

Engender response to the Scottish Government's Consultation on Implementation of the Gender Representation on Public Boards (Scotland) Act 2018

Introduction

Engender welcomes this opportunity to respond to the Scottish Government's consultation on implementing the Gender Representation on Public Boards Act 2018. Engender has actively engaged with the Gender Representation on Public Boards Act (the Act) initially recommending as part of our Smith Commission engagement that powers be devolved to enable temporary special measures¹ in Scotland to increase women's representation.² We continued to engage throughout the Bill process³ and remain strongly committed to the Act's aspirations.

As a feminist policy and advocacy organisation, Engender is ambitious for a Scotland where women's political, economic and social equality with men is realised. The global experience of quotas and temporary special measures has demonstrated their effectiveness in challenging the lack of gendered power balance in the public domain and some of the normative gender roles and perceptions around public authority which continue to lock women out of decision-making.

The response set out below comes from this perspective of advocating for women's equality and rights. While we recognise the potential for the Act to improve representation and gender mainstreaming in the practices of public bodies, we also acknowledge that the implementation of the Act comes late in the anticipated lifespan of the Gender Representation Objective. Success will therefore demand stronger action in reporting and guidance than are currently foreseen in this consultation.

¹ Measures aimed at accelerating the improvement of the position of women with a view to achieving substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation for inequalities and harm suffered.

² Engender (2014) Engender submission to the Smith Commission on devolution October 2014

³ See for example Engender (2017) Engender Parliamentary Briefing: Gender Balanced Boards Stage 1 Debate November 2017

Draft Regulations

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

No

Please tell us the reason for your answer.

The “period of no more than two years” reflects the language of the Act and appears to be practical considering the length of the public appointments processes and the frequency of vacancies. It also mirrors the two-yearly interval for public sector equality duty (PSED) reporting.

It is however regrettable that the length of time between the Act’s introduction and the expected publication of reports means that the draft regulations will allow for only one reporting round before the objective’s December 2022 expiration date. After December 2022 the requirements to report on additional steps in s.6 of the 2018 Act will not apply irrespective of whether public bodies have met the objective.

Although the additional steps set out in the Act were intended to be delivered in the short term to accelerate progress towards the objective, the single reporting round anticipated by the draft regulation means that there will be no opportunity for public bodies to correct course on actions that are not working well or for public bodies to learn from one another. Additional steps will also be impossible to track after December 2022 unless organisations take it upon themselves to continue outlining their efforts should they fail to meet the objective or should they see regression after meeting the objective.

For this reason we believe that the Scottish Government should reconsider the April 2021 date provided for and bring forward the suite of reports to allow for publication in 2020. This would allow a second report in 2022, which would enable the success of ‘other steps’ under s.6 to be critically examined and increase the likelihood of their being embedded into the processes and practices of the organisation.

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

No

Please tell us the reason for your answer.

The consultation anticipates that the Scottish Government will take 8 months to analyse the reports published in April 2021. **As outlined above, we propose that the reporting cycle should be accelerated and accordingly that reports to parliament should begin in 2020.** We have consistently recommended that the Scottish Government reports annually to parliament on progress towards the Gender Representation Objective so that any failure to progress can be identified and acted upon to increase the likelihood of meeting the 2022 objective.⁴

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

Stating whether the gender representation objective has been met

Yes

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

Yes

Providing information on:

- how many vacancies for a non-executive member of the board arose during the period covered by the report'

Yes

- for each such vacancy:

- how many competitions were run to fill the vacancy,

Yes

- for each competition:

- how many applications were received and the percentage of those which were from women, where the numbers will not identify individuals

Yes

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

Yes

Please tell us the reason for your answers.

Reports must be as comprehensive as possible as reporting is the sole accountability measure created by the 2018 Act. Without a meaningful recourse for lack of

⁴ <https://www.engender.org.uk/content/publications/Parliamentary-Briefing---Gender-Balanced-Boards-Stage-1-Debate.pdf>

compliance there is significant probability that gender balancing measures will not be taken seriously by those charged with implementing them. We also think that there is a risk that public bodies will prefer female candidates while the focus created by the Act is upon them, but that this will not drive change in their processes, practices, and culture in the longer term.

In addition to the statement, it is therefore vital that reports *evidence* the steps taken to advance the gender representation objective. The experience of public sector equality duty (PSED) reporting shows that there is a disconnect between what organisations describe as their ambitions and the steps they are implementing to achieve gender mainstreaming.⁵ It is vital that GRPB reports avoid empty rhetoric and therefore the regulations should require organisations to set out steps taken under s.5 or s.6 of the Act or otherwise justify why such actions were not considered appropriate or relevant (see response to question 16).

Reports should also be required to provide further information on the action that appointing persons and public bodies have taken to ensure that disabled women, Black and minority ethnic women, lesbian, bisexual and trans women, working class women, and older and younger women have been part of their work to meet the gender representation objective.

In addition to how many applications were received by women, reports should also be required to state **how far applications from women progressed** (where this would not be identifying). Data demonstrating how many women progressed through application processes would enable interventions, such as the design of training for appointing persons, to be better directed.

The Scottish Government should also consider amending the draft statutory instrument to **require boards to publish data on the board as a whole, including the representativeness of chair appointments** (where women are significantly underrepresented at 28.3% [2017]⁶) and executive positions.

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

Yes

Please tell us the reason for your answer.

⁵ Close the Gap; see also comments from the equality sector on the socioeconomic duty - Engender et. al (2017) Women's and Equalities Sector Response to the Scottish Government Consultation on Socioeconomic Duty

⁶ Engender (2018) Sex and Power 2017

Given the incredibly narrow timeframe for action under the Act, it must be assumed that the policy aim is for public bodies and appointing persons to embed the measures to enable lasting cultural change in their governance structures and develop processes and practices to enable women seeking public appointments to be appointed. It is therefore absolutely essential that the mechanisms explored are open to scrutiny and evaluation.

We have considerable concerns that the use of the term ‘as it [the body] considers appropriate’ in the 2018 Act allows for an extremely wide degree of discretion. In order to avoid this being used as a loophole to avoid taking action, organisations must also be required to set out why they consider particular action or inaction appropriate.

We also contend that it is vital that reports set out the totality of mechanisms explored to increase diversity from diverse groups of women and the reasons for selecting and implementing them. It would be possible for public authorities and appointing persons to implement a couple of relatively superficial approaches from the long list in the draft guidance that would not amount to a substantive change to their approach.

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

Yes

Please tell us the reason for your answer.

As with steps taken to encourage applications from women, it is important that there is opportunity for scrutiny and evaluation in assessing whether the additional steps implemented were successful and also to ensure that there is transparency in how ‘that they consider appropriate’ is being applied.

However, as previously stated, it is disappointing that the requirement to report on s.6 will expire with the gender representation objective irrespective of whether it is met in December 2022. While reporting on encouraging applications and the numbers of applications will continue, additional steps may add significant value, and reports should continue to include all actions to improve board diversity.

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?

No

Please tell us the reason for your answer.

Engender is of the view that it is more transparent to set the information out in a standalone document that allows for maximum scrutiny, especially in the absence of sanctions for non-compliance such as de-registration or fine. Enabling organisations to publish reports within other publication decreases the accessibility of information and its capacity to be used as an accountability tool.

While we were initially supportive of consolidation of reporting obligations with the public sector equality duty (PSED), our views have shifted as a trend for PSED reporting to include documents that run to hundreds of pages has emerged⁷ (see also question 9).⁸ The limited opportunity for reporting before 2022 means that transparency and accountability is even more important.

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

Please tell us the reason for your answer.

Scottish Government reporting should make use of the totality of information available. This includes the information submitted in public body reports, which should make clear innovative or successful measures as well as compliance data. Scottish Government reports should further include data on board diversity from women with intersecting characteristics. 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.

While we support the use of all information submitted, we equally would not wish to see 'must use' excluding other evidence on the implementation of the Act. Important information may also be sought from other organisations, including representative bodies such as CoSLA and third sector equality organisations such as Engender, who

⁷ Close the Gap (2015) Making Progress? An assessment of public sector employers' compliance with the public sector equality duty

⁸ See also Engender et. al (2017) Women's and Equalities Sector Response to the Scottish Government Consultation on Socioeconomic Duty

may have useful commentary and analysis on public bodies' reporting. Opportunities to engage over the reporting cycles should be made widely available.

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 Scottish Government report must “produce an overview of the operation of the Act”, including overarching purpose. In order to maximise effectiveness, the regulations should include the following aspects:

- The names of public bodies that have not met the gender representation objective and those that have not introduced changes under s.5 and s.6 of the 2018 Act.
- Data at national level on the number of women applying for non-executive public board positions and the progression of applications; and the number of appointed to non-executive public board positions. This data should also, where not identifying, be disaggregated by other protected characteristics;
- Examples of measures introduced under s.5 and s.6 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; and
- Other measures or information regarding gender equality at all levels of public agencies, including recruitment, training and promotion of staff members⁹.

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.

When the Scottish Government initially consulted on the proposals for the 2018 Act, Engender saw an opportunity to align work to support the encouragement of applications with work to support compliance with the Public Sector Equality Duty (PSED) as both sets of work have the same overriding objective of advancing

⁹ These data are required to be produced in public sector equality duty reporting and the most recent data published could be used for this purpose.

women's equality. Our view at the time was that integrating publications may make this more usable by equality organisations and individuals.

Under Reg 6A of the Scottish specific duties of PSED¹⁰, Scottish Ministers are required to gather information on the relevant protected characteristics of (board) members of listed public bodies. Public bodies are then required to use that information to perform the 'general' equality duty of eliminating discrimination, advancing equality, and fostering good relations and report on progress in their monitoring report, which requires to be published every two years¹¹.

However, in the decade since gender mainstreaming was mandated by the Equality Act 2006 and Equality Act 2010, the evidence has shown that public bodies are inconsistently complying with legal obligations to advance gender equality. In addition to lacking concrete steps to meet equality outcomes of PSED duties, reports produced have been poorly evidenced, published after deadlines or difficult to source.

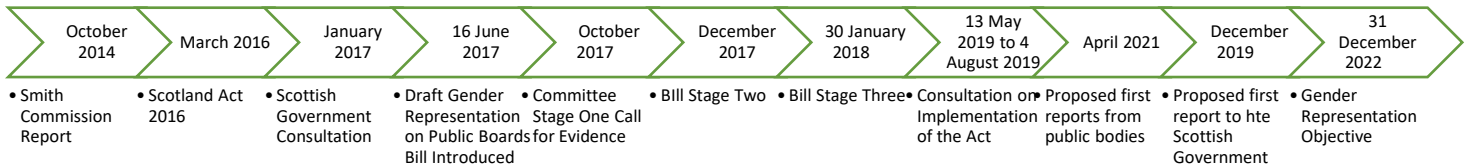
Even accepting a degree of overlap between reporting obligations we are now convinced that the GRPB objective and representation measures will be best served by a dedicated report which allows for maximum transparency. Evidencing a focussed report will more likely lead to public authorities and appointing persons considering tailored approaches to gender representation and will allow a focus on women from diverse groups to be considered as part of the single objective. It will, of course, be possible and desirable for public bodies to include this reporting on the same section of their websites as PSED publications.

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

Engender is disappointed that the length of time between the passing of the Act in 2018 and the current consultation has left limited time for the reporting process to have significant impacts. We are unclear why so little time has been left between the passage of the Bill and the objective date to enable reporting measures to have their intended effect.

¹⁰ The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016

¹¹ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012



The evidence on gender balancing measures suggests that there is a strong link between sanctions for non-compliance and the success in terms of women in leadership roles.¹² While comparable models introduced by other countries¹³ have used sanctions such as nullification of appointments,¹⁴ fines¹⁵ and de-registration¹⁶, the Act foresees the reporting process as the sole avenue of accountability, not only of progress and eventually meeting the objective, but of the measures employed under s.5 and s.6.

It is vital to the success of the Gender Representation on Public Boards Act 2018 that the reporting regulations are as robust as possible. Reports should therefore be prescriptive, and provide sufficient information with which to assess the totality of measures to secure representative and diverse boards. In addition to the measures set out above, reports should be required to include the reasons that public bodies consider that the objective has not yet been met, and what changes they propose to make following a review to meet the objective.

The short time frame for action means that it is vital that the Act leaves its legacy in policy and practice changes which tackle gender inequality across the public sector; break down the barriers to women’s equal participation in public life and

¹² Pande, R. & Ford, D. (2011) ‘Gender Quotas and Female Leadership: A Review’. Background paper for the World Development Report on Gender.

¹³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures /* COM/2012/0614 final - 2012/0299 (COD): Explanatory Memorandum

¹⁴ France, see <https://www.paulhastings.com/genderparity/countries/france.html>

¹⁵ Italy, see European Parliament (2013) Legal Instruments for Gender Quotas in Management Boards: Workshop – available at [https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT\(2013\)474413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT(2013)474413_EN.pdf)

¹⁶ Norway, see European Parliament (2013) Legal Instruments for Gender Quotas in Management Boards: Workshop – available at [https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT\(2013\)474413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/474413/IPOL-FEMM_AT(2013)474413_EN.pdf)

eliminate gender imbalance in leadership, authority and decision-making across public, political, social and cultural institutions.

Draft Guidance

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

The guidance aims to make clear the terms already used by the 2018 Act to ensure the proper intention of parliament is implemented by individual organisations. In our engagement with the Bill process, we were clear that to avoid any misinterpretation over the gender representation objective, the Act and guidance must clarify that 50 percent is the floor, not the ceiling on women's representation on public boards in Scotland. It is therefore welcome that the guidance stresses (para 2.3) that boards may appoint women to more than 50% of positions.

We also welcome the clarity around the definition of 'women' for the purposes of the Act, which secured broad agreement at bill stage.¹⁷ This definition aligns with the Equality Act 2010 and the specific circumstances relevant to the Act's application. Given that individual public boards will be required to publically report on numbers of men and women appointed to board positions, to define women so as to exclude trans women with or without a GRC would risk disclosing an individual's trans status. Given the importance of accurate and timely reporting for the Act's success and women's increased representation on public boards, it is vital that reporting requirements do not conflict or appear to conflict with individuals' right to privacy.

We would however like to see a **definition of 'equally qualified candidate'** as per s.4 of the Act provided for in the guidance. The guidance does state that the "appointing person should conduct a full and objective assessment of each applicant against the criteria which have been determined for the role."¹⁸ This could be further elaborated to stress that skills may be found from experience outside traditional routes. The underrepresentation of women in senior roles across law, finance, STEM and other sectors¹⁹ means that application criteria should be drafted so as to maximise the methods through which candidates may demonstrate necessary skills for board positions.

¹⁷ Official Report 21 December 2017, Equality and Human Rights Committee

¹⁸ Para 3.11

¹⁹ See Engender (2018) Sex and Power 2017 (new version forthcoming); <https://www.catalyst.org/research/women-in-financial-services/>; Scottish Law Society (2018) Profile of the Profession 2018 and Equate Scotland <https://equatescotland.org.uk/about/the-issue/>, among others

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.

As there is no precise definition of “equally qualified” provided in the guidance (nor in the Act itself) it would be helpful if the means by which qualification for board membership can be evidence could be described in sections 3 and 4 of the guidance. Though beyond the scope of the guidance document, the Scottish Government should seriously explore avenues to prepare candidates for public appointment which demonstrates that candidates are “equally qualified” at the point of application, such as standardised training.

While the concept of ‘merit-based appointment’ provides the starting point for appointments under the Act, it is worth noting that the implication that women may end up appointed to boards at the expense of “more qualified” candidates is deeply flawed and a barrier to equal representation in public life.²⁰ Furthermore it presumes that there is a standard appointment process and criteria for board membership, which is evidently not the case.

Without clearer definition s.4 may create an unintended loophole by leaving 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. “Equally qualified” should therefore not be limited to the precise same experience of qualifications or years of service in a particular capacity but fleshed out in such a manner as **to include skillset, performance and competence, including gender or equalities competence.**

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

The initial proposals for the Bill referred to “exceptional” circumstances where the tie-break measure in s.4(2) could be over-ridden. The Act itself does not reflect this language, and instead allows appointing persons to justify not appointing the equally qualified woman where there is a “characteristic or situation particular to that candidate.” Accordingly, the wording used in the guidance at 3.14 to 3.15 should reinforce that s.4(4) does not render this mandatory. The guidance should underline that the intention of the 2018 Act is to address the historic and persistent

²⁰ Explanatory Notes to the Equality Act provide ““the question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance”

underrepresentation of women in public life and that it may be appropriate to have a majority of board members be women.

The guidance should limit the potential loophole enabling the appointing person to forego compliance with the gender representation objective by more strictly elaborating the meanings of 'characteristic' and 'situation'. The definition proposed in paragraph 3.16 is exceptionally vague and further increases the discretion of the appointing person by offering three 'such as' examples of a 'situation' that do not necessarily relate to legally protect characteristics. This could include the opportunity to outline steps to encourage an intersectional approach to increasing women's representation by including measures to target women from diverse communities and backgrounds, including disabled women, Black and minority ethnic women, lesbian, bisexual and trans women, working class women, and older and younger women

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.

The long-term success of the Act will be dependent on the ability of the measures to improve the candidate pipeline. The 'gender representation objective' is foreseen as a short term measure which must be accompanied by others to support public authorities in encouraging and recruiting women to public boards. This will require the board and appointing persons to develop a degree of gender competence, including an understanding of barriers faced by specific groups of women.

This is especially vital as the Act places the discretion on the organisation to determine the most appropriate steps to encourage applications by women. An appointing person or public authority is permitted to 'take such steps as it considers appropriate to encourage women to apply'. Research into gender balancing measures has found that there is evidence that 'groups who are affected adversely—male incumbents, party leaders and firm owners – respond strategically in order to reduce the impact of gender quotas on leadership outcomes'.²¹

The guidance must therefore be robust and prescriptive so as to indicate the multitudes of areas that public bodies and appointing persons should examine prior to vacancies arising.

²¹ Pande, R. & Ford, D. (2011) 'Gender Quotas and Female Leadership: A Review'. Background paper for the World Development Report on Gender.

The draft guidance currently refers to “practical steps that can be taken” as outlined in the Good Practice section. 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 s.5 of the Act.

The draft guidance also comments on “how and in what ways new board members are welcomed” may need to be considered as part of necessary cultural changes. Whilst this is important it is equally important for boards to understand retention rates of women on their 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.²² Training for public boards should be conducted on outreach, equality and diversity, and unconscious bias.

The guidance should also refer to changes that may be necessary to improve application visibility such as linking up with third sector national and community groups that work with and represent women (e.g. SEStran advertising positions through Equate Scotland). 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.

PSED requirements relating to board diversity overlap with the need for succession planning processes. These are vital to the preparedness of the board to implement necessary changes to the recruitment processes and policies in advance of vacancies arising. However, succession planning is not mentioned in section 4 of the draft 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 s.5. The guidance may also wish to highlight that the monitoring and evaluation of measures to encourage applications from women is also likely to be of benefit to reporting under PSED.

²² https://parlgendertools.org/media/Chairing_inclusive_meetings.pdf; Alice Robb (2015) ‘Disrupting the Interrupting’ at Women in the World

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.

We have already stressed Engender's concerns relating to the evaluation of the short-term measures anticipated by s.6 of the Act due to the reporting timeframes proposed. The duty to take "such additional steps as they [public authorities, appointing persons and Scottish Ministers] consider appropriate" lacks necessary specificity. **Section 5 of the draft guidance is generally weak in providing clarity as to what 'additional steps' in pursuit of the objective public bodies may wish to consider. 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.**

Women and men share similar ambitions to hold leadership roles, but that that does not translate into representation in positions of power.²³ Meaningful change will require boards to demonstrate commitment to cultural change for the long-term. We would also recommend that public bodies continue to report on steps they take beyond those encouraging application from women to improve diversity of board positions post-2022. Measures relating to s.6 aims could include:

- 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;
- Mechanisms to facilitate board renewal, including term limits; and
- Creation of a national pool of equally-qualified candidates that are skilled and prepared for public appointments.

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

The draft guidance should, once the content of the regulation is finalised, more comprehensively set out the minimum expectations of reports alongside recommendations for best practice. There is also a need to set out that reports should justify why measures were not considered appropriate under s.5 and s.6 if no steps have been implemented, as paragraph 6.9 only specifies that reports should state that no steps were taken.

²³ 4 Pande, R. & Ford, D. (2011) 'Gender Quotas and Female Leadership: A Review'. Background paper for the World Development Report on Gender.

Further to our recommendation that boards continue to report on any additional measures beyond those under s.5 of the Act post-2022, we suggest that the guidance 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.

Finally, the sections of the draft 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 (see also question 10).

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.

Where the objective is met, reporting will only be required under s5 of the Act. We are strongly of the belief that boards should continue to report in the same manner as if the objective has not been met. This will enable information to be shared on measures to focus on particular groups of women, learning from best practice, and monitoring data over time to ensure progress becomes and remains entrenched. Recent progress towards 50:50 representation has been underpinned by strong commitment and leadership to drive change from the Scottish Government. **The need to future-proof representation and participation against rollback demands action beyond voluntary measures and ongoing opportunities for scrutiny.**

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

The draft 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.

The Guide should also be capable of being updated more frequently than the guidance may need to be, reflecting the limited number of reports that will be

published before 2022. It may be wise to update the good practice guide to reflect innovative or successful measures introduced and reported on at the first cycle. Measures recommended within the guidance – such as mentoring as an aspect of succession planning²⁴ – should be more thoroughly explained and use made of examples.

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

It would be helpful for the guidance to include the business case for gender equality as a means of ‘scene-setting’ or placing the gender objective with its wider context.²⁵ For example, Catalyse has published research on gender balancing measures, which includes the rationale ‘it’s impossible to measure progress without first having something to measure it against’.²⁶ Such an inclusion would legitimise the activities to those that are implementing the necessary changes may help to dispel some of the persistent misconceptions that gender balancing measures undermine meritocracy. Gender balanced workforces have been shown to lead to better decision-making and problem-solving capacity²⁷ as a variety of perspectives are brought to the table.²⁸ Specifically, gender balanced public boards will also better reflect the people they serve and their experiences of the services.

The Act is just one measure towards a more equal society in Scotland and it is vital that work to ensure participation and representation of women from diverse backgrounds and with intersecting identities. This includes the representation of women in senior executive positions and chair positions across both public and private sector. The guidance should be careful to reinforce that measures introduced to progress towards the gender representation objectives should create lasting changes to cultures and processes.

However, Engender remains concerned that the guidance is not sufficiently prescriptive to deliver action. The good practice guide provides only example measures, and the guidance does not set out parameters for application or sufficiently define considerations involved, for example, in applying the ‘characteristic’ or ‘situation’ measures. Without opportunities to challenge the decisions made in applying the act, which seem unlikely given there is will be no data

²⁴ Good Practice Guide para 8.2

²⁵ For an outline on some of the business benefits of representation see McKinsey (2010) Women Matter

²⁶ Catalyst. 2016. ‘Gender Diversity on Boards in Canada: Recommendations for Accelerating Progress’.

²⁷ Close the Gap. (2015). Gender Equality Pays: The economic case for addressing women’s labour market inequality.

²⁸ World Bank. (2012). World Development Report 2012 Background Paper: Gender quotas and female leadership.

on frequency with which the tie-break is used, the guidance is invaluable in setting the limits of discretion, without which the Act is of limited value.

The experience of PSED suggests that where public bodies lack direction and certainty on the particular action they should take to act to address inequality they do not act with purpose and do not advance equality.²⁹

Impact Assessment

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

The 2018 Act is specifically designed to address under representation and historical disadvantage of women on public boards. Guidance and reporting are a clear element of the Act's mission success, through setting prescription actions and consideration for its application.

Women account for 52% of Scotland's population and yet just:

- 36 percent of Members of the Scottish Parliament;
- 28 percent of Member of Parliament and
- 23 percent of local authority leaders.³⁰

While the gender representation objective and surrounding reporting and guidance on progress will apply to just one field, we believe the Government has a duty to pursue equal representation where it can and create lasting legacies for gender equality in access to decision-making. The measures under s.5 – if supported by comprehensive guidance and examples – can potentially create avenues to encourage women's participation and representation both in other areas and within public bodies themselves.

However, the EQIA should also look at the benefits of the reporting and guidance and the gender representation objective itself for women with intersecting characteristics. For example, the ability of public bodies to further tailor steps under s.5 of the Act to include working with BME women's organisations to deliver training programmes or shadowing opportunities to learn more about non-executive roles. This should involve a specific review of available data on representation and analysis

²⁹ Close the Gap (2015) Making Progress? An assessment of public sector employers' compliance with the public sector equality duty

³⁰ Engender (forthcoming 2020) Sex and Power 2019

of the particular barriers to social and economic equality experienced by diverse communities of women.

FOR FURTHER INFORMATION

Contact: Eilidh Dickson, Policy and Parliamentary Manager, Engender

Email: eilidh.dickson@engender.org.uk

ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.