiently detailed to demonstrate the extent to which the Act has been effective in improving the representation of women on the boards of public authorities. In this regard, it was felt that the focus of reports should provide an examination of the operation of the Act, including its overarching purpose - “demonstrating compliance with the Act, its key provisions and duties” – providing an overview of the “collective impact” of public authority action across Scotland (e.g. making use of quantified outcomes).

⁶ This was also raised by those respondents that answered “Don't Know” or Did Not Answer the question.

Some comments highlighted that the reports to Parliament should provide an aggregated overview against those elements outlined earlier at Section 2 (i.e. gender representation objective, training, vacancies, actions to encourage applications from women, appointments, etc). Some respondents went further and suggested that relevant data, where possible, should be disaggregated by other protected characteristics.

A wide range of other comments were made regarding the specific content of the reports. However, most were provided by individual respondents (see Appendix B for more detail). Below, we have sought to report on common themes mentioned by multiple respondents:

- Proportion/name of public authorities which had a) met or b) not met the gender representation objective – this could be broken down by sector, size and geographical location.
- Narrative on progress towards meeting the gender representation objective. Changes occurring over the reporting period, gender representation gap and trend analysis.
- Recording the level of compliance, and future steps to support compliance with the Act.
- Narrative on the range of activities undertaken to support the recruitment of diverse women – broken down by stages in the recruitment process where action was required (e.g. application, interview, selection stages).
- Acknowledgement of key successes and failures across public authorities.
- Identification of emerging or good practice examples of actions that have demonstrated a positive impact in achieving the gender representation objective.
- Difficulties encountered in meeting the gender representation objective – proposals/areas for improvement, steps to ensure compliance, timescales.
- Training gaps.
- Number of times the tie-break was used and the outcome for said boards.

Section 4

Alignment with Reporting under the Public Sector Equality Duty and Other Reporting Cycles

Context

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) 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.

The 2012 Regulations also contain provisions under Regulation 6A relating to the gathering and use of information on the protected characteristics of board members. 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.

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 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.

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.

Scottish Ministers have indicated that they wish to review the operation of the 2012 Regulations. 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.

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”. 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.

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.

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 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?

There were relatively few comments provided by respondents that did not focus on the concern reported throughout the consultation regarding: a) the use of the word Gender in the Act; and b) the definition of “woman” for the purpose of the Act.

Where wider comments were provided, the following common themes emerged:

- The reporting relationship as set out in the consultation paper was appropriate.
- Flexibility and alignment of reporting with other reporting cycles was welcomed. It would be sensible to keep linked reporting together (e.g. both have the same overriding objective of advancing women’s equality).
- Some mentioned that the proposed reporting requirements were similar to reporting requirements under the 2012 Regulations, and that it would be disproportionate to require separate reporting in respect of this particular duty when other appropriate publications (e.g. equality outcomes and mainstreaming reports), place similar duties on appointing persons.
- Aligned timescales for reporting was also considered sensible.
- That alignment of reporting would help ensure that improving women’s representation on the board of public authorities was an equality mainstreaming issue within the terms of the public sector equality duties of the Equality Act 2010.
- That, over time reporting should be integrated and streamlined – to reduce duplication of effort.

“It is sensible to have the same reporting timelines and framework for reasons of consistency, efficiency, transparency and oversight”.

A wider comment made (but not by many) was that the Scottish Parliament might wish to consider the ramifications of potential amendments to the 2012 Regulations given that the EHRC does not have an enforcement role for the Act or the reporting regulations made under it.

Very few mentioned the need for a dedicated report on the Act. Where this was mentioned, the main reasons were around:

- For maximum transparency.
- The importance of providing robust evidence.
- That it would encourage public authorities and appointing persons to consider tailored approaches to gender representation and would allow a focus on women from diverse groups to be considered as part of the single objective.
- That it was important that anyone with an interest could access this information easily. It was felt that including reporting on the Act within other reports would “run contrary to that ideal”.

Question 10:

Please tell us any other comments you have on the draft regulations?

The main other comment provided by most respondents related to earlier concerns raised regarding a) the use of the word gender in the Act; b) the definition of “woman” for the purpose of the Act; and c) the implications that these issues would have for meaningful data collection and reporting on the operation and effectiveness of the Act.

Where wider comments were provided, common themes were as follows (albeit not raised by many respondents):

- That the legislation and regulations were welcomed, and the level, frequency and flexibility in reporting were appropriate.
- The importance of legislation and regulations being written in plain English for ease of understanding among the lay person.
- There was a need for greater consultation with women and women’s groups on how the policy/legislation will affect women’s rights.

Other comments typically covered individual points made by respondents. No wider common themes were apparent.

Content of Draft Guidance

Section 5

Terminology Used in the Act

Context

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.

Across the variety of terms used in the Act, the majority of respondents provided comment on the definition of “woman” for the purposes of the Act. As highlighted throughout the consultation analysis, the main feedback was that:

- The definition used in the Act has extended the legal definition of woman far beyond the Equality Act (2010) – it was too broad.
- Sex not gender is a protected characteristic.
- The definition should align with the Equality Act (2010), and be clarified.
- The definition of “woman” should not be changed without consultation.
- The term “woman” should be biologically born women and not anybody who self-identifies as a woman.
- The extended definition of woman would have implications for reporting – it would skew the figures reported, and hide under-representation of women of the boards of public authorities – as per Equality Act (2010) definition. Some felt that reporting would be meaningless and that it would undermine the purpose of the Act and render it not fit for purpose.

Linked to the above feedback were comments provided on the term “gender representation objective”. The main comment was that the term gender was “ambiguous”, a “contentious word” and “misleading”.

The general view was that “gender” should be replaced with “sex” to eliminate unnecessary confusion (e.g. the two terms are not synonyms).

“The legal definition of woman needs to be defined with reference to the biological terms for an adult human female. The only exception to this would be if the person qualifies under the Gender Recognition Act 2004 and has a birth certificate which states they are of the female sex”.

“Definition of woman should be the female sex and include women with a Gender Recognition Certificate under Gender Recognition Act (2004)”.

“The definition of woman in the draft guidance seeks to conflate two separate protected characteristics under the Equality Act 2010. It is important that both characteristics are protected but by conflating the two it is impossible to tell whether the aims have been met in respect of either.

A separate piece of legislation should be enacted to address under representation by those who identify as a different gender to their sex observed at birth and to those who identify as non-binary”.

“The use of "gender" instead of "women" conflates sex and gender and is open to abuse”.

Section 6

The Appointment Process

Context

The draft guidance discusses how the provisions at section 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.

Over and above comments to the definition of “woman” used in the Act, a wide range of individual comments were raised. Where common themes were apparent, this included:

- The importance of public authorities having transparent decision-making for the appointments process was emphasised. For example, public authorities need to be able to demonstrate the way in which they evaluated each candidate and how any scoring was applied. This should include detailed records of the application, testing and interview process, and records of their reasoning as to why a particular candidate was appointed and another was not.
- Given that there was not a standard appointments process and criteria for board membership, some felt that there would need to be clearer definitions provided in the Guidance for “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. Not doing so would “leave the concept of merit based qualification open to the judgement and biases of the appointing barrier to avoid the use of the ‘tie-breaker’ provision in the Act”.
- Guidance should include recommendations for those involved in the appointments process to be fully trained and aware of equality and diversity issues, complying with equality legislation, unconscious bias and use of the tie-break provision.
- The importance of having inclusive and diverse recruitment panels was also raised by some respondents.

- There were a number of comments provided regarding the term “equally qualified”:
 - No precise definition of “equally qualified” was provided within the Act or Guidance. There was a sense across the feedback that “equally qualified” was objective, hard to assess and apply in practice – “there will always be room for dispute”, “no such thing as two equally qualified candidates”, “more difficult to determine at the earlier stages of the recruitment process if two or more candidates are equally qualified”.
 - It was reported that “equally qualified” should not be limited to, for example the same qualification level or years of service in a particular capacity. It should be defined more broadly to include, for example skillset, knowledge, experience, etc to ensure that women are not at a disadvantage.
 - It would be crucial to highlight the importance of the person specification in determining the definition of merit.
- Some respondents felt that the language used “suggested a hierarchy of protected characteristics would be in play in appointment decisions”. A number of respondents went on to say that this would “place women, once again at the bottom” – “it creates tensions between protected groups where it should foster good relations”.
- Where there are two or more equally qualified candidates, it was felt that the Act should be used for the advancement of the female candidate until/unless full parity is achieved – “if targets are not being met they must appoint the closest woman that meets their standards regardless of any other applicants. If you want to promote other protected characteristics then do that separately not tagged onto a bill to promote women. If they are not attracting good female candidates they need to look at their advertising and target women better”.
- However, a few felt that the implication that women may end up appointed to boards at the expense of more qualified candidates was flawed, and “a barrier to equal representation in public life”.
- If the objective of the Act was to protect the rights and protections afforded to women, then for some the only characteristic that mattered was biological sex. A few respondents felt that the terms “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 sounded like a “get out clause” and “not in the spirit of the Act” which aimed to boost the representation of women on the boards of public authorities.

- A few mentioned the importance of having access to specialist legal advice on the parameters determining “equally qualified”, “tie-break provision” and of “when a characteristic or situation particular to a candidate who is not a woman may be used to select that candidate”.
- A few comments were made around the guidance on meeting the duties under sections 3 and 4 of the Act being overly complicated, technical, and difficult to follow. It could be clearer, more accessible and practical (e.g. in terms of the language used, provision of summaries and case studies).

Question 13:

Do you have any comments on the guidance on section 4(4) of the Act which considers 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.

The overriding common theme on the guidance on section 4(4) of the Act aligned with much of the earlier commentary on the terminology and definitions used within the Act (i.e. “gender” and “woman”).

Here, the importance of “promoting genuine equality for biological women” was emphasised. The following quotes help illustrate the points raised:

- “This clause will be used to further exclude females”.
- “This simply gives public authorities an excuse to fail to have adequate representation of women”.
- “This section is open to misuse. If the stated aim is to increase women’s participation to 50%, having a clause which allows this to be overridden negates that aim”.
- “If the aim of the Act is to correct the sex-based imbalances seen on public boards then there cannot be anyone who is equivalent to a woman and yet not a woman. There are other protected characteristics and minority groups which also deserve representation on public boards but this Act is specifically about correct sex-based imbalance (or at least it should be). The phrase being used ‘a ‘characteristic or situation particular to a candidate who is not a woman may be used to select that candidate’ makes no sense in the context of this Act, and suggests you cannot be a woman but may be a suitable substitute. There is no acceptable substitute. If there are insufficient women candidates then the problem is engaging with sufficient female candidates, the solution is not to find non-women substitutes”.

A wide range of individual view-points were also raised. Where common themes could be identified, these are outlined below.

Firstly, the importance of advancing equality for other protected characteristics was mentioned by a few respondents. However, some felt that this “should be considered under separate arrangements”. On the flip side, others expressed a different opinion:

“Positive discrimination is still discrimination. Appointment should be on merit, not on sex”.

“It could be appropriate to ensure competence on the board to select based on specific knowledge or experience required if the best fit for that post is not a woman. We should not create gender balance at the cost of the effectiveness of the Board”.

“The guidance is clear and recognises that public authorities may wish to appoint candidates based on another protected characteristic or a factor. It is clear this is justifiable if based on the board’s skills and diversity requirements and expressed in the appointment round information pack”.

Secondly, various comments were provided about the language used being misleading and confusing. The need for plain English was emphasised.

A few responses mentioned that the guidance should be delayed until the Gender Representation Act process is complete.

Section 7

Encouraging Applications by Women

Context

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. Reference may also be made to the Scottish Government's Succession Planning Guidance and Toolkit⁷ which seeks to help public bodies to develop effective succession plans for their boards.

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.

Over and above the "gender" versus "sex" issue

"Must ensure that women as a protected sex class are targeted specifically and not conflated with other gender related categories. BAME women, women with disabilities and lesbian women should clearly be included in such targeting".

"Persons with protected characteristics should be encouraged to apply, but only the successful recruitment of biological women should count towards meeting the objectives of this Act".

Some wider common themes reported were:

- There should be transparency and consistency between appointing persons and public authorities on the steps undertaken to encourage women to apply to become non-executive members of public boards. Here, it was felt that the board and appointing persons should develop a degree of "gender competence, including an understanding of barriers faced by specific groups of women".

"The long-term success of the Act will be dependent on the ability of the measures to improve the candidate pipeline".

⁷ The Scottish Government, [Guidance on Succession Planning for Public Body Boards](#), January 2017.

- Reporting on the steps taken to encourage women to apply to become non-executive members of public boards was considered important from both a transparency and good practice perspective – “...this could potentially be updated after each Ministerial reporting cycle to develop a bank of good practice examples”.
- It was considered appropriate that public bodies and appointing persons must demonstrate how they have approached their requirement to improve women’s representation on their boards. The general view was that this should go beyond activities such as leaflets/emails. Here, meaningful engagement and consultation with women’s organisations (and women) was emphasised to better understand why under representation takes place, and how best to overcome this.

“All guidance must include the need for outreach measures to be wide ranging and delivered with an intersectional understanding. These steps should particularly focus on women who remain significantly under-represented: BME women, disabled women, women with caring responsibilities, and working class women. Furthermore the guidance should include explicit expectations for public authorities to work with third sector organisations to deliver this outreach competently to audiences they may otherwise not have access to”.

- Steps taken need to take into account a wide range of factors to encourage women to apply for positions – wording used in adverts, times and lengths of meetings (if during school times), child care arrangements, that networking opportunities and unpaid shadowing work alongside home responsibilities might not be practical, etc.

“We would like to see a culture shift in which women can be confident that they can be accommodated with flexibility. Steps which could be recommended would include childcare/creche vouchers, flexible hours, the ability to work from home at certain times, a company-wide one-stop-shop for outsourcing household responsibilities, and a strong culture encouraged of working in working hours, as opposed to presenteeism and evening networking. These are some of the steps which will encourage more women onto boards and also produce the next generation of women in senior positions”.

- Various comments were provided on the guidance and reporting:
 - The guidance should go beyond how new board members are welcomed. It was felt that advice around behaviours and culture should be expanded given how important these aspects are to ensuring a diverse board is effective.

“It is equally important for boards to understand retention rates of women on boards and the practical and cultural changes to enable women to remain in post. This may include aspects such as childcare and meeting times as well as the importance of gender competence and training for public body chairs. Training for public boards should be conducted on outreach, equality and diversity, and unconscious bias”.

- As the Act places the discretion on the organisation to determine the most appropriate steps to encourage applications by women, it was felt that the guidance must be robust and more prescriptive so as to “indicate the multitudes of areas that public bodies and appointing persons should examine prior to vacancies arising”.
- The guidance refers to “practical steps that can be taken”. The Scottish Government should consider more robust language such as “indicative steps which should inform those adopted by the public body or appointing person.” This would indicate the expectation that specific steps will be taken under section 5 of the Act.
- The guidance should refer to changes that may be necessary to improve application visibility. Examples provided include linking up with third sector national and community groups that work with and represent women. The Government should ensure that any networks or projects which aim to prepare women for board appointments are suitably supported and resourced.
- The guidance must also stress the importance of appropriate recruitment criteria and its publication well in advance of the vacancy in the audience itself, not just the Good Practice Guide examples. This should include the importance of setting out clear and accurate expectations for board members in terms of time commitment, meeting agendas and the role expected to be played in and outside of board meetings.
- It was reported that PSED requirements relating to board diversity overlap with the need for succession planning processes. These were vital to the preparedness of the board to implement necessary changes to the recruitment processes and policies in advance of vacancies arising. However, it was mentioned that succession planning was not mentioned in section 4 of the guidance. Paragraph 4.8, which states that boards “will want to ensure that wider equality and diversity continue to be considered”, is not strong enough to stress the importance of engaging with diverse groups of women and should be redrafted to ensure intersectional measures are front and centre of public body steps under Section 5.

- Although there is no duty to report on steps taken to encourage applications from people with other protected characteristics, it may be appropriate to make clear that this will not be discouraged where the reporter feels that the information would be helpful.
- Reporting on how public authorities encourage more applications from women is considered useful. Some felt that the guidance should also encourage consideration of wider diversity as mentioned in the guidance to include other groups such as ethnic minorities, disabled and young people.

Section 8

Taking Other Steps

Context

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 31st 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.

The overriding theme from the comments provided on the guidance regarding taking other steps was objection to the term “gender”.

A few other comments were provided, as outlined below:

- Correcting the imbalance between men and women represented on the boards of public authorities was considered to be priority – and must be taken seriously.
- Aligned to the above point were a few comments around the duty of public bodies to provide evidence/demonstrate the steps and actions they had undertaken, how they had engaged with women, and the results of the actions taken (including, where appropriate, an explanation into why they failed to meet their obligations under the Act).
- A few comments were made around the helpfulness of having a deadline for achieving equality representation between women and men on the boards of public authorities, and that the reporting period allowed time for progress to be made.
- Some mentioned that this requirement is in place only until December 2022. It was suggested that this implied that once gender balance had been achieved it would be maintained. An example provided that helps explain the point raised was as follows - it might be that, particularly in small boards, a woman leaves the board and a man (who is the best candidate at the subsequent appointment round) is appointed.

There was a strong sense from the feedback that there was a continuing need to ensure that, while appointment should always be based on merit, subsequent recruitment aimed to re-establish gender balance.

- Not mentioned by many, however, a couple of respondents felt that there should be a “long-term commitment to cultural change rather than short term measures driven by the reporting timeframes”. In this regard, it was suggested that public bodies continue to report on additional steps they had undertaken to encourage applications from women post-2022.

Comments that related to the specific content of the guidance were as follows:

- Section 5 – It was felt that the duty to take “such additional steps as they (public authorities, appointing persons and Scottish Ministers) consider appropriate” lacked necessary specificity. It was reported that the guidance was weak and did not provide sufficient clarity as to what “additional steps” in pursuit of the objective public bodies may wish to consider. Here, some respondents commented that “the examples provided put a considerable degree of onus on women applicants and do not sufficiently reflect the need for organisational and structural changes to address structural barriers to employment”.
- Paragraph 5.3 does mention the culture and conditions of the boardroom and again, as per the response to Question 14, “it would be good to expand this as such matters are easily dismissed by those who with less emotional awareness (low EQ)”.
- The document could refer to the board ensuring that all opinions are heard and valued and that board chairs must consider, in consultation with the rest of the board, what steps they need to take to ensure this is working effectively. This may involve canvassing views on an anonymous basis.
- Section 6.13 might benefit from clarifying why section 6 of the Act ceases to exist after December 2022 and cross referring to what reporting requirements remain in place thereafter i.e. for example, if correctly interpreted, to explain that section 3 (2) of the regulations requires reporting every 2 years after April 2021. More explanation of the operation of the Act in regard to Section 6 would be welcome.
- It was suggested that measures relating to section 6 aims could include: a) monitoring recruitment, training and promotions downstream to support women’s access to senior employment positions across the public sector, a measure which will increase their experience for potential future public appointments; b) mechanisms to facilitate board renewal, including term limits; and c) creation of a national pool of equally-qualified candidates that are skilled and prepared for public appointments.

Section 9

Reporting

Context

Arrangements for reporting progress under the Act will be set out in regulations – and the consultation document sought views 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.

The main theme that emerged from the feedback was concern around the use of the term “gender” and the definition of “woman” for the purposes of the Act.

The following provides details of specific comments made on the guidance relating to arrangements for reporting progress under the Act:

- The guidance should more comprehensively set out the minimum expectations of reports alongside recommendations for best practice. This should include deadlines and expectations on the level of detail to be reported on by public authorities (including intersectional data).
- There was a need to set out in the guidance that reports should justify why measures were not considered appropriate under Section 5 and Section 6 of the Act if no steps had been implemented, as paragraph 6.9 only specifies that reports should state that no steps were taken.
- It was recommended that boards continue to report on any additional measures beyond those under Section 5 of the Act post-2022.
- The guidance could be amended at paragraph 6.13 to make clear that boards may continue to add in other steps explored to improve board diversity, including measures aimed at diverse groups of women and other protected characteristics.
- While there was no requirement to report on activity which encourages applications from people who identify with other protected characteristics, doing so could demonstrate good practice in increasing diversity beyond legislative compliance.

- The guidance relating to publication of reports should stress the importance of accountability. Reports should be published in the most transparent way possible. Public accountability is the sole enforcement mechanism created by the Act, and it is therefore vital that reporting is robust in order that the purpose of the Act be achieved in the long term.
- The requirements for appointing persons and public authorities are complex, particularly around what information is required to be provided by authorities and by when. It may be better to have this in a table format.
- It may be helpful for the guidance to encourage appointing persons and public authorities to make it clear where they have met the reporting requirements, when the requirements are integrated into other reports. Otherwise it may be challenging to extract the information to inform Ministers' reports.

Wider comments regarding reporting included that reports:

- Must include statistics on biological sex.
- Be open to public scrutiny.
- Must be open and transparent.

Flexibility in reporting was also welcomed. However, where progress reporting was included in other reports (e.g. PSED), it was felt that this should be an easily identifiable section.

Section 10

Achieving the Gender Representation Objective

Context

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.

The main theme that emerged from the feedback was concern around the use of the term “gender” and the definition of “woman” for the purposes of the Act.

Wider feedback, though not reported by many, was that:

- Once the gender representation objective had been achieved, efforts should continue to be undertaken by boards to maintain it - beyond 2022. The general view was that there is an ongoing duty to encourage applications by women, regardless of whether or not the gender representation objective had been met.
- There was agreement that achievement of the gender representation objective is not a one-off event. Increasing the representation of women on the boards of public authorities requires long-term commitment to encouraging women to apply for non-executive roles, embedding cultural change within public authorities, and a commitment to continuous improvement.

“It will still be important to encourage those from diverse backgrounds to apply until it becomes more of a norm for those from diverse backgrounds to consider board roles”.

- Public authorities should be encouraged to undertake a regular review of representation and the policies and processes that they have in place for board recruitment to meet their obligations under the Act (e.g. risk assessments), and to make improvements where required.
- There was, however, wider recognition that there might be times when there were insufficient suitably qualified women applying for non-executive member positions, and that it might not always be possible to make an appointment of a female applicant. It was reported that there was a continuing need to ensure that, while appointment was always based on merit, subsequent recruitment aims to re-establish gender balance.

- The importance of sharing learning on what worked well in increasing the representation of women on the boards of public authorities was emphasised.

Where specific comments were made on the content of the guidance, these are outlined below:

- This section of the guidance might benefit from clearer articulation on the requirements for the appointing person or public authority. An example of a board in this situation and what was done would help better articulate what is required.
- The guidance could benefit from worked examples at section 7.3 and 7.4 and to be clearer on what the Act specifically requires in terms of section 3 (2) and 3(3). For example, it would be helpful to illustrate what “at the time of recruitment” means in terms of the gender objective having been met in relation to the wording of section 3 (2) and 3(3). If, for instance, a board had 6 female and 6 male non-executive members but went out to recruitment for a vacancy that was due to arise from the future retirement of one of those female members, would section 3 and 4 of the Act apply or not? It might also be helpful to include, perhaps at this point of the text and at other points in the document, a high profile reminder that the appointing person must appoint first of all on the basis of who is the best candidate and not on the basis of their gender.
- There is a danger in a 50:50 Board that when one member leaves, the public body will view the vacant post as male or female. The guidance should be clear on the criticality of merit in this specific circumstance.

Section 11

Examples of Good Practice

Context

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? If so, please let us know

The main theme that emerged from the feedback was concern around the use of the term “gender” and the definition of “woman” for the purposes of the Act.

Where wider comments were provided, these are reflected below:

- Some respondents said that good practice examples provided within the guidance were useful and helpful in suggesting a range of ways to increase gender balance and board diversity. It was considered important to highlight and extract the key learning in terms of what had worked well in encouraging more women to both apply and succeed in being appointed. There was also acknowledgment that the suggested good practice examples were just one step in achieving gender representation in public authorities.
- Good practice guidance could be used as the basis for training/development sessions for public authorities and appointing persons.
- The importance of consulting with women’s organisations and with women was emphasised – to better understand the “structural barriers that limit participation by women”.

“Fine-grained accounts of what helps and hinders women's applications would be a useful basis on which to build good practice”.

- Aligned to the above point, was feedback that working with, and through women’s organisations should be encouraged (e.g. targeted outreach). Such organisations were said to bring specific expertise and knowledge, and established networks, contacts and relationships with women at a local level.

“Women are more likely to self-select themselves out of a recruitment process based on misperceptions of their skills, knowledge and experience in comparison to men, and therefore acknowledge the power in approaching individual women, as well as holding outreach sessions”.

“Go to where woman congregate and talk to them, community groups, church groups do this at community level, word of mouth best publicity but face to face best to convince”.

- The importance of widening the methods and approaches used to advertise public appointments available was also highlighted, and the importance of positive and inclusive advertising material explicitly encouraging applications from under-represented groups. Statements naming the groups to encourage applications were said to be helpful (e.g. LGBTI women).
- There was recognition that women are not a homogenous group and what encourages one group of women to apply to become a board member may not resonate with others.
- There was some reference to the importance of outreach work in recruitment rounds, and that this had worked well for some public authorities in terms of increasing the diversity of candidates applying and appointments made.
- For advertising and outreach work, promoting the benefit to the applicant of being on a board was considered a useful approach (i.e. developing leadership skills, widening networks, giving back).
- There were some references to specific third sector organisations that could provide expertise/support, for example:
 - Equate Scotland - language reviews and unconscious bias training.
 - Changing the Chemistry - seeks to improve diversity of thought in the boardroom (diversity of thought being identity, cognitive and experiential diversity). It provides advice and support to organisations seeking help in diversifying their boards.
 - SCVO - can help undertake campaigns (e.g. around young trustees).
- It was highlighted that role descriptions can be put through a gender decoder (free online) which provide organisations with feedback on whether their wording could be putting off women from applying.

“Women tend to prefer more information and context. Rather than referring to another paper with off-putting words, it would be much easier to include the words in the guidance (and quote the research paper). Our experience is to make the process as simple as possible. There should also be advice on considering the make-up of the selection panel, whether this is done by the sponsor team or the body, to ensure it is as diverse as possible”.

- The importance of developing and promoting a culture in which women can be accommodated with flexibility was emphasised – for example: removing financial barriers, childcare support, accommodating of pregnancy and maternity leave, the time/length of meetings and events.
- The importance of continued training and support – role model programmes, shadowing, board observers, mentoring as an aspect of succession planning, buddying of an existing board member, and seminars were some of the activities mentioned.

Where specific comments were made on the guidance itself, these are outlined below:

- The guidance should to be subject to periodic review and refreshed in line with lessons learned from good practice – and it should be made accessible. Organisations need to be able to find the examples easily. Ongoing monitoring and reporting by public authorities' would help inform this process (e.g. help identify any innovative or successful measures).
- The Commissioner for Ethical Standards in Public Life in Scotland has published a number of new case studies on good practice in diversity in governance (one of a number of outputs of a research project which the Commissioner is running in partnership with the Scottish Government). These provide examples of how diversity is harnessed effectively by disparate boards following the appointment of more diverse members. It was suggested that the new case studies might be included in the final version of the guidance as an additional resource for appointing persons considering potential improvements to their practices.
- The guidance could more explicitly cross reference some of the elements of the best practice guide in order to make clear where examples for specific actions could be found. It is not necessarily clear how the two sections of the guidance – the statutory element and the Good Practice Guide – relate to one another. The document as a whole is dense and text heavy. It may be better to consider having two documents that better cross reference one another, so that it is clear how the guidance applies to individual organisations with references to examples in the good practice guide.
- There should be much more on creating the right culture in the boardroom and ensuring everyone is listened to otherwise having more board diversity will not deliver the benefits that should come.
- What exactly is meant by structural and systemic bias in this context? This should be explained in simple language so that it is clear to all and the right action and training implemented. Advice should also be given to the support provided for new board members such as a buddy of an existing board member.

- The guidance could consider that relevant experience might not only come in the form of paid employment, but also in relation to many women's unpaid roles (e.g. mothers, home-makers, carers for sick and/or elderly relatives, volunteers). It was felt that these roles were important and relevant and, that greater weight could be given to personal qualities, talents and aptitudes than simply recognisable experiences on boards and positions of public or commercial responsibility.

Final Comments

Section 12

Final Comments

Question 19:

Please tell us any other comments you have on the draft guidance?

The main theme that emerged from the feedback was concern around the use of the term “gender” and the definition of “woman” for the purposes of the Act.

The vast majority of wider comments were individual points. The only other common themes that emerged, albeit not raised by many respondents were that:

- The Act and guidance should be reviewed to ensure that it is written in plain English.
- There should be greater reference to unconscious bias throughout the guidance document (not just within good practice examples) given the material impact that this has on decision-making processes.
- There should be further consultation undertaken, in particular with women’s groups.

Appendix A: Consultation Respondents

Tables A1 and A2 provide details of individuals and organisations who responded to the consultation on the implementation of the Gender Representation on Public Boards (Scotland) Act 2018 and selected “**publish response with name**”. Note: this does not represent all 310 respondents, as all other respondents selected either “do not publish response” or “publish response only” (without name).

Table A1: Individuals

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A total of 49 individuals selected publish response with name

Table A2: Organisations

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Changing the Chemistry	Scottish Ambulance Service
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Care Inspectorate	Strathclyde Partnership for Transport
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Engender	The Commissioner for Ethical Standards in Public Life in Scotland (the Ethical Standards Commissioner)
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Colleges Scotland	University of Aberdeen
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Equality Network	University of St Andrews
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National Galleries of Scotland	Wise Women
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NHS 24	Woman's Place UK
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NHS Greater Glasgow and Clyde	
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How to access background or source data

The data collected for this <statistical bulletin / social research publication>:

- are available in more detail through Scottish Neighbourhood Statistics
- are available via an alternative route <specify or delete this text>
- may be made available on request, subject to consideration of legal and ethical factors. Please contact <email address> for further information.
- cannot be made available by Scottish Government for further analysis as Scottish Government is not the data controller.

Appendix B – Definition of “Woman” for the purposes of the Act

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 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”.

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 surgery.

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.

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.

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

Question 8 – Other Comments Provided

- Narrative on progress towards meeting the gender representation objective – could include comparison with the private sector in Scotland, with public authorities in the UK.
- Ways in which the reports will inform national strategy (e.g. addressing occupational segregation).
- A (+/-) differentiated analysis of Board changes so improvements are noted and equally when Boards lose women and don't replace positions with women.
- Some analysis of the reasons for women leaving/standing down from Boards
- Analysis to show when and what vacancy opportunities have arisen for equal representation to be acted on.
- Number of vacancies advertised, categorised by size of board (less than 5 members, 6-10, 11-15...) - Number of applicants applied, % of which were woman; Number asked for interview, % of which were women; Number of appointees, % of which were woman; Make up of board/appointees after appointment; Change of male:female ratio.
- Examples of measures introduced under s.5 and s6 of the Act.
- Other voluntary measures not required by the Act to improve diversity on public boards, which may not be covered by the gender representation objective (e.g. specific programmes run to target the representation of BME women.)
- Public body compliance with guidance produced under s.7 of the Act.
- Measures introduced at the national level to improve diversity of applicants (e.g. national training programmes or model application processes).
- Information from third parties such as the third sector and/or women with experience of particular board appointment measures.
- Other measures or information regarding gender equality at all levels of public agencies, including recruitment, training and promotion of staff members.

- The report must detail what information has been collected, how it has been collected and must set the information with the context of representation prior to the implementation of the Act. Public bodies and ministers must demonstrate what they are doing to achieve the desired result and must address any failings identified in delivery together with they aim to address these. The operation of the Act cannot be a tick the box exercise nor can it be enough, for example, to send leaflets out.
- Gender pay levels and gender pay gap.
- The impact on women's rights.
- Scottish Ministers should report on what steps they have taking, or are taking to ensure diversity in all public bodies, not just by gender but including other underrepresented groups.
- Some flexibility needs to be retained...., so that Government officials can consider the first tranche of reports from public authorities and appointed persons and then determine how best to structure their report with the benefit of those returns.
- Name and function of the public body: The purpose of the Board; budget allocated to the public body; The allocated number of board members and tenure for appointments; The number of vacancies within the reporting period; The process for appointing; The gender profile of the board; The gender profile of applications and appointments; Evidence of fairness and reach of the attraction strategy; Mitigating factors if gender balance not achieved; Action being taken to create greater balance.