



OFFICIAL REPORT  
AITHISG OIFIGEIL

# Equalities and Human Rights Committee

Thursday 26 October 2017

Session 5



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**Thursday 26 October 2017**

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**EQUALITIES AND HUMAN RIGHTS COMMITTEE**

**24<sup>th</sup> 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:**

Angela Constance (Cabinet Secretary for Communities, Social Security and Equalities)

Eileen Flanagan (Scottish Government)

**CLERK TO THE COMMITTEE**

Claire Menzies

**LOCATION**

The Robert Burns Room (CR1)



# Scottish Parliament

## Equalities and Human Rights Committee

Thursday 26 October 2017

*[The Convener opened the meeting at 09:31]*

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

**The Convener (Christina McKelvie):** Good morning, and welcome to the 24th meeting in 2017 of the Equalities and Human Rights Committee. I make the usual request for mobile phones and electronic devices to be switched to silent. Mobile phones should be off the table, please.

Agenda item 1 is our final evidence session at stage 1 of the Gender Representation on Public Boards (Scotland) Bill. To begin with, we have with us the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance. Good morning, cabinet secretary.

**The Cabinet Secretary for Communities, Social Security and Equalities (Angela Constance):** Good morning.

**The Convener:** With the cabinet secretary are Eileen Flanagan, who is the equality policy manager at the Scottish Government; Lesley Cunningham, who is the gender equality policy officer; and Lucy Galloway, who is a solicitor. Good morning, and thank you for coming along to this final evidence session on the bill at stage 1. We are very grateful for having you here, and we are really interested to hear your thoughts.

I hope that you have followed the evidence that we have taken on the bill over the past few weeks—I expect that you have. Some very interesting threads have arisen from that evidence.

I will kick off with an opening question to allow the cabinet secretary to set the scene a bit. Some people have asked this question during the bill process. What is the purpose of the bill? What do you expect it to do in the future?

**Angela Constance:** The purpose of the bill is to redress a continuing imbalance in the representation of women on public boards in Scotland. We have made fantastic progress over recent years. If we consider the historical figures, from around 2004-05 to 2014-15, the representation of women on public sector boards in Scotland hovered in the mid-30s—between 34 and 38 per cent. Progress was quite slow. Over the past few years, we have made substantial progress, which is very much to be welcomed.

You have heard in evidence that the representation of women on public sector boards in Scotland is now in excess of 45 per cent.

I have to point out that women are not a minority—they are 51.5 per cent of the population of Scotland—so we still have progress to make. We must be aware that, although that aggregate figure of 45 per cent is a really strong, powerful story, and women are better represented on Scotland's public sector boards than ever before, that 45 per cent is not universal. Some boards are doing better than others. It is important that we dig beneath the headline figures and scrutinise where exactly we are making progress and where we need to redouble our efforts.

All the evidence shows us that improving diversity and improving the representation of women on public sector boards lead to better decision making. Fundamentally, we need to protect progress. We are not there yet, but we need to protect progress, lock in the gains and use the new equality powers that we have to maintain the momentum and to future proof that progress.

One of my favourite quotes is from Zadie Smith, who said that progress does not stand still, that we have to be proactive in protecting it, and that we have to always redouble our efforts and reimagine how we will do things to ensure that we protect and build on progress.

**The Convener:** Thank you very much, cabinet secretary. We will go through each area that has arisen over the past few weeks. Most members have issues that they have been working on. Gail Ross wants to discuss guidance.

**Gail Ross (Caithness, Sutherland and Ross) (SNP):** Good morning, panel. Thank you for coming to the meeting.

The Scottish Government has said that it does not intend to publish guidance under the bill, and the Equality and Human Rights Commission and the Commissioner for Ethical Standards in Public Life in Scotland have said that there is already a range of guidance for bodies to draw on. However, a number of witnesses have suggested that guidance will be needed and, indeed, that that will be desirable and sometimes necessary for them to move forward and ensure that they are getting it right. Why did the Government initially say that it would not publish guidance? Now that we have received evidence, will the Government change its mind on that issue?

**Angela Constance:** It is important that I clarify the Government's position. We have existing guidance, which we certainly wish to consult on and update, and there is a ream of other guidance documents from others, such as the Commissioner for Ethical Standards in Public Life in Scotland and the Equality and Human Rights

Commission. We accept that guidance is needed, and we want to update the existing guidance. I accept that guidance is important.

My understanding of the debate on the evidence that the committee has been presented with is that the question is whether that guidance should be statutory or non-statutory. At this point, our plan is to update our existing guidance and to be fully transparent and consultative in how we go about that. However, it is important to me that I have dialogue with the committee and others, because I want the bill to be the best that it can be and to be effective.

**Gail Ross:** Will the updated guidance be relevant to the bill in particular?

**Angela Constance:** Absolutely. In many cases, people are already undertaking the actions that they need to pursue to achieve the gender representation objective that is laid out in the bill. That is why there has been significant progress over the past two to three years in increasing the representation of women. The updating of the existing guidance would relate to the specifics in and around the bill.

**Alex Cole-Hamilton (Edinburgh Western) (LD):** Good morning to the cabinet secretary and the officials who have joined us. I have a range of questions, which initially pertain to the appointing person specifically. The committee understands that it is largely the Scottish ministers who would make the final appointments, but are there any circumstances in which the appointing person would not be the Scottish ministers? If there are not, should we not just define the appointing person as “the Scottish ministers” in the bill?

**Angela Constance:** We will certainly look at that issue. Eileen Flanagan will correct me if I am wrong, but 60 per cent of the appointments to the boards that come within the scope of the bill are made by the Scottish ministers. Therefore, there are other appointing persons out there in the wider public sector, but that activity is largely undertaken by the Scottish ministers, supported by civil servants. Obviously, that has advantages in respect of knowing who is doing what and scrutiny of the activity. However, we will look forward with a fair and open mind to any suggestions that members make, particularly as we move towards stage 2.

**Alex Cole-Hamilton:** We believe that the teeth and meat of the bill in respect of the balance between meritocracy and action to improve the representation of women on public boards—I do not want to say “affirmative action”—lie in section 4. Do we have that balance right? It is quite clear that the decision rests first on merit so that the role will be given to the person who is best qualified. There are contingencies, particularly in section

4(4), where the appointing person, whether that is a minister or somebody else, can make a determination to appoint somebody who is not a woman on the basis of “a characteristic”. There has been a lot of debate and evidence from people who want to see additional protected characteristics as criteria for appointment, and that might override the thrust of the bill to increase gender representation. Will you clarify what is meant by “a characteristic” in that section?

**Angela Constance:** Absolutely. However, I want to say first that the bill will mean that we continue to appoint on merit. Taking positive action and appointing on merit are not mutually exclusive—it is important that we continue to hammer home that broad message and that we are really clear about it.

Mr Cole-Hamilton is right that, with regard to what he has described as a “tie-break situation”, we are looking at sections 4(3) and 4(4) of the bill. We have to operate in the confines of our competence over equalities legislation, which has increased but is a somewhat partial legislative competence over specific areas.

More germane to the question that the member raised is that we operate in the confines of European Union legislation. We have not used the term “protected characteristic” and have used instead “a characteristic or situation”. The reason for that is that using the term “protected characteristic” would have a narrowing effect in a tie-break situation with regard to people from other backgrounds. Our language around characteristics and situations includes protected characteristics—we are required to do that under the Equality Act 2010—but it could also include, for example, socioeconomic background, whether someone is a carer or a parent, or things such as geographical location. If we had to use the phrase “protected characteristic”, that would have a narrowing effect and, crucially, that could be outwith the law.

There is not a blanket tie-break rule in the context of EU law. Tie-break rules say that, as a condition, we must have guarantees on objective assessments that take account of the specified personal situations of all candidates. The narrowing use of protected characteristics in that circumstance could take us outwith EU law and our competence. It is an area that we have looked at closely and we will continue to do that.

**Alex Cole-Hamilton:** The bill is about improving the diversity of boards and my anxiety about having the ambiguous term “characteristic” without qualification is that it would, arguably, take us in the other direction and dilute the thrust of the bill.

As you say, there could be a range of other characteristics; I accept that and there is merit in trying to reflect in the bill that that could include

socioeconomic, rurality or geographical issues. Without having that clarified in the bill or in the statutory guidance that underpins that provision, ministers 20 or 30 years from now might read that very differently and see it just as a means of appointing in the way that we have been for many decades so that we do not reflect diversity on boards. I guess that we will have to tease that out through the parliamentary process.

**Angela Constance:** I take your point about the content of guidance, although there is another point about whether there is added value from guidance being statutory, which we will continue to reflect on. The content of guidance needs to be rooted in real life and practical. The guidance needs to be a go-to guide to enable people to know what they need to do and how they should go about the mechanics of applying the law.

09:45

However, I should emphasise that, although, as a Government, we must operate within the confines of our legal competence and the law—whether that is the broader thrust of equality legislation, the Scotland Act 2016 or European Union legislation—we are clear that there is no get-out clause. I know that you have not used that language, but it is very important that we say that there is no get-out clause. Section 4(3) says that if a public authority has two equally qualified candidates, it would be the expectation that it would appoint the woman if that would help it to meet its gender representation objective, but that must be balanced against other considerations—rightly, legislation has a habit of making such provision—given that the thrust of the EU legislation is about fairness and equality.

I suggest that the bill's teeth lie in the duties to encourage applications, which is where guidance is important. Such guidance exists; people largely know what they can and should do. Given that there is a duty to report, there is a risk of reputational damage if an organisation is not making as much progress as it should be or is making decisions that are less than ideal or which do not stand up to scrutiny.

**Alex Cole-Hamilton:** That brings me neatly to my final area of questioning, which is on what you described as the teeth of the bill.

Section 5 places a duty on the appointing person and the public authority to

“take such steps as it considers appropriate”.

I have anxiety about that language, because I think that it is very subjective. Fifty years from now, a less progressive Administration might pay lip service to that requirement, and I do not think that it would stand up to any justiciable scrutiny.

Do you think that that language is strong enough? Will those provisions be worth the candle without immediate statutory guidance to underpin them?

**Angela Constance:** I want to make two points in response to that. We absolutely want to future proof and lock in the progress that we have made. Notwithstanding our on-going deliberations about the nature of guidance and whether it should have a legal basis, I accept the point that the guidance needs to be rooted in the practicalities of life.

There is a balance to be struck. I am conscious that different boards face different circumstances and different challenges in meeting their obligations. We want to be crystal clear about what people can and should do, because the evidence is there. I do not want to be crude, but how we improve diversity on boards is not rocket science. There is a substantial body of evidence on what needs to be done and what works. That does not mean that more progress does not need to be made, that more research does not need to be done or that more evidence does not need to be gathered on specific challenges.

I am concerned that we do not have a one-size-fits-all approach and that it does not become a tick-box exercise, but we are more than happy to discuss with the committee and with MSPs how we get the balance right. There is a danger of being overprescriptive, but we do not want there to be a lack of clarity. We know what works—we know what people have to do to reach in to different communities. We know that people need to think imaginatively about how they recruit and not just rely on the same old advert in the same newspaper.

We know because of how boards interview how they look at applications and they should not make the same old assumptions about the skills, attributes and knowledge that they think they need. The committee's evidence contains someone talking about the importance of people with lived experience being represented on boards. We know that application processes need to be simplified and that the language used needs to be inclusive. We know that people have to have a clear view of the competencies that are required and to be thinking outwith the box about the knowledge, skills and attributes that will meet those requirements.

We know what works, but there is further research on things that we need to bore into. Why do we not get many applications from people under 50, for example? We suspect that it is because of the demands of working life and people being parents. We need to do other things but, by and large, we know what works. The bill is about making sure that people do that.

**Alex Cole-Hamilton:** Accountability is included in the bill in respect of the reporting duty, but there is no sanction for public authorities or the appointed person should they fall foul of their obligations under section 4 or section 5. Do we need sanctions? What would they look like?

**Angela Constance:** I refer to my earlier remarks about reputational damage and the duty to report. An organisation or public body that has a lack of women in leadership roles runs the risk of reputational damage, and that can be particularly powerful.

Sanctions is an interesting issue. I have listened to a lot of the evidence in which it has been explored. There has been a lot of rumination, but I have not heard any specific examples of a sanction and how it would operate. We will continue to listen with an open mind.

My expectation and anticipation is that public authorities will meet their obligations, especially given that 60 per cent of the boards are also subject to ministerial appointments. I note that some voices in the university sector have a different view from mine of whether they should be subject to the bill and whether they should be listed as a public authority; if I am asked about that, I will answer that specific question. If the bill is passed, I have no doubt that the university sector will meet its obligations.

The reporting requirements in regulations and the transparency around them are powerful and the risk of reputational damage is significant for any public sector organisation if it is not operating within the law.

I am conscious—this will be my final point, convener—that the EHRC is quite cautious about a sanctions regime. I hope that I am not putting words in the EHRC's mouth, but it spoke about how a sanctions regime could push appointing persons and public sector organisations into taking more unlawful positive actions.

**The Convener:** I have a quick supplementary on sanctions. Last week, I was at the Council of Europe committees in Strasbourg, where there was a debate on women's representation in public and political life. It was interesting to hear from different parts of Europe about the methods that they use, and some use sanctions or financial penalties. The ones that seemed to be making the most progress, however, were those that offered an accreditation system in which companies were praised and accredited and value was attached to the process. It seemed that the balance was more towards credits than sanctions in successful methods. Do you have an opinion on that?

**Angela Constance:** Instinctively, my opinion is that in many walks of life, positive reinforcement and encouragement—incentivising people to

behave positively—tends to be more effective than an area that is quite hard to define and could be less effective. We will certainly have a close look at the evidence from across Europe that the convener has pointed to, which sounds very interesting.

**The Convener:** You mentioned the main driver being reputational damage. How would that be reported? Would there be an annual report to the Parliament, for instance, in which some of the commissioners might report a list of things that people have not done? Audit Scotland does that. Is that something that might be attractive to Government in order to put on record whether a board is not performing?

**Angela Constance:** Transparency and the reporting duties are imperative. Therefore, the regulations that will be introduced for reporting will be crucially important. We are giving them close consideration.

Transparency is absolutely crucial. We are talking about public sector organisations and all their dealings have to be transparent. Transparency drives performance. People in the public sector guard their reputations closely and carefully. We are very fortunate in Scotland to punch above our weight in terms of world-class higher education institutions, and the reputation of our world-class universities is very important to them.

We will obviously have to consult on the regulations, so it is a bit of a two-way street, but we have had some initial thoughts about their scope and shape and I will ask Eileen Flanagan to say a bit about what we envision. We are considering the reporting cycle and whether we should tie it into the public sector equality duty reporting cycle. We do not want to overburden people, but the duty to report on progress and performance and the need for transparency is absolutely crucial.

**Eileen Flanagan (Scottish Government):** As the cabinet secretary said, we have been very mindful that we do not want to put an additional bureaucratic burden on boards in relation to how they tell us about their movement towards having membership of at least 50 per cent women. We are also mindful that a majority of the boards fit within the public sector equality duty that is specific to Scotland. That already involves reporting on their work around equality, so putting the reporting together is a logical way forward.

The suggestion to use the mainstream reporting cycle as a way for boards to tell us about their progress came out of the consultation on the draft bill. That is a two-yearly cycle and the first reporting opportunity would be 2019. The deadline that we have set for the achievement of board



membership of 50 per cent women is 2022, so the boards would be reporting on that in the next again cycle. There is a lot of time for boards to meet the requirement and tell us about it in their mainstream report.

There is a small cohort of boards that are not within that reporting regime and we will be looking at how, proportionately, those boards can tell us about their progress. There is a lot of work to be done with the boards in a consultative way to make sure that the reporting works and is not only proportionate, but transparent, as the cabinet secretary said, so that people can see that progress is being made. Also, the Commissioner for Ethical Standards in Public Life in Scotland's annual report tells us about what is happening in the ministerially appointed boards in Scotland, so there is that extra level of scrutiny.

We are mindful that we will need a system that gives the transparency that the cabinet secretary has mentioned. It also needs to work, and be proportionate, within the board's structure for reporting.

We are also mindful that organisations are already working on succession planning as a way forward to strengthen their board in terms of equality and the skills that they need. If the bill is passed, we will definitely work with all the relevant people to have a reporting structure that works and lets us know where we are and whether we have achieved the bill's objective.

10:00

**The Convener:** On that point, section 11(3) says:

"Regulations under sections 7 and 8 are subject to the negative procedure."

Would there be scope to change that to the affirmative procedure?

**Angela Constance:** Our position remains that a negative instrument will be proportionate. Although what we will be looking at is largely important, it is the power to make technical changes. However, we will have an open mind and open ears for the views and feelings of the committee and Parliament on those things.

**The Convener:** The Delegated Powers and Law Reform Committee has made that recommendation, so you are mindful of that.

**Angela Constance:** Yes.

**The Convener:** Thank you very much. For the record, we have now received apologies from David Torrance and Jamie Greene.

**Mary Fee (West Scotland) (Lab):** Good morning, cabinet secretary. I want to explore a couple of areas with you. The first is the definition

of gender in the bill. The definition is non-binary, and we have heard concerns in the evidence from the Scottish trans alliance that the bill, I suppose inadvertently, may not include trans women. The alliance has suggested a small change to include a definition of "women" that would be inclusive of trans women. Have you considered that suggestion? Would you be open to doing something to protect trans women?

**Angela Constance:** We are considering the suggestion, and we are certainly open to making improvements to how the bill is drafted. We made earlier improvements that enabled us to address the issue of people who are non-binary; a reason why we moved away from a gender representation objective of 50 per cent women and 50 per cent men was that there were some legal issues around it and it excluded non-binary people. Having a gender representation objective only about women is inclusive of people who are non-binary.

On trans women, when we use the term "women", we want that to include all persons who self-identify as women, irrespective of the sex that they were assigned at birth and, crucially, irrespective of whether they have a gender recognition certificate. We are exploring the matter within our legislative competence. The Scotland Act 2016 amends reservations under the original Scotland Act 1998. As I said earlier, the inroads that we have made into equalities legislative competence have been partial. There are some wrinkles that we need to try to iron out. However, our intention is to resolve that issue.

We are looking closely at the suggestion from the Scottish trans alliance and we want the matter to be sorted for the bill. If for some reason we cannot do that, we have a consultation around our plans for a gender recognition act. We are working hard to address the matter and we are working through a number of legal issues. We will keep the committee fully informed.

**Mary Fee:** That is helpful. The Scottish trans alliance's biggest concern is the potential for the bill to be misinterpreted. Including trans women in the definition takes a belt-and-braces approach, leaving in absolutely no doubt what we mean when we say "women". The cabinet secretary's words are very welcome.

On the financial implications of the bill, the financial memorandum says that there are "minimal costs" attached the bill. Although some of our witnesses have agreed with that, others have said that there is the potential for cost to be attached. Changing the Chemistry has said that the Scottish Government has underestimated the cost of finding diverse candidates. Inclusion Scotland and the EHRC have also raised concerns. What is your view on that?

Although the majority of boards are moving in the right direction, some boards are still finding it difficult to find that broad range of candidates and there may be a cost attached to trying to identify more candidates. There could be a cost for training the whole board after a more diverse membership is achieved. If there are more women on boards, there could also be an additional cost for boards in relation to childcare. What are your thoughts on perhaps reviewing the financial memorandum or looking at costs as the legislation progresses?

**Angela Constance:** On the point that different boards, depending on where they are in the journey, may well have to incur different costs, I would suggest that the financial memorandum is generous, given that the vast majority of boards are already on this journey. If you look at the margin, the financial memorandum goes from a minimum to a maximum cost. It has that flexibility and already covers a range of potential situations. From memory, the lower end of the scale of the costs set out in the financial memorandum was around £30,000 and the upper end of the scale goes up to around £250,000. That is a big scale. My view is that the financial memorandum is ample and generous.

I have looked at the four submissions that went to the Finance and Constitution Committee, and my reading of them is that only one organisation took a bit more exception to the financial memorandum. I say honestly to the committee that I think that the financial memorandum is fine and that my focus will be on other aspects of the bill.

**Mary Fee:** Okay. Thank you very much.

**Angela Constance:** Oh—forgive me. I should also say that childcare was indeed factored into the costs in the financial memorandum.

**The Convener:** That is a good point.

**Annie Wells (Glasgow) (Con):** I have one point so I will not take as long as others. It is about sections 5 and 6, on positive action. In section 5, we have the phrase

“take such steps as it considers appropriate”.

A lot of the witnesses said that what might be considered appropriate is quite subjective and could be different for everyone. They asked whether there was any other way of describing that.

**Angela Constance:** I suppose that this picks up on the points that Mr Cole-Hamilton raised and my response to him. We want to avoid some sort of list or tick-box exercise or a one-size-fits-all approach. The public sector landscape in Scotland is quite diverse; it is quite complex in terms of the nature of the boards and how they are configured. However, we are open to suggestions.

We know what has worked, and I gave quite a full answer on the evidence and what we know, and what those steps could and should be. I do not want to repeat that—I want to avoid incurring the wrath of the convener—but there may be ways in which we could explore a non-exhaustive list within the bill. We have had to do similar things in other legislation that is going through Parliament. In the case of the Child Poverty (Scotland) Bill, we had a debate with the Social Security Committee on what needed to be in the bill in terms of what was covered in the delivery plan. I am happy to have that discussion.

**Alex Cole-Hamilton:** We would welcome a non-exhaustive list. With no malice, some people might just not be entirely sure how they are to discharge their duties under the bill. We need to have a discussion at the margins about what that might look like—I am not entirely sure about that. What you say is interesting. Childcare is important but we also need to consider the structure of board meetings. Many boards meet in the evenings, which people with parenting responsibilities sometimes find prohibitive. Culturally, that still acts as a barrier to women, even though we would rather have a more egalitarian style of co-parenting. That is more of a comment than a question.

Have the bill team or other officials hypothesised what

“such steps as”

an authority

“considers appropriate”

might look like when it comes to drafting guidance and giving support?

**Angela Constance:** That is where we really have to get the balance right. If we have a list of steps—even a non-exhaustive one—that could be taken, the danger is that people will take out a pen and tick things off. However, those steps may or may not be appropriate to a particular board in a particular location and a particular service area.

Although I absolutely get the point about board meetings in the evenings—or, indeed, board meetings during the day, when many of the under-50s are at work—we do not necessarily want to specify to every board in the country when it has its meetings. Therefore, we need to proceed carefully with determining the level of detail. However, I am open to having that discussion, bearing in mind the extensive work that Scottish Government officials and ministers have done over the past few years and the evidence that exists throughout Europe on what works.

There is a good, solid, international evidence base and, as I said, good, solid evidence about what works in relation to application and

recruitment processes, interviews, meetings and how we upskill people. We need to be able to articulate that. Perhaps it is more about guiding principles. Sometimes, it is better to have some principles or a framework in a bill and the detail in the guidance.

**Alex Cole-Hamilton:** In my days as a voluntary sector lobbyist, you and I worked together on the design of guidance under other pieces of legislation. There are mechanisms for giving narratives and examples of what something might look like that do not form a non-exhaustive list and which could, in the fullness of time, become an exhaustive list. It would be possible to give examples of board set-ups and steps that boards have taken to enable the cross-fertilisation of best practice. That also applies to the duty under section 7 to report to the Government on the operation of the bill. Such reports should be about not only how many women a board has appointed but what steps it has taken to make that possible. That would allow other boards to pick up on those steps.

**Angela Constance:** Giving examples and the dissemination of good practice are the purpose of guidance. We will want there to be a link between the bill and the guidance. We will consider a form of words, as I am sure members will. I am conscious that individual MSPs are legislators and will formulate their own ideas and amendments.

**Gail Ross:** In one of our evidence sessions, there was a reference to the golden skirts phenomenon, but Women 50:50 said that that issue is exaggerated and pointed out that only 15 per cent of women on boards hold more than one position and that the figure is 10 per cent for men. I just want to mention that three very high-profile boards in Scotland are currently chaired by the same male, although I have absolutely no doubt that he is there on merit. What do we do not just to encourage women from different backgrounds to go on boards but to encourage them into office-bearing positions once they are there?

10:15

**Angela Constance:** There is absolutely a broader point that we do not want the same small group of people circulating around the many public boards in Scotland. A lot of the work that we have commenced on improving representation and diversity across the piece is about expanding the pool of talent. One way to do that is to take proactive action to reach out to different communities. I am conscious that, as women make up 51.5 per cent of the population, it goes without saying that we are not a homogeneous group, and neither are men. We need to always try to expand the pool of people who serve on public sector boards.

As part of the public appointments improvement programme, there have been specific initiatives on role models and outreach. It is about working with chairs on the pipeline of talent and on things such as succession planning. There are various mentoring schemes and toolkits. Some of that work is focused on particular groups, such as black and minority ethnic communities, disabled people and folk who are under 50.

Addressing the underrepresentation of women also results in gains for other groups. We do not want to pitch one group of people against another. I say with gentleness and kindness—although I certainly do not want this to be understated—that I believe that, if we can get it right for women, that will help us to get it right for other groups. There are positive gains for other people when we get equality in the representation of women.

Should we always, forever and a day, look at the issues of women and gender through the lens of sorting out other issues? We have the situation in which more than 70 per cent of the positions of power across Scotland are occupied by men but, when we are recruiting men, we do not wonder how we can improve the representation of people with disabilities or people from BME communities. There is a danger that we always look at the issues to do with women through the lens of how to tackle all those other issues. However, I stress that, when we get it right for women, we will get it right for other groups as well. I think that it was Ban Ki-moon who used to talk about equality and progress for women actually being progress for everyone.

**The Convener:** In a previous evidence session, we discussed whether, if in a tie-break situation a disabled man lost out to an able-bodied woman, that would be a dangerous line to take. We heard about the situation in which someone with another protected characteristic who is male loses out to a woman just because she is a woman.

**Angela Constance:** Those are complex situations. As I said, the law is finely balanced. The action that we have taken to improve the representation of women on public boards will broadly benefit other groups of people. We need to avoid getting into a situation of pitching women against BME communities or people with disabilities.

I absolutely accept that, as well as an underrepresentation of women on boards, there is an underrepresentation of people with disabilities, people from the BME community and people under 50, which will require specific action. I sit in front of you today to talk about a specific bill that is focused on gender equality, and I make no apologies for that, but I am conscious that I am the equalities secretary and there is nothing in the bill that prohibits work in other areas. We have the

race equality framework and we will be bringing forward the race equality action plan. There are specific actions in the work that the Minister for Social Security has done on the disability action plan on outreach work to increase the representation of people with disabilities on public boards. Their representation has increased over the past 10 to 15 years, but they are still underrepresented. The more recent figures actually show a decrease. We have an obligation and a duty there, too.

**Gail Ross:** That takes me neatly on to what I wanted to ask about. Section 1.1 says:

“The ‘gender representation objective’ for a public board is that it has 50% of non-executive members who are women.”

In its written evidence, the Equality and Human Rights Commission said that changing the target to 40 per cent would make the provisions much more flexible. Do you have an opinion on that?

**Angela Constance:** I suppose that I should have declared an interest at the start of the session: I am a signed-up member of the Women 50:50 campaign. Women make up 51.5 per cent of the population. The voluntary measures that many boards have taken to increase the representation of women to about 40 per cent have been effective. The bill is rightly focused on non-executive members, as that is where we can act. I am conscious that, given the complexity of the public sector landscape, there are people who sit on boards because they are elected to those positions or because they are *ex officio*. The bill does not address the representation of women in *ex officio* positions, nor indeed their representation among elected members. The bill is one measure, but there are broader issues that need to be tackled in and around gender inequality and other inequalities in society; we do not demur from that.

The bill is focused. It takes targeted action in response to our new powers, and I would argue that that is decisive action to lock in the gains that we have made and to build that momentum. However, there are other issues that we have to tackle and wrestle with as a Government and as a society. Why are only 29 per cent of elected members on councils women? There are 100 wards in Scotland where no women have been elected.

Thirty-five per cent of MSPs are women. That is a salutary lesson. The Parliament started off with nearly 40 per cent women MSPs, and the proportion has gone down. It is a stalemate between the last election—the 2016 election—and the previous one. That is one of the biggest lessons on why we need to guard against complacency. I am very proud of the fact that more than 45 per cent of the non-executive members of our public sector boards are women.

However, if we consider the history of the Scottish Parliament, we realise that we need to guard against complacency. We need to lock in the progress that has been made and build on it.

**Mary Fee:** I take you back to your earlier point about universities. Universities Scotland is supportive of the bill. You will be aware that it does not think that the bill should apply to universities, because they are autonomous, non-profit institutions. How will you ensure that they abide by the legislation and that they make changes to their board structures?

**Angela Constance:** It is very clear that universities are considered to be public authorities under equality legislation. They are listed public authorities under schedule 19 to the Equality Act 2010, and it would be utterly inconsistent if they were not considered to be public authorities for the purpose of the bill given that they are considered to be public authorities for other equality legislation. By the by, they are also listed as public authorities under freedom of information legislation. As a former education secretary, I understand that universities are autonomous, unique and a special, not-for-profit sector. However, like the rest of us, they are accountable and, like other public sector boards, for the purposes of equality legislation and the bill, they are considered to be public authorities.

**Mary Fee:** Will you take any specific measures in relation to the sector to ensure that universities comply, given the stance that they have taken?

**Angela Constance:** I read with interest the evidence that was given by the University and College Union and by Mary Senior in particular. However, although I have strong views about the views that have been expressed by some in the university sector, I do not for one minute envisage the university sector not complying with the law.

**Mary Fee:** That is helpful. Thank you.

**Alex Cole-Hamilton:** That has sparked a question in my mind about the duties of the appointing person and the public authority. It is clear from your earlier answers who we mean by an appointing person, but who in the public authority will discharge the duty to take the steps that the appointing person deems necessary to encourage applications by women? Will that be done by the people who have the executive function in the organisation—the chief executive or the paid members of staff—or by the existing board? To whom does the duty apply, and do we need to specify that more clearly in the bill?

**Angela Constance:** That is a good question, as the person will vary depending on the board. As I indicated, 60 per cent of the boards are subject to ministerial appointments and, ultimately, ministers have a responsibility. Many of the duties that

underpin ministerial responsibilities are fulfilled by civil servants, and we are subject to the full glare of scrutiny by committees and the Parliament as well as by wider civic society.

Eileen Flanagan may be able to give examples of who the appointing persons will be in other boards. The landscape is complex and variable.

**Eileen Flanagan:** The other main cohort is universities, whose appointment process has absolutely no connection to ministers. They have a code of governance for their process that mirrors quite closely the code of the Commissioner for Ethical Standards in Public Life in Scotland, which is about good practice in how they conduct their rounds. In colleges, a few appointments are made by ministers, but the majority are made independently, and colleges follow a code of governance that sets out how they should do that. There is a lot of information in there about good practice.

Recently, colleagues in our public appointments team have been transforming their process by using the good practice—the cabinet secretary talked about sharing good practice and what works—that is in the college and university sectors. People are looking at ways to learn from our recent experience.

That is the biggest group outwith the ministerially appointed boards. I may be wrong, but I think that schedule 1 lists lots of individual examples of boards where posts may be partly ministerially appointed and partly appointed by other authorities. It gets very bitty. If the committee is interested, we could list those bodies, but the main cohort outwith ministerial appointments involves universities and colleges.

10:30

**Alex Cole-Hamilton:** I suggest that schedule 1 needs a third column—in addition to “Authority” and “Excluded position”—that defines who the appointing person is for each authority. If the appointments in question are not 100 per cent ministerial appointments, we need to clarify that in schedule 1.

The second part of my question was about the duty on public authorities. I want the people who will apply the legislation to be clear about with whom the buck stops, so that we do not have people saying, “I wasn’t clear about who in our organisation was responsible for taking such steps as they deem necessary.” The landscape is complex, and duties and responsibilities differ between authorities, but we need to be a bit clearer about who will ultimately be responsible under the legislation for the recruitment process. Will that be the chief executive or the paid members of staff?

**Angela Constance:** Although individuals who work in particular organisations will have responsibilities as employees—I am thinking in particular about those who work in human resources departments—and they will be expected to work in accordance with best practice and the best available advice and evidence, boards as a whole and chief officers will have a corporate responsibility and a leadership role. If there are ways in which we can flesh that out a bit better, we will endeavour to do that. We are in the business of being crystal clear where possible.

**Eileen Flanagan:** The number of appointments that are not to colleges or universities and are not ministerial appointments is very small. We are not talking about a lot of boards that come outwith those bigger groups.

**Alex Cole-Hamilton:** For all public authorities across the piece, we need to be clear from the authority’s side about who in the organisation should be taking the steps, or at least to delineate that it is not the responsibility of just the current board chair to work to make the appointments happen; it is also the responsibility of the chief officer, the HR department or whoever.

**Angela Constance:** This does not all rest on the HR department’s shoulders. The point about senior leadership, whether that is from Government ministers, senior civil servants or those in the wider public sector, is well made.

**The Convener:** Can I shift you away from universities, which think that they should not be part of the bill, to the evidence that we heard about a group of individuals who think that their organisations—integration joint boards—should be part of it? We heard from Fiona Moss of Glasgow City integration joint board, who was concerned that IJBs have not been included. That may be because they are not listed in schedule 1. Can we remedy that and make sure that they are listed in that schedule, given their size and function and the huge amount of public money that they are responsible for?

**Angela Constance:** I was really interested in Fiona Moss’s evidence; I am not unsympathetic to it. The issue is about the how. There are complexities around integration joint boards and the solution as to how we could include them in the bill is not obvious.

The difficulty is that some members of integration joint boards are specified in law—such as doctors, nurses and chief social work officers—and they are employees, while other members are nominated from local authorities, and they are elected members. The bill is about non-executive directors so, as it stands, it does not cover people who are employees or elected. I am afraid that that is the knotty issue, although I noticed that

Glasgow City integration joint board is gender balanced.

**The Convener:** I noticed that some organisations seem to be really keen to be part of the bill and have demonstrated that clearly. If we can work through a remedy for that, that would be helpful. I do not think that we would be unresponsive to some pressure being put on elected members to recognise the need for gender balance when they make appointments to boards, because in some cases that does not happen.

**Angela Constance:** The integration joint board issue takes us into equality in the law and in practice in relation to employment and, indeed, into who is and is not elected in Scotland.

**The Convener:** We need to take baby steps first.

Have we covered everything that we need to? The clerk has reminded me that only one in four board chairs in Scotland are women. How do we improve that? When responding to some of my colleagues, the cabinet secretary touched on chairs and mentioned the pipeline. In some cases, it is a leaky pipeline, with women getting so far and then dropping off for all sorts of reasons.

I have heard anecdotal evidence about a woman who got to a chair position only to be told that it would be ensured that she would be there for only a year. She was not given the normal contractual period, which was four years—there was a routine of one year, two years and one year.

How do we fix that? How do we ensure that more women are encouraged to go for chair positions and that such barriers are taken away, to allow women to progress?

**Angela Constance:** We have been working hard on the issue of chairs for a few years. We have made good progress on the representation of women as non-executive members and, of course, chairs are non-executive members, so having more women on boards will give us a bit of a springboard to address further the issue of who chairs them.

The question is similar to the broader issue of women in leadership positions. Women are missing from and underrepresented in positions of leadership—in this instance, as chairs of boards. The improvement programme is focused on working with existing chairs on succession planning. It is about reaching into communities and looking at the talent pipeline—there are specific actions and activities. I can drop the committee a fuller note of what we are doing to improve the representation of women as chairs on public sector boards; there is a concerted effort on that.

**The Convener:** That would be helpful.

I think that that exhausts all our topics. We are grateful to the cabinet secretary and her officials for coming to the meeting. We will now get on with drafting our stage 1 report and no doubt we will hear back from you, and you from us, in due course.

**Angela Constance:** Thank you, convener. I look forward to receiving your report.

10:38

*Meeting continued in private until 11:03.*

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