



OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 5 October 2017

Session 5



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EQUALITIES AND HUMAN RIGHTS COMMITTEE
23rd Meeting 2017, Session 5

CONVENER

*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)

*Jamie Greene (West Scotland) (Con)

*Gail Ross (Caithness, Sutherland and Ross) (SNP)

*David Torrance (Kirkcaldy) (SNP)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tanya Castell (Changing the Chemistry)

Rebecca Marek (Coalition for Racial Equality and Rights)

James Morton (Scottish Trans Alliance)

Iain Smith (Inclusion Scotland)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 5 October 2017

[The Convener opened the meeting at 09:30]

Gender Representation on Public Boards (Scotland) Bill: Stage 1

The Convener (Christina McKelvie): Good morning and welcome to the 23rd meeting in 2017 of the Equalities and Human Rights Committee. I make the usual request that all mobile phones should be off the desk and on silent, please.

I welcome David Torrance back to the committee. It is good to have you back, David.

David Torrance (Kirkcaldy) (SNP): Thank you.

The Convener: Today we continue our stage 1 scrutiny of the Gender Representation on Public Boards (Scotland) Bill. We have one panel, who we are delighted to have at committee: James Morton, who is manager of the Scottish trans alliance; Tanya Castell, who is chief executive officer of Changing the Chemistry; Iain Smith, who is policy and engagement team manager with Inclusion Scotland; and Rebecca Marek, who is policy and parliamentary officer for the Coalition for Racial Equality and Rights. You do not have to switch on your microphones, as the broadcasting people will sort that out.

I have a general opening question for everyone. Why is the bill necessary, and where could you influence how it should operate? We will start with Rebecca Marek.

Rebecca Marek (Coalition for Racial Equality and Rights): Thank you very much for having us along this morning, convener.

CRER, as an equalities organisation, is always in favour of legislation that goes a way towards improving the situation for groups who are underrepresented in public life. I am here today not to call for homogenisation of the bill across the protected characteristics or for the introduction of similar quotas for black and minority ethnic groups, but because we have identified a few places in which we think the bill could be improved so that groups who are already disadvantaged do not fall further behind. In particular, we suggest better defining the characteristics that can be considered to allow preference to be given to a candidate who is not a woman, including wider representation, consideration and encouragement of applications from people with protected

characteristics other than gender, and definitively requiring public bodies to publish specific information in order to report effectively on their equality monitoring. Those are relatively simple things that could be done.

We also have a suggestion that may be less popular, which is to look at changing the 50:50 target to a 60:40 target. We see potential loopholes and situations in which, for example, a white woman may need to be appointed over an equally qualified black man or disabled man who would also contribute to the diversity of the board but who might not meet the requirements within the narrow confines of the bill.

We are aware that, if a man were to resign from a board that had a 50:50 balance, a black woman may be overlooked in that situation. We question why we would want to limit representation to 50 per cent when we are talking about one or two people, and there may be situations—especially in sectors that have a high percentage of women in the workforce—in which a 60 per cent target may be even better.

I am happy to talk about any of those points. In summary, we support the bill's equality initiatives—we simply ask that provisions are put in place to ensure that groups who are already quite underrepresented are not unintentionally left to fall further behind.

Iain Smith (Inclusion Scotland): Inclusion Scotland supports the principles of the bill in relation to improving the representation of women on public boards. However, we question whether the bill is necessary to achieve that improvement, given that all the measures that it proposes, other than setting a 50 per cent target, can currently be taken by ministers. Nothing in the bill will change the powers that ministers currently have to be able to achieve that 50 per cent balance.

Nonetheless, we share many of the concerns that Rebecca Marek has just raised with regard to the broader diversity of public bodies. There may be unintended consequences of the legislation that actually lead to less, rather than more, diversity on boards. The bill will place a legislative requirement on public bodies and on ministers to promote the appointment of women, and will include measures to encourage more applications from women.

That might take away from efforts to encourage applications from other underrepresented groups, including disabled people. Last year, Inclusion Scotland did some work on behalf of the public appointments team in the Scottish Government, in which we identified a number of areas where work needs to be done to encourage more applications from disabled people. We are concerned that an inadvertent consequence of the bill might be that

work to develop those proposals will be shelved because of the legislative requirement to concentrate on the gender balance issue.

Tanya Castell (Changing the Chemistry): Changing the Chemistry is about promoting diversity of thought. Ideally, as has already been mentioned, that is not just about gender diversity. I guess that we see gender diversity as a proxy for diversity of thought, but it is a crude one, and the danger of putting off other types of diversity is a concern.

Why is the bill necessary? Currently, because of unconscious bias, recruitment is not a meritocracy. Our biases mean that we all tend to recruit people who look and sound like us. Until it is the norm to have greater diversity on boards, it makes sense to have a bill such as the Gender Representation on Public Boards (Scotland) Bill to help to overcome that. However, we would like to think that, in time, recruitment can become a meritocracy. Potentially, once the target—whatever it should be—has been hit for, say, five years, the legislation should disappear, because ultimately it should be about meritocracy and having the right people on boards.

I am interested in the idea of a 60:40 target. I would tend to suggest a 40:40:20 target whereby, with the 20, we have a bit more flexibility and can promote greater diversity of thought, rather than gender diversity exclusively.

James Morton (Scottish Trans Alliance): The Scottish trans alliance works specifically on transgender equality and human rights. We work closely with the women's equality sector in Scotland, and we find it a very good ally. We support the bill. We believe that for women to have only 36 per cent representation on boards when they are 52 per cent of the population is a really shameful underrepresentation, and one that needs to be addressed. We welcome any actions, such as the bill, that help to bring attention to that.

We are keen—and we are here today—to try to make sure that the bill does not accidentally produce any barriers to transgender people being involved in boards. We welcome the spirit of the bill and we do not believe that it is intended to cause any such difficulties, but we need to make sure that the wording is correct so that it does not accidentally do so.

The Convener: Thank you. The next question is from Mary Fee.

Mary Fee (West Scotland) (Lab): Good morning, panel. My question follows on nicely from the comments that James Morton has just made. I am particularly keen to hear a bit more about the issues that the Equality Network and the Scottish trans alliance have raised about the wording of the

bill and the impact that it could have on trans women and trans men.

I would also like you to touch on the issue of non-binary people. I have asked previous panels about that. What impact will there be on non-binary people? I would be grateful if you could give us a bit of a flavour of the barriers that trans people face in getting to the point where they are on boards.

James Morton: Under the trans umbrella, which covers anyone whose gender identity varies from the gender that they were assigned at birth, we talk about trans men, such as me, who were assigned a female gender at birth but grow up identifying strongly as a man; trans women, who were assigned a male gender at birth but grow up identifying strongly as a woman; and non-binary people, who find that their gender identity is more complex and does not fit neatly in the boxes of man or woman. We believe that the aim of increasing the representation of women on public boards needs to be clearly inclusive of trans women.

The bill's wording is positive in that it says that it is about women and it does not try to limit that in a negative way against trans people, but we need to make sure that it is not open to misinterpretation. We would like a bit of extra information to be included for the avoidance of doubt. We propose that the bill should say that the definition of "woman" includes a person with the protected characteristic of gender reassignment who is living in the female gender and does not include a person with the protected characteristic of gender reassignment who is not living in the female gender.

It is about how people live and identify, not about whether they have gone through the very cumbersome process of getting a gender recognition certificate. At the moment, the vast majority of trans women, who have lived as women for many years, do not have gender recognition certificates, because getting one is such a degrading and humiliating process.

It is really important not to end up in a situation where boards feel that they have to scrutinise the histories, backgrounds and gender reassignment statuses of trans people. There is a fear of having your gender unpicked and questioned, and of the humiliation that goes with people in power asking themselves whether what someone's life is like meets their criteria for womanhood. That is a major barrier for people applying for boards. Indeed, it is a major barrier for people who are just applying for jobs at the moment. It is so important that people are trusted when it comes to how they identify themselves. That is how we would trust people with all their other characteristics.

I am pleased that diversity monitoring in Scotland is already very much about self-declaration. People get asked how they identify their gender, and they write that down. That is how it should be. We have written the extra clarification carefully, so that it is compliant with the devolved powers that are set out in section 37 of the Scotland Act 2016. It refers to

“the protected characteristic of gender reassignment”,

so it keeps it in the required area. We have used the language of

“living in the female gender”,

because that is based on the language that is already in use, for example, in the Gender Recognition Act 2004. We therefore think that our suggested definition is a carefully phrased addition for the avoidance of doubt.

To explain a little bit more about the issues that people can face, one major barrier that trans people have faced when it comes to joining boards has been the requirement for their previous names to be stored at Companies House. Steps are now being taken to sort that out, but that has been a major barrier. Some trans people had been invited on to boards but then declined when they realised that it would out them as trans.

Mary Fee: May I interrupt you there? You say that steps are being taken to sort that out. What steps are being taken?

James Morton: There has been behind-the-scenes work to ensure that, although the data needs to be held, it does not necessarily need to be available to anybody who randomly happens to look at Companies House. However, if someone had a particular need to investigate a crime, for instance, they could access the information. There would still be the safeguards around storing the information, but it would not be subject to the exposure that trans people would be very uncomfortable with.

Going back to the point about non-binary people, we think that, because the bill focuses on women, it is important that it has the 50 per cent target for women, including trans women. Trans men like me and non-binary trans people would end up being counted among the other 50 per cent. We think that that is acceptable, because there is such a small percentage of trans people in society: we are talking about less than 1 per cent of the population. The population is probably 0.3 per cent trans women, 0.3 per cent trans men and 0.4 per cent non-binary folk. That will not massively affect your percentages. If we take boards consisting of 10 people, say, it would not really make sense to try and achieve a statistical representation quota for trans people. You would

end up with having an arm of a trans person or something like that.

We are comfortable with the target. When it comes to reporting, it is important to ensure that you do not out non-binary people. Diversity monitoring of boards should ask people a non-binary-inclusive gender question. It should ask whether someone is male or female or whether they identify in another way. That is our good practice in diversity monitoring. For reports at individual board level, the number of places on the board that are filled by women could be stated, with the percentage of representation of women. That would not need to break down the exact male or other identifications of the other members of the board at local board level.

09:45

If we were to break things down at a national level across all public boards to show how many of the total number of places Scotland-wide are filled by people who identify as women, how many are filled by people who identify as men and how many are filled by people who identify in another way, that would be useful. It might avoid the risk of outing people and it would help in letting us know whether any non-binary people were making it on to boards.

Mary Fee: You have explained what you would like to be added to the bill to give protection to trans women. Might it be beneficial to include in any guidance or policy documents that go along with the bill a further explanation of what is meant by that definition and what should be done to actively support and encourage trans women?

James Morton: Yes. It is important for explanatory guidance to make it clear that if someone applies as a woman and uses female pronouns in interacting with other board members, that is all anyone needs to know. No one needs to dig into what their birth certificate says or what, if any, gender reassignment or medical treatment they have had. Those are very personal and private matters; all that matters is how someone interacts with you on a day-to-day basis.

For those who are recruiting board members, the importance of having diversity across the different protected characteristics should be clarified to ensure that they do not just reach out to non-trans, white, middle-class women but take proactive steps to advertise and recruit a really diverse range of women. Encouraging that approach would be very helpful.

Mary Fee: Has your organisation had any input into the “On Board” guidance for board members?

James Morton: We have not been involved in that as yet, partly because there are only two

transgender-specific equality and human rights posts in Scotland. Our primary focus, therefore, has been on whether trans people can get into employment at all rather than whether they can be appointed to boards. It is all a matter of priority. In the future, we would want to be more involved in that work, but for trans people, the issue is how to get through their daily lives instead of having some massive focus on getting on to a board.

Mary Fee: Thank you.

Jamie Greene (West Scotland) (Con): Good morning, panel. I want to touch on the bill's financial implications for the organisations that will be affected by it. When the Finance and Constitution Committee called for submissions on the financial effect of the bill, there were, unfortunately, only four respondents. However, one of them is sitting before us today, which is great.

Three of the responses were positive and said that the estimate of around £400,000 for the bill's financial implications was adequate. Of the public bodies and organisations with an interest in the bill that were contacted, only Changing the Chemistry said that the amount was not enough. Tanya, can you share with us why you thought that, and tell us what the figure should be?

Tanya Castell: I do not have an exact number, but I can say that the main challenge for Changing the Chemistry is the assumptions that the estimate is based on. Initially, Changing the Chemistry worked very heavily with individual public sector bodies, but I think that only VisitScotland commented on that work in the consultation. We think that the figure is an underestimate because, given the way in which things are set out at the moment, it is not clear how they will be implemented to ensure that diverse candidates are found.

The bill's ultimate aim is partly to ensure that society is represented, but partly to get better boards. Indeed, as far as Changing the Chemistry is concerned, that is the whole point of having more diverse boards. As a result, you need to get the right candidates. A lot of work has been done by the public appointments team, which has done a great job, and organisations such as Changing the Chemistry to reach out to and encourage individuals who might not necessarily have thought about going on to boards. Indeed, most of the people in question have never thought about doing such a thing.

We have been doing that work for two and a half years, which is not really long enough to enable us to be sure that we will continue to get that inflow of candidates, because we still have all the biases and stereotypes, and a number of people are still not thinking about entering the boardroom. The

work needs to continue until we have addressed those stereotypes and got people thinking about going on to boards. For me, it is that outreach work that is important.

We could carry on as we are doing, with organisations advertising and people applying for roles, but either we will get the same people applying, which will mean that we will not necessarily bring in wider diversity of thought, or we will get people who are not necessarily prepared. I have sat on a panel for the Scottish Government and for Edinburgh College, so I know that we need people who understand and have had some support with the process, and who are of the right calibre. To me, we are talking about the cost of reaching out to those people.

As I understand it from the consultation with the members of Changing the Chemistry, the issue is how we will continue to reach out and get to those people. It seems that the approach is one whereby it will be incumbent on the individual boards to find those candidates and reach out to them. In my view, that is inefficient. I am vice-chair of Scottish Canals, which has a tiny board of six people. Every time we recruited, we would have to go and do that outreach. We are gender balanced, but we are keen to bring greater social and, ideally, ethnic diversity to our board the next time we recruit. We would have to go and do all that outreach work, and the time that it would take to do that effectively is not taken into account.

We could rejig things. Our challenge was less to do with the total amount and more to do with the approach. We could centralise that and continue to use the public appointments team, which has done a brilliant job in reaching out to different parts of the community and different social and ethnic groups through various networks. If one was to leverage that and use it to support all the public bodies, the costs would not necessarily be huge, but that is not how I read the way in which the implementation will be done.

Jamie Greene: You gave a good example of the board of a small organisation that will have less funds available to do proper outreach to enable it to reach the target. You are very lucky in that there is equality on the board of Scottish Canals, but there might be other organisations with smaller boards that are quite a way off the target and will need to do a substantial amount of work to reach it. Should the Government create a central pot to assist all public boards? I am always reticent about asking for money without a purpose, but is that an idea that we could propose?

Tanya Castell: The Scottish Government's public appointments team has done some work in this area, which Changing the Chemistry has helped it with. Originally, we started working individually with public sector boards such as the

boards of Scottish Natural Heritage and Highlands and Islands Enterprise, but given that we are a voluntary organisation and all our members work in their spare time, we said that that was not practical. We went to the public appointments team, which has reached out to various ethnic minority groups and all sorts of networks to bring people in, and which has also run events.

It would be good to have a pot that the public appointments team could use in consultation with other groups such as CEMVO—the Council of Ethnic Minority Voluntary Sector Organisations—to reach out to and bring in those additional networks. The public appointments team could manage that. As a result of a conversation that Changing the Chemistry has had with the team, it now has that sussed, so it does not need us to draw in diverse candidates.

The next stage is the application process. Many applications come in from people who are not used to doing competency-based applications. There is a good reason for not using CVs, and I support the process that is used, but we have said that Changing the Chemistry probably needs to help some of the diverse candidates to do the application form. That will mean that credible candidates get through the process. We should have a central pot for that, to make sure that those diverse candidates find out about the roles, are interested in them and succeed in the process.

Jamie Greene: This is an open question. Do you find that people tend to approach boards that they are interested in, or do you come across people who think that they would like to be a non-executive director on a public board and whose names go into a central pot before an attempt is made to match them up with a board that is relevant to their interests or experience? Is the approach individualised or is there room for a much more centralised approach to recruiting people to boards in general so that the pipeline is constantly being fed and there is always a bigger pool?

Tanya Castell: It is a bit of both. It will not have occurred to some people that they are good enough to be on a board. I will generalise horrifically and say that, in general, women underplay their skills. There is quite a lot of research to show that women tend to underplay their skills, whereas men overstate them. Forgive me for saying that, but there is research to back it up. I come across a lot of people who say, “Oh, I couldn’t go on a board”. Those people really underestimate their skills and it never even occurs to them that they could be on a board. When it does occur to them, it is because they are interested in something, so it is about a particular board.

To be a really good board member—it is easy to be a member of the Scottish Canals board, because the board is inspirational—the person has to have a kind of passion and interest, and they can grow that interest. There are certain types of boards that I would probably not be very good on, but there are others that are more my thing. We can do some pooling, but the fit and what works for the individual are also important.

Jamie Greene: My final point relates to that line of questioning. James, you said in your opening statement that 36 per cent of public board members are women. Last week, we heard that the figure is now up to 45 per cent. I just wanted to set the record straight. The 36 per cent figure gets used a lot, but it is very out of date. That is not a criticism.

James Morton: I saw that figure used in the first evidence panel, and some of the women’s organisations use it, too. Thank you for that clarification.

Jamie Greene: The percentage has gone up, so it is good news.

James Morton: It is not my specialist subject.

The Convener: We heard that bang-up-to-date figure from the commissioner only last week. The percentage has gone up because of the particular measures that have been taken very recently.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning and thank you for coming to see us. I want to pick up on the remarks that Iain Smith and Rebecca Marek made in their opening salvos about the bill having unintended consequences. It is always important for a committee that is scrutinising a bill to consider any unintended consequences.

You are right to suggest that one of the unintended consequences of our drive to get 50:50 gender representation on the boards could be that we starve out diversity by exclusion and so lose out on people with other protected characteristics. The condition under section 4(4) of the bill is that the appointing person

“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”.

My reading of that section is that, if there is such a “characteristic”—that suggests a protected characteristic—the person who is appointing can use it to justify why they have chosen not to pick a female candidate in a 50:50 situation. Is that provision not strong enough?

Iain Smith: We need to go further back in the process than that. It is possible that that section could be used in that way, although it is not

specific or clear about the characteristics that might be considered.

The issue is that we need to ensure that the bill relates to the overall diversity of the board and all of us in Scotland, and not just to gender. There could be a specific gender target for appointments, but there is a need to address at the start of an appointments round whether the board is sufficiently diverse and what steps need to be taken to address the balance and any underrepresented groups within that. That includes considering the selection criteria for the appointment so that there are no barriers.

Often, appointments require the applicant to have previous governance experience or experience on a board. That immediately limits the pool to the groups that are already overrepresented on boards. There are questions about which criteria are essential things that every member of the board must have, which are things that some members of the board must have and which are things that people might be able to learn on the job. We have a tendency to look at too many things that everyone on the board must have, rather than saying that the board as a whole must have certain skills and experience. Not everyone on a board needs to have the skills—some people will be new and can learn those skills on the job. There are a range of issues that we need to consider in relation to selection criteria to ensure that we do not put people off.

10:00

There is also the issue of how to attract and identify potential candidates, which was touched on in the responses to the previous question. People find out about appointments either because they have registered on the appointed-for-scotland.org website and they get the alerts or because they see them in specifically targeted advertising. Appointments for particular boards now tend not to be generally advertised—they tend to be specifically advertised. Again, that might limit the pool of applicants. The evidence from the work that we did last year was that disabled people, for example, tend not to be aware either that public appointments exist or that they can apply for them. There is a view out there that public appointments are for the people—the white middle-class males and females—who have traditionally tended to be appointed.

There are issues about how the Scottish ministers identify the selection criteria and go about advertising and promoting the bodies, and those need to be addressed before we get anywhere near the appointment stage. That also touches on things such as accessible communications and support for people who might need help with filling in application forms. For

example, people with learning disabilities may have a lot to contribute to a board, but they may find the appointment process very daunting.

We would, therefore, like to see the bill amended to include a general requirement to look at the overall diversity of the board and not just specifically at the gender representation. In particular, we would like section 5 to be amended to cover the ways that boards try to identify and promote applications from all underrepresented groups on boards, and not just from women. At the moment, the unintended consequence of gender representation becoming a legislative requirement may be that that is all that boards will focus on. If they have a limited amount of money, which they will have, that is all that they will be able to afford to do. They will not be able to reach out to other underrepresented groups such as disabled people or black and minority ethnic candidates.

Rebecca Marek: I agree with a lot of what Iain Smith said. In our equality work, we find that, if a requirement to engage groups with protected characteristics is not explicitly laid out in legislation—and even sometimes when it is—it is often overlooked. Our opinion is that using the word “characteristic” is not strong, particular or narrow enough. I guess that a board could justify an appointment based on someone having the characteristic of having worked for the body whose board they are now applying for, or having some connections that would be useful.

The meaning of “characteristic” can be quite wide ranging, whereas “protected characteristic” narrows it down to the nine characteristics that are defined in the Equality Act 2010, ties it into legislation and opens it up for wider equality considerations. We see time and again, even with the public sector equality duty, that if that is not laid out and made explicit, it is just not done. We want section 4 of the bill to be strengthened, and perhaps tied specifically to the protected characteristics as defined in the 2010 act.

Alex Cole-Hamilton: I agree. Above that in the bill, section 4(1) says that

“The appointing person”

needs to pick the

“candidate ... best qualified for the appointment.”

That suggests to me that, if there is someone, as you described, who has worked for the body before and has relevant experience, that would qualify them in a way that others will not be qualified. I think that that is captured in that section. The fact that it mentions a

“characteristic ... particular to that candidate”

makes me wonder whether that is what the bill’s drafters are driving at.

I think it comes back to the fact that we are missing an element of the legislative process, with the intimation from the Scottish Government that there is no plan to provide statutory guidance behind the bill, so we have to interpret it solely on the letter of the law. That is a problem; we can assume or infer that the bill is talking about other protected characteristics, but unless we get that clarified, it will be misapplied by the appointing person and the board.

That brings me to my next question. Tanya Castell talked very eloquently about the demands on public boards in terms of encouraging women to apply, and they certainly exist. Aside from reporting, that is really the only duty that the bill puts on the public board, because the appointing person, as we uncovered at our previous meeting, is the minister. I think that we need that to be clarified more in the bill. However, if there is an equal duty on boards and ministers to encourage appointments of women, why are we assuming that all the costs of that should fall to the boards? Should we not make provision in the bill for ministers to find some way to generate resources to that end?

Tanya Castell: I agree that having all the costs fall on the bodies will mean that they are going to spend a lot more money. We should have something central that promotes and encourages people, continuing and probably expanding on what the public appointments team does today, supported by organisations such as Changing the Chemistry.

Changing the Chemistry has not charged for any of its work with the public appointments team. We do it because we have a group of passionate people who believe strongly in improving diversity of thought. Frankly, the money tends to be spent on booking locations and providing tea and coffee, so we are not talking about a major expense.

To my mind, if you distribute that responsibility to all the bodies, they will not necessarily have the skill sets or the time to do it. They are already trying to do a lot more with a lot less. It does not make sense to me to try to get everybody to do the same thing and replicate the work in all the different bodies. We need to have something central. In this particular case, I hope that it will be needed only in the short term because, ultimately, when we have enough people up there and there are role models, everybody will want to do it, so it should not be a long-term thing.

Iain Smith: The appointments process involves not just the minister and the public body but the sponsoring department. Within that, the sponsoring department should have a responsibility to ensure that the board has the resources that it needs to widen the applications.

For example, when we worked with the Mobility and Access Committee for Scotland, Transport Scotland funded the event that we ran to promote the appointments to disabled people in Scotland. It was not the Mobility and Access Committee for Scotland that paid for that; it was Transport Scotland, as the sponsoring department, with the support of the public appointments team in the Scottish Government. The bill should place a responsibility on the sponsoring department, and not just on the board, to ensure that there is compliance with the requirements.

Alex Cole-Hamilton: That is useful. Thank you.

My final question is for James Morton. You delineated the issue around gender definition very well. It is something that the committee has agonised over in its consideration of the bill. If we win the argument with the Government that we need statutory guidance to underpin this, will that be sufficient to deal with the issues that you have identified for non-binary people and trans people, or do we need a material change to the bill?

James Morton: It would be much better if there was a clarification, for the avoidance of doubt, in the bill. Sometimes people read statutory guidance, but sometimes they feel that they have understood things well enough after reading just the bill. Also, I do not want the definition to end up being quibbled over. It would be beneficial to have it in the bill, as that would remove the doubt, and it would have a stronger and clearer focus than if it was put into the depths of more detailed guidance.

Gail Ross (Caithness, Sutherland and Ross) (SNP): I am interested in the Changing the Chemistry submission. You laid out succinctly what you think reporting should cover and, at the end, you stated:

“One suggestion is that the number of women being appointed to chair positions”

should also be reported on. We have not touched on that in any of our evidence sessions so far. Can you expand on that a little bit?

Tanya Castell: That would need to be part of gathering information centrally, because clearly there is only one chair in each board. I do not have the latest statistics—you have much more up-to-date information. I know that the number of women chairs was hovering at around 21 or 22 per cent but that information may be a year out of date.

I know that there is a programme—because I am part of it—to mentor diverse candidates, including women, to aspire to be chairs of public sector bodies. However, that is another area where, potentially, bias can creep in around those appointments and people can be a little bit uncomfortable with a candidate who looks a bit

different from candidates they have seen in the past. It would be worth while to have greater transparency in this area so that people can see what progress is being made.

Gail Ross: How should boards, or the bodies that the boards represent, approach training? We have spoken in previous evidence sessions about it being a confidence issue for women to put themselves forward for those positions, and about explaining what a board does, what their role would be on it, how they would be fantastic and how their skills would be used. How do we go about taking the next step up to a chair position?

Tanya Castell: The mentoring programme that is under way is a good starting point in helping individuals to think about that. I meet an awful lot of women because of what Changing the Chemistry does. I meet a lot of confident women and I tend to describe it by saying that we undervalue ourselves. We do not necessarily appreciate what we have got to give.

Once individuals are on the boards, the first thing is to help them to understand the board dynamic and get comfortable in it. The second thing is particularly for people who are coming from a different background, whether that is the third sector or the private sector. My background is in the private sector, so I wanted to get comfortable with interacting with Government. How does the relationship with the board's sponsor team work? If I want to have influence and see my board do the right things, communicate properly and build the right relationships, how will that be different from what I have seen in the past?

We need to develop and do more of the training programmes in different aspects of boards—a public sector board is a different type of board—and in chairing techniques, such as how to manage a board and how the order in which questions are asked can, frankly, manipulate answers around the boardroom. We need to have such workshops to encourage and help people to realise that they are capable of doing that work.

Gail Ross: We also need to get the language correct. It is not a chairman any more; it is a chairperson.

Tanya Castell: I just say “chair”. I refer to myself as the chair.

Gail Ross: Rebecca Marek started by addressing the 60:40 or 60:20:20 aspect. How would that work and how would it help?

Rebecca Marek: When we consider the sizes of boards, we are looking at one or two people making the difference between 50 or 60 per cent and 40 per cent. I guess that that is likely to fluctuate over a period of time. Why should some

boards not have 60 per cent women, especially in sectors in which women are overrepresented? For years, boards have been 70, 80 or 90 per cent men, so I do not think that we should necessarily cap the percentage at 50 per cent for women.

We see a lot of room for loopholes in terms of feeling required to promote a woman over a black man or a disabled man and almost prioritising one characteristic over another. That is not the intention behind the bill, but it might be the result. I think that you are tiptoeing into territory in which a 50 per cent cap could unintentionally create a ceiling for women and barriers for people from more underrepresented characteristics on boards. If someone is aware that a woman has vacated a position on a 50:50 balanced board and is aware that the board will probably be keen to appoint another woman to keep the balance, we could assume that a black man would hesitate to apply for the position. If there is a lot of strong rhetoric around gender representation, another barrier might be thrown up for people from other characteristics who struggle a bit more than women with representation. That is our thinking behind the point.

Another issue that we have touched on is that the bill does not pertain to executive members. Chief executives and chief financial officers tend to be men, so a 60 per cent allowance offers the potential that the entire board, including executive members, might achieve a 50:50 balance. However, if it is capped at 50:50 for non-executive members and executive members are overwhelmingly men, that is another potential imbalance.

We find that the strict 50:50 target might create additional barriers, limit potential in some ways, or discourage groups with other characteristics. Our suggestion is 60:40 but we just wanted to highlight the issues that we see.

10:15

The Convener: For clarity, is it your perception in reading the bill that there is a 50 per cent cap or that it is a strict 50:50? The committee's interpretation is that the bill requires at least 50:50, so that there is some flexibility. If you are reading the bill in another way that the committee has not seen, we need to deal with it.

Rebecca Marek: That is the way that we read it. I apologise if we got the wrong end of the stick.

The Convener: I am not saying that the committee's way or your way is right or wrong. It is just that, if there is a different perception, the committee needs to deal with that so that we do not build in an unintentional barrier.

Rebecca Marek: That is what we perceived the bill to say. Perhaps that is another area in which statutory guidance laying out matters further would be helpful.

A 50 per cent minimum does not totally remove the concern that a minimum might mean that black or disabled men would hesitate to apply. We still have concerns, and the language of 50:50 complicates the situation.

The Convener: Jamie Greene has a supplementary question.

Jamie Greene: I will keep it quick. I will ask the question that Annie Wells might have asked had she been here.

In a recruitment process with two candidates of “equal merit”, in the words of the bill, the bill dictates that preference should be given to the female candidate to meet the quota. How would that affect a situation in which there was a female candidate and a male candidate with another protected characteristic? That would be an unusual scenario, because of the difficulty in defining “equal merit”, but I am concerned that boards might be nervous about how to deal with such situations.

Rebecca Marek: I agree that there could be some tension and confusion on boards. That is one of the reasons for arguing for a change to section 4 to define “characteristic” better and to specifically reference the protected characteristics. That would go some way to addressing the issue.

Statutory guidance could make it clear that appointments are about not just balancing boards in terms of gender but looking at other areas in which a board lacks diversity, and that it is important to bring such areas into the consideration of appointments.

It is a difficult issue and one which it might not be possible to address fully in the bill. Guidance would go some way towards addressing it, as well as defining what is meant by “characteristic”.

Tanya Castell: It would be the minister who would make the decision, as he would have both candidates on the list.

Jamie Greene: The minister would be the appointing person.

Tanya Castell: Yes.

The Convener: If it is a regulated post.

Tanya Castell: Yes. The board members of Scottish Canals are not regulated posts.

Gail Ross: What are Iain Smith’s views on the 60:40 or 60:20:20 example? How do boards go about recruiting more disabled people?

Iain Smith: How long have you got?

The Convener: On my list of what the committee has to tick off is person specifications and how we ensure that they do not have unconscious bias built in. We have been following that line of thinking for the past few weeks. It ties in nicely with Gail Ross’s question.

Iain Smith: There has to be flexibility at the margins. Section 4(4), which Alex Cole-Hamilton referred to, needs to be reworded in that respect.

A board could currently have 45 per cent white middle-class women and 55 per cent white middle-class men. The two applicants with equal merit are another white middle-class woman and a disabled, ethnic minority, gay man. The minister decides that, in order to meet the target, they have to appoint the middle-class woman. That does not do much for the diversity of the board.

The bill needs to be amended to include a requirement for an overall look at the diverse nature of the board and boards in general. There is a serious risk that person specifications simply reflect the current make-up of the board. If a board is not particularly diverse, the chances are that it will set the same person specification and end up with the same applicants. It is important that we look carefully at person specifications.

As I mentioned earlier, another issue is the need for boards to look at their overall requirements rather than necessarily looking at individual requirements. All boards require somebody who has some understanding of governance and finance, but not every person on the board needs such experience because others on the board can advise and support them and they will learn on the job.

By requiring the traditional previous experience in governance and finance, boards tend to limit the pool of applicants to those who have traditional characteristics, such as middle-class lawyer or accountant types. By definition, people who come from disadvantaged backgrounds are less likely to have built up such experience because they will have had fewer opportunities to do so. Disabled people may not have had opportunities through education, or they may face barriers in other parts of their life that mean that they have not been able to develop that experience and those skills. Boards need to include in their person specifications other ways in which people can demonstrate that they have the qualities that are needed to be a good board member, which may not necessarily be the traditional qualities that people tend to think about when they carry out tick-box exercises.

In drawing up the specification matrix that is used to analyse qualities, boards need to be more imaginative, and less emphasis needs to be placed on saying, “You need to have this particular

skill” unless the board is looking for a particular requirement for a specific job. Most boards need a better mix of skills.

There are ways of doing that. We had a look at the issue in an exercise that we did with the Mobility and Access Committee for Scotland, and we found that there were problems around defining which skills are essential and which are desirable, and which skills people might learn on the job. That aspect needs to be examined in general in looking at public appointments, in relation to not only gender representation but the representation of all diverse groups.

The Convener: I know that Changing the Chemistry has done some work on that—perhaps Tanya Castell can enlighten us.

Tanya Castell: It is not only Changing the Chemistry; the Scottish Government public appointments team has done a lot of work, too. Changing the Chemistry has worked with VisitScotland and more recently with other organisations, and they have massively softened some of their criteria. Rather than saying that applicants must have been on a board, the organisations ask whether people have worked with, supported or advised a board; there is also an emphasis on team working. The public appointments team has tried to soften the wording and provide a much wider set of examples in the general guidance that it gives out to sponsor teams.

Having said that, when I look at some of the notices that go out, I see that there are issues around selling the organisations. I looked at one—it might have been quite close to home—and thought, “Well, that really doesn’t describe the organisation, and I wouldn’t apply for that role.” There are some amazing organisations. The notices need to highlight what an organisation is about rather than just referring to governance or whatever, as Iain Smith described. I am not an ex-accountant or ex-lawyer but I am an ex-banker, so I definitely sit in the white middle class. I went to a nice university and everything else—I accept that I am not very diverse.

It is very much about making the wording softer. There is a lot of research about how notices can be worded to make them inclusive. Providing more context can often help people who are less familiar with what a role is about. It is also important to find those individuals and get the specification out to them, and to persuade them that being on a board is great fun.

Rebecca Marek: I cannot say too much about person specifications. However, on the subject of measures that can be taken to help people at the appointment stage, the “Removing Barriers: race, ethnicity and employment” report that your

predecessor committee, the Equal Opportunities Committee, published last year presented a lot of useful suggestions in relation to employment that could also apply in the situation that we are discussing.

We have found that, when there is a BME representative on the interview panel, it is much more likely that a BME person will make it through to the interview stage and will be successfully appointed. With BME groups, we are not operating on a deficit model. The groups outperform their white Scottish peers in attainment and in going on to positive destinations, so qualifications are not lacking—again, the issue is discrimination and conscious or unconscious bias. This is beyond the scope of the bill, but there is a need to examine where discrimination has an effect and what evidenced measures can counter that. I cite that report as a good resource to consider.

Gail Ross: I will touch on something really interesting that I read in your submission. It is about getting underrepresented groups on to boards when they are already underrepresented in the workplace. You have used the words “underlying racism and discrimination”. If that applies to the workplace in some instances for some protected characteristics, does it also apply to boards? Are some people with protected characteristics put off applying because they feel those underlying tensions in some way?

Rebecca Marek: Yes, definitely. One of the few sectors in which BME people hold quite high positions is the health sector. In some instances, people have faced discrimination and racism in the workplace and might hesitate to apply for a board because they think that to do so would just open the door for that to happen again. Despite their qualifications, they might question the point of applying because they do not look like the people on the board.

We worry that, if the bill’s focus remains solely on gender, those groups will feel like another barrier has been thrown up. We talk about person specifications and the qualifications that people need to be on a board and to achieve in a meritocracy. However, BME groups are underrepresented in employment and in higher-level positions. They are less likely to have the qualifications that get them through to boards, so the issue is with the entire pipeline. With the bill, we are looking at 500 to 600 positions and people who are already quite well along in their careers and have achieved a good amount. For BME groups, the problem lies much further back.

As the Equal Opportunities Committee found last year, the issue is not qualifications or merit; it is discrimination that is present in public bodies. There is a need to address that. If we find from the Scottish attitudes survey that some 20 per cent of

Scottish people still think that it is appropriate to discriminate against people, it is fair to assume that that 20 per cent exists in the workplace and, in some cases, on boards. Therefore, it is fair to assume that that discrimination is present at that level.

Does that answer your question?

Gail Ross: Yes. Are we missing a trick by making the Gender Representation on Public Boards (Scotland) Bill just about gender?

Rebecca Marek: Yes. The latest census shows that BME groups are 4 per cent of the population and we anticipate that that figure will double by the time that the next census comes around, so quotas are tough to do for race. However, there are places where the bill could be extended to cover other protected characteristics in a way that would make it clear that diversity in all its forms is valuable and that we should try to achieve it on our public boards. That is what the amendments that I proposed in our supplementary submission are about. It is not about having quotas across the board, although I understand why that is an important measure for gender; it is about having cognisance of what representation might mean for other protected characteristics.

The Convener: The only issue that we have not covered is whether there should be sanctions. We took a lot of evidence on that last week. Some of that evidence suggested that a sanction too far could have the scatter effect—that is, people would not touch the board because of the sanctions that might be involved. However, some sanctions obviously need to be put in place to ensure that there is no rollback from progress that is made. Do you have any opinion on sanctions and what they should be?

Iain Smith: I am not entirely sure what the purpose of sanctions would be. The danger of sanctions is that people might focus solely on the target of having 50 per cent-plus representation of women on boards, not consider any of the other diversity issues and ignore section 4(4), which is about the possibility of using the appointment to support the representation of other protected characteristics.

10:30

The most effective sanction is effective reporting and monitoring by the Parliament and by this committee to examine whether ministers—who are, in fact, responsible—are meeting the requirements of the bill and, I hope, the wider requirements for wider diversity of public bodies. I am not entirely sure what other sanctions there could be, because we would have to examine every appointment to find out whether in any single appointment the minister had failed to take

account of the bill. In fact, the Commissioner for Ethical Standards in Public Life in Scotland already has that power.

The Convener: He was very clear about that at last week's committee meeting.

Iain Smith: I have not read the evidence.

Alex Cole-Hamilton: This is perhaps more of a comment, but I would like to get the panel's reflections on it.

The convener raised the point about sanctions. I admit to having done a bit of a volte-face on the issue in the sense that, as my understanding of the bill has improved, so too has my view on sanctions changed. If the only duties on public authorities are to encourage female candidates to apply and to report to ministers in respect of that fresh duty, I do not see how any public authorities would fail in that duty and what sanctions could be administered. If the buck ultimately stops with the appointing person, the only person who should be sanctioned is the appointing person—if that person is the Scottish ministers, that is a whole different story. Does the panel agree?

Tanya Castell: One other aspect is that having put diverse candidates—who will almost certainly not have been on a board before—on boards, there is a need for boards to support those individuals.

I am on a range of boards. As one of the boards has become more diverse, it has caused more challenge. Research shows that meetings of more diverse boards take longer, because it is necessary to hear all the different perspectives, and there is a little bit more tension. That is good, as long as tension does not become conflict; indeed, it is the whole point of having diversity of thought. We want some of that tension but it makes the chair's job harder and there are board members who have not necessarily seen a board before.

All the boards that I am on are different and, at different times, each one of them has moments when I frankly feel like going in the corner and crying. It is really difficult and you have to be incredibly strong. Human nature is to conform; we are much more comfortable conforming and it can be painful not to conform.

There are all those different dynamics and we are bringing in people who may not be used to that environment, so another aspect—the situation has possibly evolved since Changing the Chemistry made its submission—is to think about experiences like some of the ones that I have seen in boardrooms over the past couple of years. There is an onus on the body to make sure that people who are new to the boardroom are fully supported and encouraged and to ensure that time

is taken to build the connections and relationships to make diversity—which, by definition, brings a little more tension if it is going to add value—work.

Iain Smith: I will add to that very important point. We believe that it is necessary for boards and selection panels to have proper equalities training—disability equalities training and general diversity training—to minimise unconscious bias.

Other things could be done to support new applicants. For example, somebody could be appointed well in advance of them actually taking the appointment, so that they could shadow a board in a sort of apprenticeship way for a while and get used to the procedures and understand how the board works. When they come to take power on the board, they would have a better understanding of what is going on.

Mentoring and peer support systems—and a range of other things—could be put in place to help support people from diverse backgrounds and who have less experience to become available to sit on boards. Action could also be taken to ensure that all the proceedings of a board are fully accessible, with all the documents being produced in accessible formats and so on.

We do not want to get down to the quota business, because we then end up with disabled people having a concern that they are on boards in a tokenistic way and that they are just there to make up the numbers and are treated in a tokenistic way. They have to be full participating members of the board. Those are all very important things.

Returning to the sanctions issue, if a board is failing to do these things and is failing to provide support and to encourage diversity, I suppose that the ultimate sanction is that the minister does not reappoint the chair the next time that their position comes up for renewal or, indeed, sacks the chair. That option is available to ministers.

The Convener: We are well over time. We have heard some excellent evidence and are incredibly grateful to you all for your evidence this morning and for your written evidence. If you realise once you have gone away that there is something that you should have mentioned, please let us know. There are another couple of weeks before the minister is in front of us and we get to the end of our stage 1 consideration.

10:35

Meeting continued in private until 10:51.

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