

This document relates to the Gender Representation on Public Boards (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 15 June 2017

Gender Representation on Public Boards (Scotland) Bill

Policy memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Gender Representation on Public Boards (Scotland) Bill introduced in the Scottish Parliament on 15 June 2017.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 16–EN);
- a Financial Memorandum (SP Bill 16–FM);
- Statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Communities, Social Security and Equalities (Angela Constance MSP) (SP Bill 16–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy background

The Scotland Act 2016

4. The Bill has been made possible by the Scotland Act 2016 which transfers competence to the Scottish Parliament to legislate on:

“Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions”.

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5. The Scotland Act 2016 transfers competence by creating a new exception in Schedule 5 of the Scotland Act 1998. Under the Scotland Act 1998 equal opportunities are reserved to the UK Government unless an exception applies.

6. In line with the transfer of competence to the Scottish Parliament through the Scotland Act 2016, the Bill:

- extends to certain public sector bodies, colleges and Higher Education Institutions (HEIs) in Scotland which meet the definition of “Scottish public authorities with mixed functions or no reserved functions”;
- does not extend to voluntary organisations or private companies as these do not meet the definition of “Scottish public authorities with mixed functions or no reserved functions” and the Scottish Parliament does not therefore have competence to legislate for equal opportunities in relation to the members of voluntary or company boards;
- extends to non-executive members on the boards of Scottish public authorities, but not to executive members.

Women’s representation

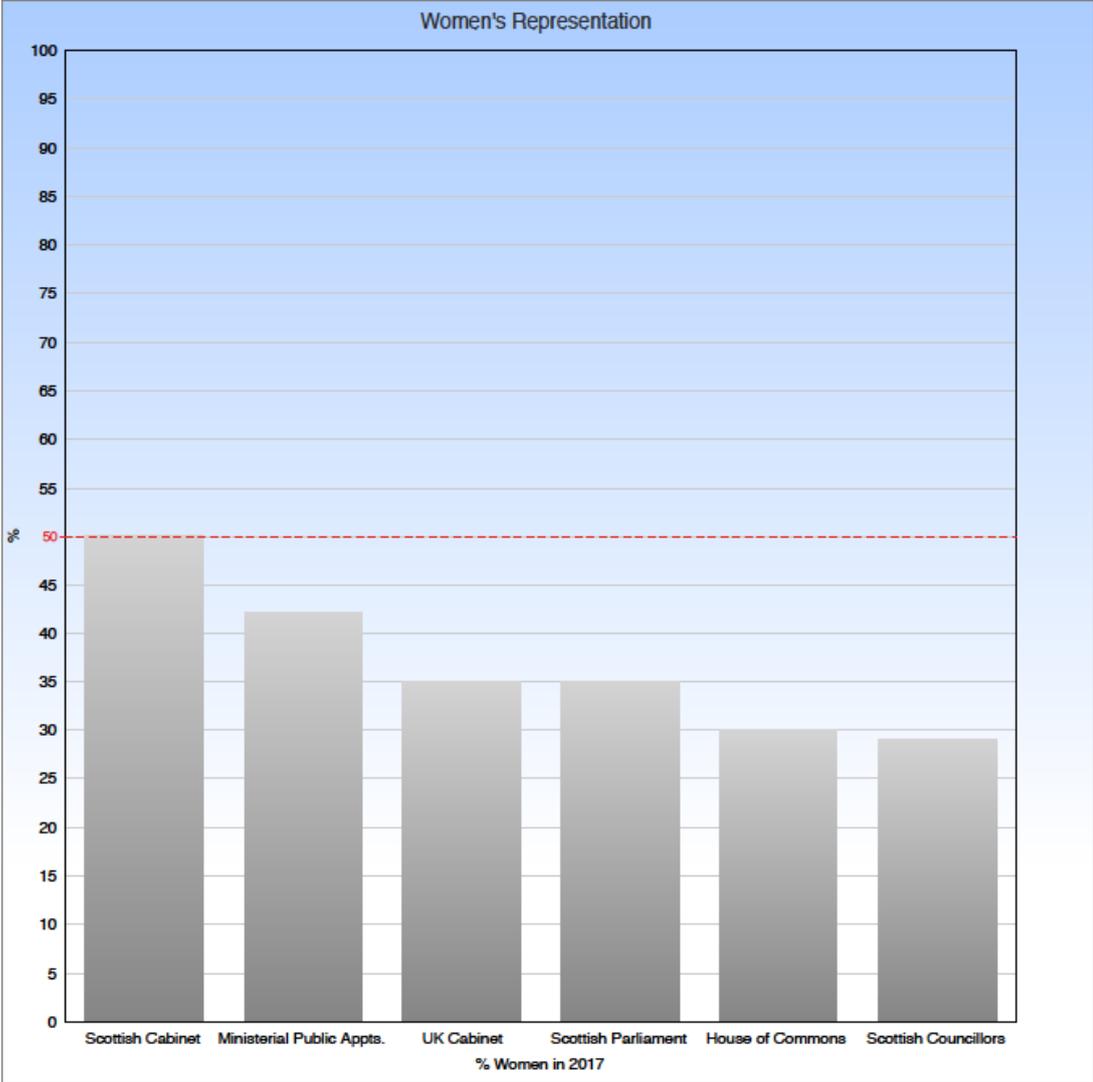
7. The Scottish Government is committed to improving the representation of women at senior and decision making levels as part of an overarching commitment to women’s equality. The Bill is a key legislative commitment in the Scottish Government’s 2016-17 Programme for Government: [A Plan for Scotland](#)¹.

8. The Scottish Government’s decision to bring forward legislation to address women’s representation on public boards was made within the wider context of the persistent under-representation of women across decision making structures. The most recent census showed that women made up 51.5% of Scotland’s population in 2011. And yet, women remain under-represented on public and private sector boards and across political

¹ ‘A Plan for Scotland: The Scottish Government’s Programme for Scotland 2016-17’, 6 September 2016, <http://www.gov.scot/Publications/2016/09/2860> [accessed 6 June 2017]

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institutions, including both the Scottish Parliament and the House of Commons.



9. The Scottish Government believes that the current under-representation of women in decision making positions should not be accepted in 2017 and decisive action is needed to redress the imbalance.

10. In relation to ministerial public appointments specifically, significant positive progress has been achieved through the concerted use of existing voluntary mechanisms. In 2015, for the first time, the Scottish Ministers

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appointed more women than men to regulated public boards² in Scotland, helping to bring the overall percentage of women to an historic high of 42% in December 2015. The proportion of female applicants and appointments continued to increase: in 2016, 43% of applicants and 59% of those appointed were women, an increase of 12 and 20 percentage points, respectively, from 2012, and a jump of 5% in female appointees in a single year.

11. But the Scottish Government will not rest on its laurels. The decisions made by the bodies covered by the Bill have an impact on all aspects of people's lives in Scotland, including the delivery of key public services and further and higher education. Women's voices must be part of these decisions. Not only is this fundamental to equality and social justice, but there is a strong economic imperative for diverse boards too.

The business case for diverse boards

12. Evidence indicates that diversity in the boardroom helps organisations to perform better, because:

- the organisation is recruiting from the widest possible talent pool;
- there is greater understanding of customer, stakeholder and workforce requirements;
- the board benefits from diverse perspectives;
- the board exercises more balanced decision making and better risk management;
- it contributes to improved organisational reputation.

13. Some of the supporting evidence for diverse boards is as follows:

- **recent IMF research**³ looked at 2 million firms in 34 countries in Europe, and found strong evidence that companies with a higher proportion of women on the board, tended to be more profitable;

² Public appointments made under a system regulated and monitored by the Commissioner for Ethical Standards in Public Life in Scotland.

³ 'Unlocking Female Employment Potential in Europe: Drivers and Benefits', Lone Christiansen, Huidan Lin, Joana

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- a 2007 **McKinsey & Company report “Women Matter”**⁴ also found strong evidence that companies with a strong female representation at board and top management level perform better than those without, and that gender-diverse boards have a positive impact on performance;
- a report published by the **Chartered Management Institute** called “A Moral DNA”⁵ linked greater diversity at senior management levels to happier and more engaged employees and a more ethical and value based culture;
- a 2015 report published by **Grant Thornton**⁶ showed that listed companies in the UK, US and India with at least one woman on their board outperformed companies with all-male boards by £430bn in 2014;
- **Catalyst** (2004)⁷ when assessing Fortune 500 companies found that those in the top quartile for the number of women in senior

Pereira, Petia Topalova, and Rima Turk under the guidance of Petya Koeva Brooks, International Monetary Fund (2016), <http://www.imf.org/external/pubs/ft/dp/2016/eur1601.pdf> [accessed 12 June 2017]

4 ‘Women Matter: Gender diversity, a corporate performance driver’, McKinsey & Company, 2007, <http://www.mckinsey.com/global-themes/women-matter> [accessed 12 June 2017]

5 ‘The MoralDNA of Performance: Better values, better decisions, better outcomes’, Professor Roger teare, Pavlos Stamboulides, Peter Neville Lewis, Lysbeth Plas, Petra Wilton and Patrick Woodman, Chartered Management Institute (October 2014), <http://www.managers.org.uk/~media/Angela-Media-Library/pdfs/Research/The%20MoralDNA%20of%20Performance%20-%20October%202014.pdf>

6 ‘Women in business: the value of diversity’, Grant Thornton, 2015, <http://www.grantthornton.co.uk/news-centre/diverse-boards-in-the-uk-india-and-us-outperform-male-only-peers-by-uk430bn-us655bn/> [accessed 12 June 2017]

7 ‘The Bottom Line: Connecting Corporate Performance and Gender Diversity’, Catalyst, 2004, http://www.catalyst.org/system/files/The_Bottom_Line_Connecting_Corporate_Performance_and_Gender_Diversity.pdf [accessed 12 June 2017]

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management roles had an 18% return on equity and 128% return to shareholders compared to 13% and 95% respectively for companies in the bottom quartile for the number of women in senior management role.

International Human Rights and Treaty Obligations

14. In addition to the moral and economic imperative for increasing women's representation on Scotland's public boards, taking action is also crucial to upholding women's human rights. The Scottish Government is committed to protecting, respecting and realising human rights and takes its international human rights and treaty obligations seriously. Taking action to ensure that women are properly represented on public boards is imperative to meeting these obligations.

Convention on the Elimination of All Forms of Discrimination Against Women

15. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a core UN Treaty, often referred to as a "bill of rights" for women due to its comprehensive coverage of women's equality. The UK ratified CEDAW in 1986 and like other States that are party to the Convention must submit 'periodic' reports to the UN Committee on CEDAW every 4 years. These reports detail the legislative and other measures which have been taken by the member state to implement the Convention.

16. Article 7 of CEDAW requires that State Parties "shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publically elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country".

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17. The UK submitted its 7th Periodic Report⁸ to the UN Committee in 2011, which was followed by an oral examination of the UK by the Committee in Geneva in July 2013. In its Concluding Observations and Recommendations, published on 30 July 2013 following the UK's oral examination, the Committee noted the increase in the representation of women in the public sector, but stated, it is:

“concerned that women continue to be significantly under-represented in some fields, including in Parliament, in the judiciary and on public-sector boards”⁹.

18. The UK is due to submit its 8th Periodic Report to the UN Committee by the end of July 2017.

Alternative approaches

Voluntary measures

19. Prior to the enactment of the Scotland Act 2016 the Scottish Government adopted a voluntary approach to improve women's representation on boards. This approach includes the Partnership for Change 50/50 by 2020 campaign and a programme of work led by the Scottish Government Public Appointments Team in collaboration with the Commissioner for Ethical Standards in Public Life in Scotland intended to transform the ministerial public appointments process to bring greater diversity. In addition, HEIs made a voluntary commitment to work towards 40:40:20 by 2018.

8 UK's Seventh Periodic Report to the UN Committee on the Elimination of All Forms of Discrimination Against Women,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGBR%2f7%2fAdd.2&Lang=en [accessed 12 June 2017]

9 Paragraph 42, page 8, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', UN Committee on the Elimination of All Forms of Discrimination Against Women, 13 July 2013,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/7&Lang=En [accessed 12 June 2013]

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Partnership for Change 50/50 by 2020

20. The Partnership for Change 50/50 by 2020 campaign was launched in June 2015 by the First Minister with the aim of encouraging organisations to sign up to a voluntary commitment to work towards 50/50 gender balance on their boards by 2020. The campaign is open to organisations across the public, private and voluntary sectors in Scotland and to date has over 190 signatories.

Transforming Ministerial public appointments

21. To support the delivery of 50/50 by 2020 in the public sector, the Scottish Government's Public Appointments Team was tasked with supporting public bodies in achieving the Partnership for Change voluntary commitment through practical change to the regulated ministerial public appointments process. The team established a strategic partnership approach with the Commissioner for Ethical Standards in Public Life in Scotland to balance creative approaches with reassurance on compliance with the Ministerial Code of Practice. This work has led to a transformation in the regulated public appointments process in Scotland and clearly demonstrates that using positive action can deliver measurable results.

22. From first principles, ministerial public appointments in Scotland are made on merit within a system founded on integrity which promotes diversity. With those principles at the heart of the drive for change, and scrutinising all aspects of the process, the Scottish Government's Public Appointments Team, along with the Commissioner's office, have taken a range of actions to bring greater diversity to public body boardrooms. These actions have included:

- the Scottish Government's Public Appointments Team engaging Ministers at the outset of competitions to establish their vision for boards, encouraging the definition of merit in creative rather than traditional terms;
- working with groups representing those with protected characteristics to identify barriers to participation and develop solutions;
- targeted advertising strategies and outreach events that challenge perceptions of traditional board members;

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- the creation of an accessible core skills framework to develop person specifications to ensure that criteria do not inadvertently exclude any groups;
- building the capacity of boards themselves by offering induction and development sessions supported by peer learning and mentoring opportunities;
- continuously testing, evaluating and refining their processes, recycling learning, sharing good practice, and using the data generated within Board appointment rounds to track and measure progress.

23. This has resulted in improvements to the gender balance of ministerial public appointments, most significantly:

- the target for applications from women set in the Commissioner for Ethical Standards in Public Life in Scotland's Diversity Delivers strategy¹⁰ is 40% - in 2016, 43% of applications were from women;
- in 2015, Ministers appointed more women than men for the first time: 54% of all new appointments went to women; and
- at the end of 2016, over 45% of all board positions were held by women.

Higher Education Institutions Voluntary Commitment to 40:40:20 by 2018

24. In April 2015, the Chairs of Scotland's 18 HEIs announced a commitment to achieve a minimum of 40% of both men and women on their governing bodies by 2018. The commitment applies to the independent members of universities' governing bodies who are external and independent of the institution. Other members are elected by university staff, students and on occasion university alumni, and are not covered by the commitment.

10 'Diversity Delivers: A strategy for enhancing equality of opportunity in Scotland's ministerial public appointments process', 27 August 2008, <http://www.publicappointments.org/publications/publication/641/> [accessed 12 June 2017]

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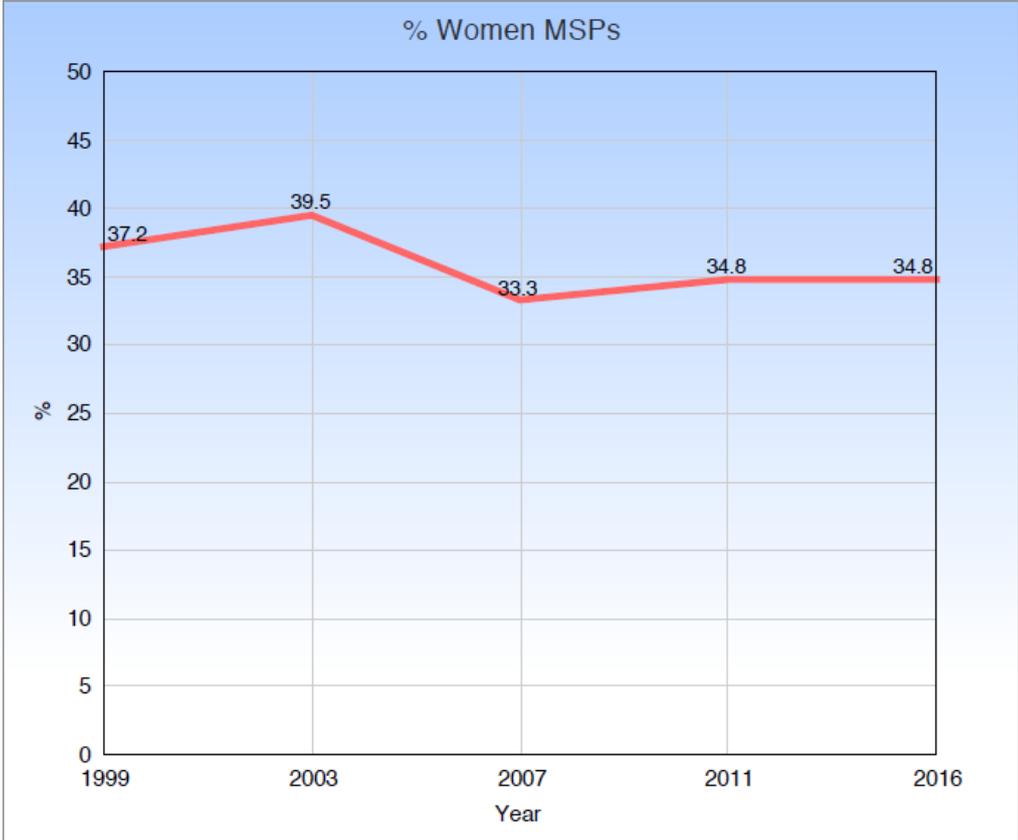
25. Universities Scotland, the representative body of Scotland's HEIs has reported that positive progress has been made towards the commitment:

- as of August 2016, there will be equal numbers of men and women in the position of chair of governing body at Scotland's HEIs;
- nine of the last 12 appointments to the position of chair of governing body have been women, each appointed as the best person for the job;
- seven institutions have a minimum of 40% of either gender among their independent governors and a further two governing bodies have 60% women among their appointed members;
- across the sector, women make up 39% of independent governors. This is an improvement of ten percentage points since 2013.

The case for legislation

26. The success of voluntary measures inevitably raises the question of whether legislation is necessary. The Scottish Government is clear that it is: to lock in the gains that have been made thus far and to ensure that we keep moving forward. Regrettably, the Scottish Government knows from the history of women's representation in the Scottish Parliament, that without sustained attention and action, progress made is not always maintained and indeed can be lost altogether.

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Consultation

27. On 5 January 2017 the Scottish Government published a draft Bill for consultation. The consultation was intended to provide bodies covered by the Bill, those with a role in public appointments, and other interested parties, with an opportunity to consider and provide feedback on the Bill’s provisions, and to put forward suggestions for how the Bill might be strengthened.

28. The consultation received 99 responses, 33 from individuals and 66 from organisations. Responses to the consultation have been analysed by Craigforth Research and the consultation analysis and individual responses, where permission was given to do so, have been published on the Scottish Government’s website and consultation hub¹¹. In response to the consultation, a number of changes have been made to strengthen the draft Bill prior to its introduction to the Parliament.

11 <https://consult.scotland.gov.uk/equality-unit/draft-gender-representation-on-public-boards>

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29. The key matters arising through the consultation and the changes the Scottish Government has made to the draft Bill as a result are set out in the following sections.

Matters arising in consultation

30. There was widespread support for the principle of increased representation of women on public boards.

31. Issues raised included that the Bill used a binary definition of gender, and thus gave the perception that the Bill was not inclusive of people who do not identify as either female or male.

32. The importance of reporting was highlighted by many respondents, as was that any reporting requirement should be aligned with existing requirements under other legislation. The biennial report required by the Public Sector Equality Duty Amendment Regulations 2016 was often suggested.

33. It was also suggested that the legislation should include target dates for achieving the Bill's objective of equal gender representation.

ONS Classification of Higher Education Institutions

34. All Scottish universities and other HEIs are classified to the private sector as Not for Profit Institutions Serving Households in the UK National Accounts. The Office for National Statistics (ONS) is currently undertaking a classification review of universities in the UK. The review will test whether individual HEIs are market or non-market producers and will not affect the current classification to the private sector. The review is expected to be completed within 12 months.

35. The issue of HEIs' inclusion amongst the bodies covered by this Bill has previously been raised as a concern by the sector as possibly giving weight to the case for their reclassification by ONS. The nature of this Bill's objective, which is to achieve greater representation of women on HEIs' governing bodies and not to make changes to HEIs' governing bodies' structure, is not expected to impact on the classification of HEIs included in the Bill.

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Single focus on gender

36. A number of respondents to the consultation advocated for a wider approach which would seek to address the under-representation of all relevant protected characteristics, as defined in the Equality Act 2010. The Scottish Government acknowledges that people who share other protected characteristics are also underrepresented on boards and is taking action to address this, including through the application of voluntary positive action measures described in relation to ministerial public appointments.

37. However, the Scottish Government also considers that focussing on the representation of women as opposed to all protected characteristics as defined by the Equality Act 2010 is justified. Women are not a minority but rather account for more than half of the population. Moreover, women are diverse and all of the other protected characteristics are reflected among them. The Scottish Government also considers that legislating for women's representation on boards is an opportunity to improve diversity more widely, by ensuring that steps are taken to evaluate existing appointment processes with a view to breaking down barriers and reaching out to a wider pool of potential applicants.

38. In April 2017, the Scottish Government published its equality outcomes for 2017-2021 as part of its Equality Outcomes and Mainstreaming Report required by the Equality Act 2010 (Scotland) (Specific Duties) Regulations 2012. One of the Scottish Government's outcomes is that "Ministerial public appointments are more diverse reflecting broadly the general population by 2021". The outcome is intended to cover the protected characteristics of: age; race; sex; disability; religion or belief, and sexual orientation, with an early focus in 2017-18 on working with disabled applicants and those under 49.

Inclusion of sanctions

39. The Bill does not contain sanctions on public authorities or "appointing persons" as defined in the Bill, for non-compliance with the Bill's provisions. The absence of sanctions within the Bill was raised during the consultation process with some respondents expressing concern that the absence of sanctions would weaken the Bill's effectiveness. A number of respondents highlighted similar legislation in other countries where sanctions have been included. These measures include financial penalties and dismissal of the Board Chair. While these measures were not

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considered appropriate in the context of Scottish public appointments, the Scottish Government recognises the importance of clear accountability mechanisms, including through the addition of a requirement to report progress to the Bill.

Changes made to the draft bill in light of the consultation responses

40. Following consultation the Scottish Government has made a number of changes intended to address some of the key points raised by respondents, with a view to strengthening the Bill prior to introduction. The main changes made to the Bill are:

- to remove the requirement for 50% of non-executive members to be male;
- to add a target date of 31 December 2022 for delivery of the Gender Representation Objective;
- to add a requirement on public authorities to report on the operation of the Bill if enacted, in accordance with regulations.

Removing the requirement for 50% male non-executive members

41. Amending the Gender Representation Objective to remove the requirement for a public board to have 50% of non-executive members who are male or who identify as male is intended to eliminate the perceived barrier created through the use of a binary definition of gender, for people who do not identify as either male or female.

New provision for reporting

42. The Bill now enables Ministers to make regulations requiring public authorities to report on the operation of any Act flowing from the Bill. The majority of public authorities covered by the Bill already produce two-yearly equality mainstreaming reports, as a requirement of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012¹². These regulations were amended in 2016 and the Equality Act (Specific Duties) (Scotland)

12 Available at:

<http://www.legislation.gov.uk/sdsi/2012/9780111016718/contents>

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Amendment Regulations 2016¹³ offers a specific mechanism for public authorities to report on progress. Where bodies are exempt from producing a mainstreaming report, they will be required by regulations to produce an equivalent update in their most relevant corporate documents.

Amending the Gender Representation Objective to refer to individuals who are women

43. A further change has been made to the Gender Representation Objective to refer to individuals who are women as opposed to those who are female or who identify as female. This step was taken to ensure that the Bill reflects the protected characteristic of “sex” in the Equality Act 2010.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

44. The results of an Equality Impact Assessment have been published alongside the Bill and other accompanying documents. The Equality Impact Assessment has drawn from the responses to the consultation on the draft Bill. The main issues raised in relation to equality were: that the Bill’s single focus on the protected characteristic of sex could either have a negative impact on those from the other protected characteristics groups or at least would not do anything to promote board membership amongst people from these groups; and a frequently raised issue, which has already been addressed, concerned the degree to which the Bill is inclusive of transgender people and/or people who identify as non-binary.

45. As is stated earlier, women, in all their diversity, form over half of the population of Scotland but this is not reflected in the membership of boards that govern Scotland’s public sector. The Scottish Government considers that it is justified in the focus of the Bill but is also taking steps to remove the barriers faced by those people with protected characteristics who are currently under represented on public sector boards. More information on

13 Available at:

http://www.legislation.gov.uk/ssi/2016/159/pdfs/ssi_20160159_en.pdf

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the work underway in this area is included in the Bill's Equality Impact Assessment.

Human rights

46. The Scottish Government is committed to protecting, respecting and realising human rights and takes its international human rights and treaty obligations seriously. As set out in paragraphs 14-18, the Scottish Government considers that action to improve the representation of women on public boards is necessary to meet its obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women.

Island communities

47. It is not anticipated that the Bill will have any disproportionate impact on island communities.

Local government

48. Local authorities are not listed public authorities for the purposes of the Bill, and are not therefore required to take any action under the Bill. However, it is hoped that an indirect consequence of the Bill might be to strengthen the symbolic narrative in support of women's equality and equal representation of men and women in senior and decision making positions.

Sustainable development

49. The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations. In the context of Scotland's public boards the Scottish Government considers that more diverse boards make better decisions and better reflect the needs of all of the communities that they serve.

50. Sustainable development is integral to the Scottish Government's overall purpose - to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

51. The Scottish Government's Economic Strategy sets out its approach for achieving this, based around increasing competitiveness and tackling

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inequality and Scotland's Labour Market Strategy has a clear vision for a strong labour market that drives inclusive and sustainable economic growth. It focuses on promoting equality in the workplace and tackling inequality in the labour market so that everyone has the opportunity to fulfil their potential. The Bill is included in the Labour Market Strategy as a commitment that the Government sees as part of its wider work to address inequality.

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