



Engender response to call for evidence on the Gender Representation on Public Boards (Scotland) Bill

1. INTRODUCTION

Engender welcomes the opportunity to respond to the call for evidence on the draft Gender Representation on Public Boards (Scotland) Bill.

In Scotland, women make up 52 percent of the population.¹ However, gender parity in public spheres is far from becoming reality. In Scotland, women are currently:

- 35 percent of Members of the Scottish Parliament;
- 25 percent of local councillors;
- 16 percent of council leaders;
- 17 percent of Members of the European Parliament; and
- 28 percent of public body chief executives.²

As highlighted by Engender in its response to the call for written evidence on gender balancing measures on public boards in Scotland in 2014, policy changes are needed to tackle gender inequality across the public sector; to break down the barriers to women's equal participation in public life; and to eliminate gender imbalance in leadership, authority and decision-making across public, political, social and cultural institutions.

¹ Engender. 2017. *'Equal Voice, Equal Power'*.

² Engender. 2017. *'Equal Voice, Equal Power'*.

2. RESPONSE

The Committee has set out several points, each of which is answered below.

The impact, if any, on people applying for an appointment as a non-executive member of a public board:

1. International evidence suggests that lack of gendered power balance in the wider public domain has a major impact on equality of outcomes across government.³ In other words, having women around the table changes the subjects that are discussed and the outcomes of those discussions. In addition to enriching perspectives, representative public boards would also challenge normative gender roles and perceptions around public authority. Where women are seen to succeed, more women participate in general.
2. Research shows that gender balancing measures increase women's leadership across sectors, including corporate and public, providing evidence that the primary constraint on female leadership is not a lack of interest in leadership positions by women.⁴
3. A contributing factor to occupational segregation and men's over-representation in senior positions, including public boards, are assumptions made about women's and men's capabilities and preferences. However, research from Catalyst, a non-profit organisation working to accelerate progress for women through workplace inclusion, found that 55 percent of women aspired to be in a senior leadership position.⁵
4. Anecdotal evidence from Engender's members indicates that some women have stopped putting themselves forward for positions on public boards following multiple unsuccessful attempts to secure interviews for positions for which they are amply qualified, and that this is perceived as being on account of their gender. There is a significant cultural perception that public boards remain 'jobs for the boys'.
5. Increasing the number of women in positions of power, including public boards, is a positive step towards addressing women's participation in

³ World Bank. (2012). *World Development Report 2012 Background Paper: Gender quotas and female leadership*.

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

⁵ Pande, R. & Ford, D. 2011.

public life. Evidence shows that increased representation for women on boards influences both the focus and outcomes of discussions, which is of key significance for public service delivery.

6. Achieving gender balance on public boards has the potential to influence occupational segregation through challenging gender norms and perceptions around public authority, and providing children and young people with a more diverse range of role models. Equal representation will also drive excellence in public service delivery as decision makers better reflect the populations they serve.
7. Mandatory gender balancing measures for public boards would provide a platform for gender advocates and government officials to promote gender balance in related areas, and would represent a symbolically powerful statement on the need for a cultural sea-change regarding gender roles in Scotland.
8. One area of concern is whether the Bill will have a positive impact on transgender women's representation on public boards. We echo the concerns of the Equality Network, specifically that transgender people may be treated as their legal sex when applying for an appointment as a non-executive member of a public board, rather than as their gender identity.
9. There is concern that there may be uncertainty around who is included by the term 'women'. As outlined by the Equality Network, the possibility exists that transgender women without gender recognition certificates may be treated in a discriminatory manner when applying to be non-executive members of a public board. It is vital that the Bill be inclusive of all women, including transgender women who do not have gender recognition certificates.
10. To ensure that all transgender women are included, we support the recommendation by the Equality Network to define 'woman' in the Bill as follows:

"woman" –
 - (a) includes a person with the protected characteristic of gender reassignment who is living in the female gender, and
 - (b) does not include a person with the protected characteristic of gender reassignment who is living in the male gender.

The impact, if any, for those public authorities responsible for encouraging and recruiting women to public boards as non-executive members:

11. Research by Close the Gap found that employers who take concrete steps to address women's inequality in work led to several benefits, including: 1) reduction in costs through lower turnover; 2) improved employee morale and motivation; and 3) higher levels of productivity.⁶
12. In their paper 'Gender Equality Pays', Close the Gap reports 'The business benefits of increasing the gender diversity of the workforce lie in better decision-making and problem-solving capacity, as a variety of perspectives are brought to the table, and companies benefitting from women's 'market proximity'.⁷ By reflecting the people they serve, gender-balanced boards can drive excellence and efficiency in public service delivery.
13. While introducing a 'gender representation objective' is a welcome initiative, it must be accompanied by other measures to support public authorities in encouraging and recruiting women to public boards as non-executive members.
14. Action must be taken to encourage applications from women, and there must be detailed guidance on the practical steps that can be taken to allow women to progress. Detailed guidance is required, as research from Close the Gap evidences that support for gender equality by organisations does not translate into specific actions to advance gender equality within organisations.
15. Additional measures to contribute to the aim of gender-balanced public boards could include:
 - Use at least one mechanism to facilitate board renewal, including, but not limited to, term limits;
 - Establish written policies describing how the agency plans to increase the number of women on its board;
 - Review board recruitment strategies and policies, and consider introducing a requirement that women, including women from diverse

⁶ Close the Gap. (2015). *Gender Equality Pays: The economic case for addressing women's labour market inequality*.

⁷ Close the Gap. (2015).

communities, comprise at least 50 percent of board candidates and/or 50 percent of the interview pool; and

- The creation of a national pool of candidates who have been skilled and prepared for public appointments, rendering a set of equally-qualified candidates for selection by public authorities.
16. Other measures to bolster the success of gender balancing measures include reviewing gender equality at all levels of public agencies. Recruitment, training and promotion should be monitored and tracked to identify where and how policies and processes can be amended to increase the representation of women across public agencies, including on boards.
 17. To further encourage applications, public bodies must acknowledge the structural barriers women face in seeking employment and in the workplace, including inadequate access to childcare and inflexible working arrangements. To promote women in applying and participating on public boards, public bodies will need to concentrate efforts on breaking down these barriers, not only for prospective women on their boards, but also for existing board members and employees who are women. Delivering equitable access to boards will be limited if wider access issues are not also addressed.
 18. Similarly to Close the Gap, we see an opportunity to align work to support the encouragement of applications with work to support compliance with the Public Sector Equality Duty (PSED). It may be that a coordinating amendment is needed to make the link between this Bill and existing legislation to improve compliance, reduce the duplication of effort within public bodies, and reduce perceived perceptions that the Bill presents an additional 'administrative burden' on public bodies.

The Bill requires public boards to report on the operation of the Act, although Scottish Ministers can regulate how this should happen; what should any reporting requirements cover and why; and whether there should be penalties for non-compliance with the Bill and what these should be and why:

Reporting Requirements

19. The Bill should explicitly state the monitoring and reporting requirements of the gender representation objective, and should include a responsibility by the Scottish Government to report progress to the Scottish Parliament.

20. All public boards should make their membership public and where gender parity does not currently exist, boards should be legislated to outline their strategy to reach parity.
21. All public boards should be required to monitor and publically report, after a period of 1 year, on their progress towards meeting the initial target of 50 percent in accordance with their specific equality duties.
22. Public authorities have existing reporting requirements relating to PSED. As such, PSED could be amended to include the requirement to monitor progress against the gender representation objective and to regularly report on gender representation on their boards. However, it could also include a requirement to report on the steps taken to encourage members of the under-represented sex to apply and the reasons why they consider that the objective has not yet been met, and what changes they propose to make following a review to meet the objective.

Accountability Measures

23. Prior to introducing the Bill in Parliament, the Scottish Government amended its earlier version of the draft Bill to include a target date by which 'gender representation target' should be achieved (i.e., 31 December 2022). This is a welcomed amendment to the Bill, but must be included alongside accountability measures.
24. Evidence on gender balancing measures and female leadership shows that 'if governments demonstrate a willingness to punish non-compliance then they can increase female representation'.⁸
25. As highlighted in our earlier responses, robust enforcement is essential, and without a meaningful recourse for non-compliance, there is a significant possibility that gender balancing measures will not be taken seriously by those charged with implementing them. As highlighted by Close the Gap, precedent exists of public bodies failing to comply with legal obligations to advance gender equality, including certain aspects of PSED. Examples include public bodies failing to publish any information on their website by reporting deadlines, or failing to undertake concrete steps to meet equality outcomes.

⁸ Pande, R. & Ford, D. 2011.

26. Engender supports the proposal put forward by Muriel Robison and Nicole Busby (University of Glasgow) that the legislation include a redress mechanism for an unsuccessful candidate of the underrepresented sex. In these cases, the burden of proof would lie with the appointing organisation to explain why they had not recruited that person.⁹ As written by Muriel Robison and Nicole Busby, ‘further, the appointing organisation is obliged to disclose on the request of the unsuccessful candidate the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria, where relevant, considerations tilting the balance in favour of the candidate of the other sex.’¹⁰
27. The Commissioner for Ethical Standards in Public Life has the following statutory functions:
- Investigate complaints alleging contravention of the relevant Code of Conduct by councillors, members of public bodies, and members of the Scottish Parliament; and
 - Where there has been contravention of the relevant Code, to report:
 - In the case of councillors and members of public bodies, to the Standards Commission for Scotland.
28. Efforts should be made to investigate whether the statutory functions of the Commissioner for Ethical Standards in Public Life could be amended to allow the Commissioner to oversee appointments with a view of ensuring they comply with the gender representation objective. More specifically, whether the Commissioner could play a role in monitoring appointments and, where necessary, investigating appointments which do not comply with the gender representation objective. In cases where appointments do not comply, corrective action would be necessary and the Commissioner would require the power to, for example, nullify appointments.
29. Such powers exist in foreign jurisdictions who have introduced gender balancing measures. In France, for example, the government introduced accountability measures which included the nullification of a board appointment if it violated the legislation on gender balancing measures.

⁹ Robison, M. & Busby, N. (2017). *Response 283016390 to a Scottish Government Consultation on the Draft Gender Representation on Public Boards (Scotland) Bill*.

¹⁰ Robison, M. & Busby, N. (2017).

Please tell us about any other comments you feel are relevant to the Bill:

We have several additional comments in respect of the Bill:

30. Subsection 4(4) of the Bill states:

- 4 **Consideration of candidates**
- (1) The appointing person must determine whether any particular candidate is best qualified for the appointment.
- 20 (2) If no particular candidate is best qualified for the appointment, the appointing person must identify candidates it considers are equally qualified.
- (3) Subject to subsection (4), the appointing person must give preference to a candidate identified under subsection (2) who is a woman if appointing that candidate will result in the board achieving (or making progress towards achieving) the gender representation objective.
- 25 (4) **The appointing person—**
- (a) **must consider whether the appointment of a candidate identified under subsection (2) who is not a woman is justified on the basis of a characteristic or situation particular to that candidate, and**
- 30 (b) **if so, may give preference to that candidate.**

At issue is whether this subsection provides a loophole for the appointing person to forego compliance with the gender representation objective. It is not clear to us the rationale for amending this section of the Bill, and in particular the reasoning for such a broad exemption. In its earlier iteration (i.e., the draft published by the Scottish Government for consultation), the Bill proposed:

- 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.**

There is cause for concern if the amendment creates an inadvertent loophole, as research on the impact of gender balancing measures has found evidence that ‘groups who are affected adversely [by gender balancing measures] – male incumbents, party leaders and firm owners – respond strategically in order to reduce the impact of gender quotas on leadership outcomes’.¹¹

Clarification is required on two points: 1) the rationale for this amendment; and 2) whether the outcome of this provision would impede the gender representation objective.

¹¹ Pande, R. & Ford, D. 2011.

31. We are also concerned about the level of discretion provided in section 5 of the Bill, where an appointing person and public authority are permitted to 'take such steps as it considers appropriate to encourage women to apply'. As we have highlighted earlier in our submission, the steps to encourage women to apply to public boards should be prescriptive. In our view, too much discretion is left to the appointing person and the public body, and we wonder if this language would, in practice, result in inconsistent plans and procedures across public bodies.
32. In addition, we believe that training for public boards should be conducted on outreach, equality and diversity, and unconscious bias.

3. CONCLUSION

Women's access to power is a key pillar of our work. Within this branch of our work we advocate for policy change to tackle gender inequality across the public sector, the barriers to women's equal participation in public life, and the lack of gender balance in leadership, authority and decision-making across public, political, social and cultural institutions.

While the Bill is a positive step towards redressing women's under-representation in senior and decision-making roles in public life, there is scope to go further. As we have highlighted in our response, amendments could be made to strengthen existing provisions; amendments which, if made, would assist public boards in meeting the gender representation objective by 2022.

For Further Information

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About Engender

Engender has a vision for a Scotland in which women and men have equal opportunities in life, equal access to resources and power, and are equally safe and secure from harm. Engender is a feminist organisation that has worked in Scotland for 20 years to advance equality between women and men.