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By email:

27 November 2017

Dear Christina

Thank you for the Equality and Human Rights Committee's Stage 1 report on the Gender Representation on Public Boards (Scotland) Bill. I am pleased to enclose the Scottish Government's response ahead of the plenary Stage 1 debate on Thursday 30 November 2017 and I hope this is helpful in addressing the points raised by the Committee.

I am grateful to the Committee for their helpful and constructive scrutiny of the Bill and I look forward to continuing to work with members of the Committee and the wider Parliament to ensure that the Bill is as strong as it can be.

Yours sincerely

ANGELA CONSTANCE



SG response to the Equality and Human Rights Committee's Stage 1 report

[For ease of reference the Committee's comments are shown in **bold** and our responses are shown in *italics*]

Gender representation objective

1. We wholeheartedly support putting measures in place to protect the gains made towards greater equality and ensuring that public boards are representative of the general population.

SG response – The Scottish Government welcomes the Committee's support for the aims of the Bill.

2. However, we are open minded as to what level and structure the objective should be set at, and are mindful of the potential for a 50% objective to unintentionally work against greater diversity. We therefore ask the Scottish Government to weigh up the arguments made by the witnesses at Stage 1.

SG response – The Scottish Government has weighed up the arguments made by the witnesses at Stage 1 and remains of the view that setting the gender representation objective at 50% appropriately reflects the fact that women make up almost 52% of the population in Scotland.

In a tie-break situation, the provisions of the Bill (section 4(4)) allow a candidate who is not a woman to be appointed where that can be justified on the basis of a characteristic or situation particular to that candidate. The Scottish Government believes that this provision is wholly sufficient to deal with the kinds of situations raised by some witnesses at Stage 1. For example, where there are two equally qualified candidates, one of whom is a woman and one of whom is a black or disabled man [as raised by the Coalition for Racial Equality and Rights in their oral evidence to the Committee on 5 October] an appointing person could give preference to the man if they consider doing so to be justified under section 4(4).

3. We would welcome absolute clarity from the Scottish Government on whether the 50% objective is an exact target, or if it is a minimum percentage to be met by public boards. If it is the latter, then we would encourage the Scottish Government to make that clear in guidance to better encourage boards who wish to improve the overall balance of their board by making its non-executive appointments more than 50% women.

SG response – The gender representation objective at section 1 is for a public board to have 50% of non-executive members who are women. This is not an exact target or a cap and the Bill does not preclude a public board from having more than 50% of non-executive members who are women. However, in the event that a public board already has 50% or more non-executive members who are women and there is a tie-break situation, the positive action provisions in sections 3 and 4 would not apply. We have taken note of the Committee's advice and will ensure this is clearly reflected in guidance.

Where a public board has an odd number of non-executive members, the gender representation objective applies as if the board had one fewer member. Therefore it would

be possible for the gender representation objective to be achieved even though a public board has less than 50% of non-executive members who are women. For example, a public board that has 9 non-executive members would be considered to meet the gender representation objective if 4 (44%) of its non-executive members are women.

Work on gender representation for non-executive members should not preclude organisations from taking steps to consider the diversity of their workforce and executive members.

Key definitions

4. Although the exact nature of these changes would be a matter for Stage 2, we would expect the Scottish Government to address the issues raised by the Scottish Trans Alliance.

SG response – The Scottish Government is actively considering how the Bill can be as inclusive as possible, including giving full consideration to the proposed amendment put forward by the Scottish Trans Alliance in their written evidence to the Committee.

Duty when appointing non-executive members and consideration of candidates

5. While we recognise that this piece of legislation has been drafted to avoid contravening EU legislation, we request that the Scottish Government clarifies the tie-breaker situation described in paragraphs 53-63 in any guidance issued alongside the Bill.

SG response – The Scottish Government recognises that some uncertainty has been expressed about the meaning of “a characteristic or situation particular to that candidate” in section 4(4) and will ensure that we provide clear explanation in supporting guidance.

In response to the Committee’s recommendations and the evidence put forward by witnesses at Stage 1, the Scottish Government can provide reassurance that following consultation with public authorities and other relevant parties, we will publish guidance to support the implementation of the Bill.

6. We ask the Scottish Government to consider putting in place an aggregate gender representative objective across all public boards for chair positions, which matches the ambition for boards more generally.

SG response – Currently, the gender representation objective in the Bill includes chair positions (except those excluded in Schedule 1) but does not distinguish them from other non-executive members of a public board. The Scottish Government shares the Committee’s concern that despite significant steps forward in improving the representation of women on public boards, the number of women occupying chair positions lags behind that of non-executive member positions as a whole. In his oral evidence to the Committee on 28 September, the Commissioner for Ethical Standards in Public Life in Scotland Bill Thomson indicated that 25% of regulated chair positions are held by women.

The Scottish Government Public Appointments Team is taking targeted action to improve the diversity of chairs. A Future Chairs mentoring project has been established to address the lack of diversity at chair level. Participants on the project are identified by their current Chairs as having the potential to move into a chair position in future and in turn receive mentoring

from another experienced Chair. There are currently 26 serving women board members being mentored through the project.

In addition, the Scottish Government is taking forward a range of activity to support existing board members to grow their confidence and skills, including through: organising networking and peer-learning events; introducing a corporate induction for new board members, and developing an online governance portal which allows board members to network with peer 'virtually' and to take part in learning opportunities.

The Scottish Government agrees with the Committee that this is an area worth further exploration and will therefore continue to keep a close watch on the activity discussed above. However having considered, the Scottish Government is not convinced that an aggregate chair objective could be practically applied across all public boards covered by the Bill and or that it could operate meaningfully alongside the gender representation objective for non-executive members as a whole. But we can assure the Committee we will look at how we can share and encourage best practice and monitor this area.

Other protected characteristics

7. We understand the Scottish Government's position is that this Bill may not be the legislative vehicle for each and every protected characteristic. However, we seek reassurances from the Scottish Government on how it will ensure that this Bill does not have any unintended consequences for other protected characteristics.

SG response – The Scottish Government is committed to diverse boards which reflect Scotland's communities. Though the Bill is focussed on redressing the under-representation of women, and it would be outwith its scope to address diversity more broadly, it does not preclude or prevent work to improve the diversity of public appointments across other characteristics.

The Scottish Government is clear that women are diverse, reflecting all of the other protected characteristics, and that the Bill can be a catalyst to help realise greater diversity by challenging existing processes.

Furthermore, as set out in response to the Committee's comments at paragraphs 2 and 5, the Scottish Government considers that section 4(4) allows for a candidate who is not a woman to be appointed where that can be justified on the basis of a characteristic or situation particular to that candidate.

While the Scottish Government believes that it is right for the Bill to focus on redressing women's under-representation on public boards, we want to be clear that this sits as part of a broad programme of activity to improve the wider diversity of ministerial appointments and address under representation.

In 2017, to meet its requirements under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, the Scottish Government set an equality outcome to improve the diversity of ministerial public appointments with a focus on age and disability.

Improving the diversity of Scotland's public boards is also reflected in other action plans including 'A Fairer Scotland for Disabled People', the Scottish Government's delivery plan to 2021 for the UN Convention on the Rights of Persons with Disabilities, published in December 2016 and the Scottish Government's Race Equality Framework 2016-2030, published in March 2016.

The Scottish Government Public Appointments Team is taking action through the Public Appointments Improvement Programme. Work currently underway in the improvement programme includes:

- *The delivery of an outreach programme intended to reach out to the broadest range of potential applicants, using role models to allow potential applicants to ‘see themselves in the boardroom’.*
- *Work with existing Chairs and members to make sure they are diversity confident, and a focus on developing the Chair pipeline.*
- *A research project, delivered in partnership with the Commissioner’s office, to establish a solid evidence base for the benefits of diversity on public boards.*

8. We would welcome the Government’s view on the suggestion from Inclusion Scotland that Section 5 of the Bill could be expanded to place a duty on boards to encourage applications from all under-represented groups.

SG response – The Bill has a restricted Parliamentary scope. The Scottish Government considers that amending section 5 of the Bill to place a duty on public authorities and appointing persons to encourage applications from all under-represented groups as opposed to women would be outwith the scope of the Bill.

However, as set out in response to the Committee’s previous recommendation, the Bill does not preclude or prevent work to improve the diversity of public appointments across other characteristics and the Scottish Government is actively seeking to reach out to the broadest range of potential applicants through its public appointments outreach programme.

Reports on operation of Act

9. We are convinced of the need for the Bill to be strengthened to ensure action is taken to improve equality and diversity on public boards. We believe that a crucial element of this Bill lies in the reporting duty and therefore believe it is necessary to include a new reporting duty under section 5 of the Bill.

10. We consider it vital that the Parliament plays a role in monitoring progress towards the objective, and that Ministers are openly held to account for the boards to which they appoint.

11. We therefore ask the Scottish Government to take forward amendments at Stage 2 to require Scottish Ministers to lay before the Parliament an annual report which draws together the gender balance within both regulated and non-regulated boards so that comparative progress and sharing of best practice can be easily identified.

SG response – The Scottish Government is committed to working with the Committee and the wider Parliament to ensure that the Bill is as strong as it can be. Section 7 of the Bill makes provision for Scottish Ministers to make regulations requiring the publication of reports on the operation of the Act. We recognise that the requirement to report is central to the Bill’s effectiveness and so will bring forward an appropriate amendment at stage 2 as recommended by the Committee.

We will also ensure that these reporting requirements are aligned with existing reporting requirements, for example: the Commissioner for Ethical Standards in Public Life in Scotland's annual report to Parliament covering regulated appointments, and the requirements placed on listed public authorities by the amendments made to the Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2012 on 18 March 2016.

Power to modify schedule 1

12. Given the sums of public money granted to universities, and that the Bill is strictly drawn to non-executive members, we are not persuaded by the argument made by the higher education sector for its exclusion from this Bill, particularly when the argument is made on principle rather than on the merits of the aims of the Bill itself.

SG response – The Scottish Government welcomes the Committee's position that higher education should be covered by the Bill.

13. Conversely, we consider the omission of Integration Joint Boards from the public authorities listed to be notable. However, in recognition of the complex governance arrangements of IJBs, we ask the Scottish Government to consider how Local Authorities and Health Boards can be encouraged to consider diversity when appointing members of IJBs.

SG response – The Scottish Government notes the Committee's recommendation that the Bill considers how we encourage diversity in Integration Joint Boards and agrees that this is an issue we should keep under consideration. We can assure the Committee we will pay attention to this recommendation and consider outwith the Bill, how Local Authorities and Health Boards can be encouraged to share and implement best practice to increase and improve diversity when nominating members to Integration Joint Boards.

14. We support the suggestion by the Delegated Powers and Law Reform Committee that the Bill's regulations under section 8 should be subjective to the affirmative procedure rather than the negative procedure as is currently drafted.

SG response – The Scottish Government's view, as set out to the Delegated Powers and Law Reform Committee (DPLRC) on 19 September is that the negative procedure is appropriate given the limited and technical nature of any changes under section 8.

However, given the Committee's support for the DPLRC's position, the Scottish Government will bring forward an amendment at Stage 2 with the effect of making regulations under section 8 subject to the affirmative procedure rather than the negative procedure as currently drafted.

15. We also ask the Scottish Government to define the appointing person for each authority to ensure greater accountability. We would also seek clarify as to who is accountable for performing the duties in public authorities (ie. Chief Executive Officer or the existing board).

SG response – Section 2 currently provides the following definition of an appointing person- "appointing person means, in relation to the function of appointing a non-executive member of a public board, a person who has that function"

We use this definition (i.e. referring to the function rather than a specific person) as it ensures that we avoid the need to amend the future Act every time any relevant body seeks to change their governance.

That said, the Scottish Government accepts the Committee's point that it would be helpful to clarify who the appointing person or persons are for each of the public authorities covered by the Bill and who is accountable for performing the duties on public authorities. We propose that the best way of achieving this without amendments needed to the Act due to the reasons outlined above, is through supporting guidance.

Guidance

16. We are strongly of the view that the measures in this Bill must be accompanied by renewed statutory guidance which applies equally to regulated and non-regulated appointments.

17. We are acutely aware that there is a lot of pre-existing guidance, and do not wish to see unnecessary duplication of guidance created. We would therefore welcome confirmation from the Scottish Government on how it will ensure that clear and cohesive statutory guidance is established.

18. We would expect any statutory guidance to provide examples of best practice to better highlight what steps could be taken to meet the duties within the Bill. This guidance should also cover steps that boards could take to ensure their working practices do not deter potential candidates or lead to new members leaving at an early juncture.

19. We believe that it makes sense for this guidance to flow from the pre-existing guidance from the Commissioner for Ethical Standards in Public Life in Scotland.

SG response – In response to the Committee's recommendations and the evidence put forward by witnesses at Stage 1, the Scottish Government can confirm that we will publish guidance to support the implementation of the Bill. In order to ensure that new guidance supporting implementation of the Bill aligns with pre-existing guidance and does not create unnecessary duplication, we will ensure this guidance follows consultation with public authorities and other relevant parties, including the Commissioner for Ethical Standards in Public Life in Scotland.

The Scottish Government will ensure that, as the Committee has noted, our guidance should:

- apply equally to regulated and non-regulated appointments;*
- provide examples of best practice,*
- flow from existing guidance published by the Commissioner for Ethical Standards in Public Life in Scotland.*

We also accept the recommendation from the committee that the guidance should be statutory and will therefore bring forward an appropriate amendment at Stage 2.

Financial impact

20. We are content that the financial memorandum estimated costs are sufficient, and ask that the Scottish Government monitor these costs if the Bill is passed.

SG response – The Scottish Government welcomes the Committee’s statement regarding the financial memorandum and can provide reassurance to the Committee that costs incurred by the Scottish Government will be monitored going forward.

Conclusions

21. We support any moves which could contribute to a more equal society, particularly if these moves are within the remit of the Scottish Government and can be monitored, reported and resourced.

22. However, we consider the Bill and its accompanying documents as they currently stand to be a work in progress, capable of making greater strides towards equality and providing further direction and clarity on the measures within the Bill itself.

23. We urge the Scottish Government to act on our recommendations and to commit to working with the Committee and the wider Parliament to strengthen and refine the proposed legislation at Stage 2.

24. We agree to the general principles of the Bill and look forward, pending Parliament’s agreement at Stage 1, to considering amendments at Stage 2.

SG response – The Scottish Government is grateful to the Committee for its constructive scrutiny of the Bill and its support for the Bill’s aims and general principles. The Scottish Government welcomes the opportunity to work with the Committee and the wider Parliament to strengthen the Bill going forward and commits to giving full consideration to the Committee’s recommendations.