

# **A Scottish Government Consultation on the Draft Gender Representation on Public Boards (Scotland) Bill**

January 2017

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## **About this Consultation**

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

Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post. After a consultation is closed we publish all responses where we have been given permission to do so.

Responses are analysed and used as part of the policy making process, along with a range of other available information and evidence. Responses to this consultation will help to inform the development of the Gender Representation on Public Boards (Scotland) Bill, which will be introduced to the Scottish Parliament in Summer 2017.

### **Deadline**

The consultation was published on 5 January 2017 and closes at midnight on 17 March 2017.

### **How to Respond**

You can respond to this consultation online, by email, or by post.

### **Respond Online**

To respond online please use the Scottish Government's Consultation Hub, [Citizen Space](#). You can save and return to your response at any time while the consultation is open. But please ensure that your response is submitted before the consultation closes at midnight on 17 March 2017. You will automatically be emailed a copy of your response after you submit it.

If you choose this method you will be directed to complete the Respondent Information Form. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public.

## **Other Ways to Respond**

If you prefer you can also submit a written response in hard copy to:

Lesley Cunningham  
The Equality Unit  
Area 3H-North  
Victoria Quay  
Edinburgh  
EH6 6QQ

Or, by email to [Lesley.cunningham@gov.scot](mailto:Lesley.cunningham@gov.scot)

If you would like to submit your response by email or by post, please ensure that you complete the Respondent Information Form provided at Annex B and attach it alongside your response. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public.

## **Next Steps**

After the consultation has closed we will analyse all the responses received and use your feedback to help inform the development of the draft Gender Representation on Public Boards (Scotland) Bill. Where permission has been given, we will make all responses available to the public at <https://consult.scotland.gov.uk/>. The responses to the consultation and analysis will be published in Spring 2017.

## **Enquiries and complaints**

If you have a query about the consultation process, or a complaint about how this consultation has been conducted you can send your query by email to [Lesley.irving@gov.scot](mailto:Lesley.irving@gov.scot), or by hard copy to:

Lesley Irving  
The Equality Unit  
Area 3H-North  
Victoria Quay  
Edinburgh  
EH6 6QQ

## Ministerial Foreword by the Cabinet Secretary for Communities, Social Security and Equalities



The population of Scotland on census day in 2011 was estimated to be 5,295,403, fifty-one and a half per cent of whom were women<sup>1</sup>.

And yet, women continue to be under-represented in political, civic and public life and at senior levels and in the boardroom. Women make up just: 35% of members of the Scottish Parliament; 29% of members of the House of Commons; 24% of local government councillors in Scotland<sup>2</sup>; and 26.1% of FTSE 100 boards<sup>3</sup>.

As a Government we have made our position crystal clear - this is simply not good enough. And the time for change is now.

The decisions made by public boards affect all of us and impact on all aspects of our lives. Women's voices must be part of these decisions. Not only is this a matter of equality and fairness but there is strong evidence to suggest that better balanced boards perform better too.

Scotland's public sector boards do a great job which is why I have no qualms about our ability to rise to this challenge together. This is an opportunity to demonstrate our commitment to equality with concrete action.

This is not to say that we haven't made progress, we have. In our public sector, real advances have been made over the last parliamentary term to improve the diversity of Ministerial appointments to the boards of regulated public bodies<sup>4</sup>. In 2015, for the first time, Scottish Ministers appointed more women than men to regulated public

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<sup>1</sup> <http://www.scotlandscensus.gov.uk/population-households>

<sup>2</sup> <http://researchbriefings.files.parliament.uk/documents/SN01250/SN01250.pdf>

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf)

<sup>4</sup> Public bodies regulated by the Commissioner for Ethical Standards in Public Life in Scotland - <http://www.appointed-for-scotland.org/about-public-bodies/directory-of-public-bodies-appointments/>

boards at 53.6%.<sup>5</sup>, helping to bring the overall percentage of women to an historic high of 42%.

But we won't rest on our laurels. We must ensure that we maintain the progress we have made and that we keep moving forward.

In Scotland today, we have a female First Minister, a gender balanced Cabinet, and female leaders of the two largest opposition parties in the Scottish Parliament. As the First Minister herself has said, this should send a positive and powerful message to women and girls everywhere that there should be no limits - you can and you should pursue your dreams and ambitions, wherever they lie.

I hope this Bill sends a very clear and unequivocal message too. A message to women who tell us that they simply don't see themselves reflected on Scotland's public boards at the moment, and doubt whether they are the kind of people that we want. You are.

Of course, every appointment to a public body is unique, and potential candidates will have to demonstrate that they have the relevant qualifications, skills, knowledge and experience that the board requires. This will not change.

But our public boards should also reflect the diversity of people who live in Scotland: people from different ethnic minority communities; disabled people; LGBTI people, men and women.

Only when our public boards do reflect Scotland's diversity can we be sure that we are tapping into the talents of all of our people and that we are successfully breaking down the barriers that we know some people experience in our society.

And so I am delighted to launch this consultation on our draft Gender Representation on Public Boards (Scotland) Bill.

I am particularly keen to hear from all of those bodies and individuals who are involved in appointments to public sector boards in Scotland: public bodies themselves, including colleges and higher education institutions; current board members and those who are contemplating applying for a public appointment.

I very much hope that your feedback will help us to strengthen and inform the development of the Bill before we introduce it to the Scottish Parliament in Summer 2017.

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<sup>5</sup> <http://www.ethicalstandards.org.uk/site/uploads/publications/4bbac3ff88405f5958a87bb1b6485990.pdf>

## Introduction

This consultation seeks views on the Scottish Government's draft Gender Representation on Public Boards (Scotland) Bill.

The Bill is a key commitment in the Scottish Government's Programme for Government 2016-17: [A Plan for Scotland](#), and represents a further step towards the realisation of women's equality in Scotland, a goal which remains at the heart of the Scottish Government's vision for an equal Scotland.

Using the new competence transferred to the Scottish Parliament through the Scotland Act 2016, the Bill will require positive action to be taken to: redress gender imbalances on public sector boards.

The purpose of the consultation is to seek views on the practical application of the Bill's provisions and to offer consultees an opportunity to offer views on how the Bill might be strengthened. Responses will help to inform the development of the Bill, prior to its introduction to the Scottish Parliament in Summer 2017.

Although the consultation does not seek views on or set out in detail the arguments in favour of or against legislation in principle, any views put forward by consultees will be noted as part of the analysis of responses.

A summary of the draft Bill can be found at page 9, and the full text of the draft Bill can be found at page 12.

## **Consultation Questions**

A total of 11 questions are asked in the consultation. However, respondents are not required to submit an answer to all questions and can choose to answer some or all of the questions as they choose.

To make it easier to analyse responses, a single question: “What, if any, comments would you make in relation to section [1] of the draft Bill?” is asked for each of the Bill’s 6 substantive provisions.

An additional question: “What, if any, changes should be made to the schedule of listed authorities?” is intended to gather views on the bodies who are covered.

Two additional questions seek views on reporting, which is not currently described in the draft Bill, and invite consultees to offer any views, not already expressed in response to previous questions, including on how the draft Bill might be strengthened.

Finally, two further questions seek views on the impact of the draft Bill on equality groups, and the business and financial impacts. Responses to these questions will support the development of an Equality Impact Assessment and a Business Regulatory Impact Assessment.

### **Equality Impact Assessment**

The Scottish Government is legally required to carry out an Equality Impact Assessment for all Government Bills and to publish the results within a reasonable period. The equality impact assessment process helps to identify the impact of a policy on people who share certain ‘protected characteristics’: age, disability, sex, gender reassignment, sexual orientation, race and religion or belief.

### **Business and Regulatory Impact Assessment**

The Business and Regulatory Impact Assessment helps the Scottish Government to analyse the costs and benefits of proposed legislation.



## Summary of the Draft Bill

### Purpose

The purpose of the Gender Representation on Public Boards (Scotland) Bill is to redress gender imbalances on the boards of public bodies.

The Bill seeks to achieve this by setting a gender representation objective for the non-executive member component of public boards and requiring certain action to be taken in the appointing of non-executive members, towards the achievement of the objective.

### Who is covered?

Only bodies that are “Scottish public authorities with mixed functions or no reserved functions” are covered by the Bill. The Bill does not therefore cover private companies or voluntary organisations. Schedule 1 lists those bodies it is proposed will be covered by the Bill, and includes certain colleges and higher education institutions.

Only non-executive members appointed to public boards (that is, members who are not also employees of the body in question) are covered by the Bill. Schedule 1 also specifies other members of the relevant public bodies who are excluded from the Bill’s provisions (for example, because they are elected as opposed to appointed to the board).

### Legislative Framework

The Bill has been made possible by the Scotland Act 2016 which transfers competence to the Scottish Parliament to legislate on equal opportunities as far as relating to the appointment of non-executive members to the boards of Scottish public authorities<sup>6</sup>. It does so by creating an exception to the equal opportunities reservation in the Scotland Act 1998.

However, the application of EU law, including a body of European Court of Justice case law, also has implications for how the Bill can be framed. A summary of the relevant EU legislative framework and its implications is set out at Annex A. The key principles in EU law which any Bill in this area must seek to take account of are:

- Positive action measures can only be used to appoint on the grounds of gender where candidates are judged to be of equal merit, and;
- These measures cannot give automatic and unconditional priority to female candidates over male candidates and vice versa.

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<sup>6</sup> S.37 (3) of the [Scotland Act 2016](#) transfers competence to the Scottish Parliament to legislate for “Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions”.

The legal position is complex and no final decisions have yet been taken as to exactly what might be needed to ensure compliance with EU law. In particular, no final decision has yet been taken on whether the Bill may apply to both gender equally.

### **The Gender Representation Objective**

Section 1 of the Bill sets the 'Gender representation objective'.

The objective is that a public board has-

- (a) 50% of non-executive members who are female or who identify as female, and
- (b) 50% of non-executive members who are male or who identify as male.

Where a public board has an odd number of non-executive members, the requirement for 50% female and 50% male non-executive members applies as if the board had one fewer non-executive member.

### **Duty when appointing non-executive members – 'The Tie-Breaker Provision'**

Sections 3 and 4 of the Bill describe the duty to take certain steps when appointing non-executive members. No action is required in relation to executive members.

Certain other members of boards are excluded by virtue of being elected to the board as opposed to appointed. Excluded positions are listed in schedule 1 alongside the relevant body.

The duty falls on the "appointing person". In the majority of appointments to public boards the "appointing person" is Scottish Ministers. However, other non-executive appointments are made, for example by the Lord President (for the Judicial Appointments Board for Scotland) and by the Scottish Parliamentary Corporate Body (for the Standards Commission for Scotland and the Scottish Commission for Human Rights).

Where there are two or more equally qualified candidates for an appointment, the appointing person must appoint a candidate of the under-represented sex unless there are exceptional circumstances which tip the balance in favour of another candidate.

This is the tie-breaker provision. It applies only where there are two or more equally qualified candidates.

Schedule 2 describes how the Bill should be applied in relation to certain listed authorities. These authorities are: the Judicial Appointments Board for Scotland; Regional Board for Glasgow Colleges; Regional Colleges, and the Scottish Criminal Cases Review Commission.

## **Encouraging Applications**

Section 5 of the Bill places a duty on all appointing persons and listed public authorities to take steps, as appropriate, to encourage persons of the under-represented gender to apply to become a member of a public body.

In contrast to the tie-breaker provision which focusses on the decision made by appointing persons, section 5 focusses on the process which leads up to an individual appointment.

# Gender Representation on Public Boards (Scotland) Bill

## CONSULTATION DRAFT

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#### Section

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Schedule 1 —Public authorities

Schedule 2 —Application of act to certain public authorities

# Gender Representation on Public Boards (Scotland) Bill

## CONSULTATION DRAFT

An Act of the Scottish Parliament to make provision about gender representation on boards of Scottish public authorities.

### **1 Gender representation objective**

- (1) The “gender representation objective” for a public board is that it has—
  - (a) 50% of non-executive members who are female or who identify as female, and
  - (b) 50% of non-executive members who are male or who identify as male.
- (2) Where a public board has an odd number of non-executive members, the percentages mentioned in subsection (1)(a) and (b) apply as if the board had one fewer non-executive member.

### **2 Key definitions**

In this Act—

“appointing person” means, in relation to the function of appointing a non-executive member of a public board, a person who has that function,

“excluded position”, in relation to a public authority, means a position mentioned in the second column of the table in schedule 1 which corresponds with the public authority mentioned in the first column,

“non-executive member”, in relation to a public authority, means a position on its public board—

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

“public authority” means an authority listed, or within a description listed, in the first column of the table in schedule 1,

“public board” means—

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

**3 Duty when appointing non-executive members**

- (1) Subsection (2) applies where there is—
  - (a) a vacancy in a position of non-executive member of a public board,
  - (b) more than one candidate for the position,
  - (c) at least one candidate who is female or identifies as female, and
  - (d) at least one candidate who is male or who identifies as male.
- (2) The appointing person must, in making the appointment to fill the vacancy, act in accordance with section 4 with a view to achieving the gender representation objective immediately after the appointment takes effect.
- (3) When an appointing person is making more than one appointment—
  - (a) all of those appointments must be taken into account in identifying the number of non-executive members, and
  - (b) the appointing person must act with a view to achieving the gender representation objective immediately after all of those appointments have taken effect.

**4 Consideration of candidates**

- (1) The appointing person must determine whether any particular candidate is best qualified for the appointment.
- (2) If no particular candidate is best qualified for the appointment, the appointing person must identify candidates it considers are equally qualified.
- (3) Unless the appointing person considers that there are exceptional circumstances, it must give preference to a candidate identified under subsection (2) if appointing that candidate will result in—
  - (a) the board achieving the gender representation objective, or
  - (b) the board making progress towards achieving that objective.

**5 Encouragement of applications**

- (1) This section applies where the gender representation objective is not achieved in relation to a public board.
- (2) An appointing person for the public board must take such steps as it considers appropriate to encourage persons of the under-represented gender to apply to become non-executive members of the public board.
- (3) The public authority to which the public board relates must take such steps as it considers appropriate to encourage persons of the under-represented gender to apply to become non-executive members of the public board.
- (4) In subsections (2) and (3), “persons of the under-represented gender” means—
  - (a) where less than 50% of non-executive members of the board are female or identify as female, persons who are female or who identify as female,
  - (b) where less than 50% of non-executive members of the board are male or identify as male, persons who are male or who identify as male.

**6 Power to modify schedule 1**

- (1) The Scottish Ministers may by regulations modify schedule 1 so as to add an entry, vary the description of an entry or remove an entry.
- (2) Regulations under subsection (1) may—
  - (a) include incidental, supplementary, consequential, transitional, transitory or saving provision,
  - (b) make different provision for different purposes,
  - (c) modify this Act.
- (3) Regulations under subsection (1) are subject to the negative procedure.

**7 Application of Act to certain public authorities**

Schedule 2 makes provision about the application of this Act in relation to certain public authorities.

**8 Equality Act 2010**

- (1) Sections 158 and 159 of the Equality Act 2010 (positive action) do not apply to any action taken under this Act.
- (2) Part 5 of the Equality Act 2010 (work) does not prohibit any action taken under this Act.

**9 Commencement**

- (1) This section and section 10 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under this section may—
  - (a) include transitional, transitory or saving provision,
  - (b) make different provision for different purposes.

**10 Short title**

The short title of this Act is the Gender Representation on Public Boards (Scotland) Act [2016].

SCHEDULE 1  
(introduced by section 2)

PUBLIC AUTHORITIES

<i>Authority</i>	<i>Excluded position</i>
Accounts Commission for Scotland	
Architecture and Design Scotland (company number SC267870)	
Board of Trustees of the Royal Botanic Garden, Edinburgh	
Bòrd na Gàidhlig	
British Waterways Board	
Cairngorms National Park Authority	Members elected under article 5(2) of the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 (S.S.I. 2003/1)
	Members nominated under article 5(4) of that Order
Caledonian Maritime Assets Limited (company number SC001854)	
Children's Hearings Scotland	
A college of further education other than a regional college (within the meanings given to those terms by the Further and Higher Education (Scotland) Act 1992)	All members other than those appointed under paragraph 3A(2)(a) and (f) of schedule 2 of that Act
A regional college (within the meaning given by the Further and Higher Education (Scotland) Act 1992)	All members other than those appointed under paragraph 3(2)(a) and (f) of schedule 2 of that Act
Common Services Agency for the Scottish Health Service	
Community Justice Scotland	
Creative Scotland	
Crofting Commission	Members elected by virtue of paragraph 7 of schedule 1 of the Crofting Reform (Scotland) Act 2010



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David MacBrayne Limited (company number SC015304)	
Food Standards Scotland	
A Health Board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978	Councillors appointed under paragraph 2(1)(b) of schedule 1 of that Act
Healthcare Improvement Scotland	The member mentioned in paragraph 2(1)(b) of schedule 5A of the National Health Service (Scotland) Act 1978 (the person appointed to chair Social Care and Social Work Improvement Scotland)
A higher education institution (within the meaning given by the Higher Education Governance (Scotland) Act 2016)	All members other than those appointed by the governing body (which has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992)
Highlands and Islands Airports Limited (company number SC097647)	
Highlands and Islands Enterprise	
Historic Environment Scotland	
Judicial Appointments Board for Scotland	
Local Government Boundary Commission for Scotland	
Loch Lomond and the Trossachs National Park Authority	Members elected under article 5(2) of the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 (S.S.I. 2002/201)  Members nominated under article 5(4) of that Order
Mental Welfare Commission for Scotland	
Mobility and Access Committee for Scotland	
National Confidential Forum	
National Galleries of Scotland	
National Library of Scotland	

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National Museums of Scotland	
National Waiting Times Centre Board	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
Newbattle Abbey College (company number SC262968)	
NHS 24	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
NHS Education for Scotland	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
NHS Health Scotland	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
Quality Meat Scotland	
Regional Board for Glasgow Colleges	All members other than those appointed under paragraph 3(2)(a) and (f) of schedule 2B of the Further and Higher Education (Scotland) Act 2005
Revenue Scotland	
Risk Management Authority	
Sabhal Mor Ostaig (company number SC361752)	
Scottish Advisory Committee on Distinction Awards	All members other than the Chair, the Medical Director and the lay representatives
Scottish Agricultural Wages Board	Persons nominated or elected under paragraph 1(a) of schedule 1 of the Agricultural Wages (Scotland) Act 1949 (persons representing employers and workers)
Scottish Ambulance Service Board	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
Scottish Charity Regulator	
Scottish Children's Reporter Administration	

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Scottish Commission for Human Rights	The member appointed to chair the commission under paragraph 1(1)(a) of the Scottish Commission for Human Rights Act 2006
Scottish Courts and Tribunals Service	The Lord President The Lord Justice Clerk The President of the Scottish Tribunals
Scottish Criminal Cases Review Commission	
Scottish Enterprise	
Scottish Environment Protection Agency	
Scottish Fire and Rescue Service	
Scottish Fiscal Commission	
Scottish Further and Higher Education Funding Council	
Scottish Futures Trust Limited (company number SC348382)	
Scottish Housing Regulator	
Scottish Land Commission	
Scottish Legal Aid Board	
Scottish Legal Complaints Commission	
Scottish Natural Heritage	
Scottish Police Authority	
Scottish Qualifications Authority	
Scottish Social Services Council	
Scottish Sports Council	
Scottish Water	
Skills Development Scotland Co. Limited (company number SC202659)	
Social Care and Social Work Improvement Scotland	The member mentioned in paragraph 2(1)(b) of schedule 11 of the Public Services Reform (Scotland) Act 2010 (the person appointed to chair Healthcare

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	Improvement Scotland)
	The member mentioned in paragraph 2(1)(c) of that schedule (the person appointed as convener of the Scottish Social Services Council)
Standards Commission for Scotland	
State Hospitals Board for Scotland	Councillors appointed under paragraph 2(1)(b) of schedule 1 of the National Health Service (Scotland) Act 1978
VisitScotland	
Water Industry Commission for Scotland	
West Highland College UHI (company number SC153921)	

SCHEDULE 2  
(introduced by section 7)

APPLICATION OF ACT TO CERTAIN PUBLIC AUTHORITIES

*Judicial Appointments Board for Scotland*

- 1 When the Lord President is making an appointment of a judicial member under paragraph 2(a) of schedule 1 of the Judiciary and Courts (Scotland) Act 2008, the Lord President must act with a view to achieving the gender representation objective in relation to the judicial members only.
- 2 When the Scottish Ministers are making an appointment of a legal member or a lay member under paragraph 2(b) or (c) of that schedule, they must act with a view to achieving the gender representation objective in relation to the legal members and lay members only (taken together).

*Regional Board for Glasgow Colleges*

- 3 When the Scottish Ministers are making an appointment under paragraph 3(2)(a) of schedule 2B of the Further and Higher Education (Scotland) Act 2005 (“schedule 2B”) they may, for the purpose of identifying the number of non-executive members, disregard a vacancy in a position mentioned in paragraph 3(2)(f) of schedule 2B.
- 4 When the board mentioned in paragraph 3(2)(f) of schedule 2B is making an appointment under that paragraph, the board may, for the purpose of identifying the number of non-executive members, disregard a vacancy in a position mentioned in paragraph 3(2)(a) of schedule 2B.

*Regional colleges*

- 5 When the Scottish Ministers are making an appointment under paragraph 3(2)(a) of schedule 2 of the Further and Higher Education (Scotland) Act 1992 (“schedule 2”) they may, for the purpose of identifying the number of non-executive members, disregard a vacancy in a position mentioned in paragraph 3(2)(f) of schedule 2.
- 6 When the board mentioned in paragraph 3(2)(f) of schedule 2 is making an appointment under that paragraph, the board may, for the purpose of identifying the number of non-executive members, disregard a vacancy in a position mentioned in paragraph 3(2)(a) of schedule 2.

*Scottish Criminal Cases Review Commission*

- 7 For the purposes of the application of this Act in relation to appointments to the Scottish Criminal Cases Review Commission—
  - (a) the Scottish Ministers, in making a recommendation under section 194A(4) of the Criminal Procedure (Scotland) Act 1995, are to be treated as the appointing person (instead of Her Majesty), and
  - (b) references in this Act to the making of an appointment are to be construed as references to the making of a recommendation under that section.

### The EU Legislative Framework

Equality between men and women is a fundamental principle of European Union (EU) law. It is enshrined in the EU treaties<sup>7</sup> and in the Charter of Fundamental Rights of the European Union (the Charter).<sup>8</sup> EU directives<sup>9</sup> have been issued and transposed in Member States with the objective of securing equal treatment and opportunities for men and women in employment and occupation.

The work-related provisions of domestic equality law, including the concepts of discrimination and positive action, have been drafted to accord with EU equality law, with which they must be consistently interpreted.

Article 23 of the Charter provides that the principle of equality ‘does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex’.

This is also reflected in Article 157(4) of the Treaty on the Functioning of the European Union (TFEU) and Article 3 of the Equal Treatment Directive (ETD), which permit the use of proportionate positive action measures in order to prevent or compensate for disadvantages related to gender in vocational activities or professional careers, pursuing the legitimate aim of achieving full equality in practice.

In general, positive action is permitted when people of one gender are under-represented in a sector or company, provided that the measures which are adopted pursue the legitimate aim of addressing the causes of under-representation and that they are proportionate.

The Court of Justice for the European Union (CJ EU) has considered<sup>10</sup> situations in which positive action measures can be used in recruiting employees, defining the boundaries between legitimate positive action and unlawful direct discrimination.

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<sup>7</sup> Articles 2 and 3(3) of the Treaty of the European Union and Articles 8 and 157 of the Treaty on the Functioning of the European Union.

<sup>8</sup> Articles 21(1) and 23 of the Charter.

<sup>9</sup> Directives 2006/54/EC (the equal treatment directive) and 2010/41/EU (self-employed workers directive)

<sup>10</sup> See C-450/93, *Kalanke* (1995 ECR I-3051); C-409/95, *Marshall* (1997 ECR I-6363); C-158/97, *Badeck* (2000 ECRI I-1875); C-407/98, *Abrahamsson* (2000 ECR I-5539); C-319/03, *Briheche* (2004).

To date, the CJEU has decided that positive action measures are an exception to the principle of equal treatment and must be interpreted narrowly because they permit more favourable treatment of particular groups.

In order to be lawful, the CJEU requires that positive action measures:

- are only used in a sector or company in which one gender is under-represented
- cannot displace the requirement to assess objectively and consistently the suitability for appointment of each candidate
- cannot give automatic and unconditional priority to female candidates over male candidates (or vice versa)
- can only be used to appoint on the grounds of gender where candidates are legitimately judged to be of equal merit, and
- cannot be used where the objective assessment of candidates discloses one candidate is even marginally better than another.

Failure to appoint within the parameters of positive action in compliance with these conditions is likely to result in unlawful direct discrimination.



## RESPONDENT INFORMATION FORM

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

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

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

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

### Information for organisations:

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

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

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

- Yes  
 No



## Consultation Questionnaire

### Question 1

What, if any, comments would you make in relation to section 1 [Gender representation objective] of the draft Bill?

### Question 2

What, if any, comments would you make in relation to section 2 [Key definitions] of the draft Bill?

### Question 3

What, if any, comments would you make in relation to section 3 [Duty when appointing non-executive members] of the draft Bill?

### Question 4

What, if any, comments would you make in relation to section 4 [Consideration of candidates] of the draft Bill?

**Question 5**

What, if any, comments would you make in relation to section 5 [Encouragement of applications] of the draft Bill?

**Question 6**

What if any, comments would you make in relation to Schedule 2 (introduced by section 7) [Application of Act to Certain Listed Authorities] of the draft Bill?

**Question 7**

What, if any, comments would you make in relation to Schedule 1 (introduced by section 2) [Listed Authorities] of the draft Bill?

**Question 8**

The draft Bill does not specify any requirement for reporting. Do you have any comments on reporting arrangements under the legislation, including timescales, location and content of reports?

**Question 9**

Do you have any comments on the draft Bill, not already expressed in response to previous questions, including on how the Bill could be strengthened to deliver Minister’s stated objective of gender balanced public boards?

**Question 10**

To help with the development our Equality Impact Assessment, please provide any comments on the impact of the draft Bill on people who share certain ‘protected characteristics’: age, disability, sex, gender reassignment, sexual orientation, race and religion or belief, or any further information you think is relevant.

**Question 11**

To help with the development our Business Regulatory Impact Assessment, please provide any comments on the costs and benefits of the draft Bill, or any further information you think is relevant.



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