

# **GENDER REPRESENTATION ON PUBLIC BOARDS (SCOTLAND) ACT 2018**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### ***Sections 3 and 4 – Duty when appointing non-executive members and consideration of candidates***

6. **Section 3(1)** describes the circumstances in which section 3(2) applies. Under section 3(1), section 3(2) applies where there is:
  - a vacancy in a position of non-executive member of a public board;
  - more than one candidate for the position;
  - at least one candidate who is a woman; and
  - at least one candidate who is not a woman.
7. Under section 3(2) an appointing person must, in making the appointment to fill the vacancy, act in accordance with section 4 with a view to achieving (or making progress towards achieving) the gender representation objective immediately after the appointment takes effect.
8. **Section 3(3)** provides that when an appointing person is making more than one appointment:
  - both or all of those appointments must be taken into account in identifying the number of non-executive members; and
  - the appointing person must act with a view to achieving (or making progress towards achieving) the gender representation objective after all of those appointments have taken effect.
9. **Section 4** requires an appointing person to determine whether any particular candidate is best qualified for the appointment. If no particular candidate is best qualified for the appointment, the appointing person must identify candidates it considers are equally qualified. Provided that there is among those candidates who have been identified as equally qualified, at least one candidate who is a woman and at least one candidate who is not a woman (see explanation of section 3 above) the appointing person must give preference to a candidate who is a woman if appointing that candidate will result in achieving (or making progress towards achieving) the gender representation objective.
10. **Section 4(4)** provides that an appointing person must consider whether the appointment of a candidate who has been identified as equally qualified and is not a woman is justified on the basis of a characteristic or situation particular to that candidate. If so, the appointing person may give preference to that candidate.
11. **Section 4(5)** provides that a “characteristic” referred to under section 4(4) includes a protected characteristic within the meaning of section 4 of the Equality Act 2010.

*These notes relate to the Gender Representation on Public Boards  
(Scotland) Act 2018 (asp 4) which received Royal Assent on 9 March 2018*

12. The inclusion of section 4(4) in the Act, which provides that an appointing person may over-ride the requirement to give preference to a woman in the circumstances described in sections 3 and 4 of the Act, is required by the jurisprudence of the European Court of Justice which provides that such a requirement cannot be absolute (see Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; Case C-158/97 *Badeck* [2000] ECR I-1875; Case C-407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539; Case C-476/99 *Lommers v Minister van Landbouw Natuurbeheer en Visserij* [2002] ECR I-2891; *Briheche v Ministri de l'Interieur*, Case C-319/03, [2004] ECR I-8807; *Griesmar v Ministre de l'Economie*, Case C-366/99, [2001] ECR I-9383).