

GENDER REPRESENTATION ON PUBLIC BOARDS (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE ACT

3. Revised Explanatory Notes on the various provisions of the Act are provided below. A detailed explanation of the policy intentions underpinning the Act can be found in the Policy Memorandum.

Section 1 – Gender representation objective

4. **Section 1** sets a gender representation objective for a public board that it has 50% of non-executive members who are women. There is a definition of ‘non-executive member’ in section 2. Where a public board has an odd number of non-executive members, the gender representation objective applies as if the board had one fewer member.

Section 2 – Key definitions

5. **Section 2** defines the Act’s key terms:
 - “appointing person” means, in relation to the function of appointing a non-executive member of a public board, a person who has that function. For example, the Scottish Ministers;
 - “excluded position” in relation to a public authority, means a position mentioned in the second column of the table in schedule 1 which corresponds with the public authority mentioned in the first column. Where a position is an “excluded position”, it is not a “non-executive member” position as defined in the Act. As a result, “excluded positions” are discounted for the purposes of calculating the percentage of non-executive members who are women under section 1 and no action is required under the Act in relation to “excluded positions”. Non-executive members who are appointed by virtue of having been nominated or by virtue of holding an elected position have been excluded;
 - “non-executive member”, in relation to a public authority, means a position on its public board that is:
 - o not an excluded position;
 - o not held by an employee of the authority, i.e. an executive member;
 - “public authority” means an authority listed, or within the description listed, in the first column of the table in schedule 1;
 - “public board” means:
 - o if the public authority is a company, the directors;
 - o if the public authority has a statutory board or other equivalent statutory management body, that board or body;

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o in relation to any other public authority, the membership of the authority;

- “woman” includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female. This means that it is not necessary for a trans woman to have a Gender Recognition Certificate to be included as a woman for the purposes of the Act, provided they –
 - o have the protected characteristic of gender reassignment,
 - o are living as a woman, and
 - o are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of becoming female.

A trans man without a Gender Recognition Certificate would not be included as a woman for the purposes of the Act if they -

- o are not living as a woman, or
- o are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of becoming male.

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.

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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.
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).

Section 5 – Encouragement of applications by women

13. **Section 5** places a requirement on appointing persons and public authorities to take such steps as they consider appropriate to encourage women to apply to become non-executive members of public boards. While it is for appointing persons and public authorities to ultimately determine what steps are appropriate, such steps could include:
 - evaluating and targeting advertising strategies and outreach events to better reach and appeal to women;
 - thinking creatively about the sorts of skills and attributes that are required and how these are expressed, with a view to attracting more women to apply.
14. Appointing persons and public authorities may also refer to the Scottish Government’s Succession Planning Guidance and Toolkit¹ which seeks to help public bodies to develop effective succession plans for their boards, building on good practice.
15. **Section 5(3)** provides, for the avoidance of doubt, that subsections 5(1) and 5(2) do not prevent an appointing person or public authority from taking such steps as it considers appropriate to encourage persons with other protected characteristics (within the meaning of section 4 of the Equality Act 2010) to apply to become non-executive members of the public board.

Section 6 – Duty to take steps towards achieving the objective

16. **Section 6** places a general duty on appointing persons and public authorities to take such steps as they consider appropriate, in addition to anything done under sections 3 to 5 in the case of appointing persons, and in addition to anything done under section 5 in the case of public authorities, with a view to achieving the gender representation objective by 31 December 2022. Under subsection (1), section 6 applies whenever the gender representation objective is not achieved in relation to a public board.

Section 7 – Guidance on operation of Act

17. **Section 7** requires Scottish Ministers to publish guidance on the operation of the Act and sets out in subsection (2) those sections of the Act that guidance must in particular cover. Subsections (3) and (4) provide that an appointing person and public authority must have regard to the guidance in carrying out functions under the Act.

¹ ‘Guidance on Succession Planning for Public Body Boards’, January 2017, <http://www.gov.scot/Topics/Government/public-bodies/BoardChairs> [accessed 13 June 2017]

Section 8 – Reports on operation of Act

18. **Section 8** covers the reporting requirements under the Act which must be met by the Scottish Ministers, appointing persons and public authorities. Reports on the operation of the Act must be in accordance with provision made in regulations by the Scottish Ministers.
19. **Section 8(1)** and **(2)** require the Scottish Ministers to lay reports on the operation of the Act before the Scottish Parliament at intervals of no more than two years and in accordance with provision made in regulations under subsection **(6)**. In addition, under subsection **(3)** the Scottish Ministers must publish reports on the carrying out of their functions under sections 3 to 6 in accordance with provision made in regulations under subsection **(6)**. Subsection **(4)** provides that an appointing person (other than the Scottish Ministers) specified in regulations under subsection **(6)** must publish reports on the carrying out of its functions under section 3 to 6 in accordance with provision made in regulations under subsection **(6)**. Subsection **(5)** provides that a public authority specified in regulations under subsection **(6)** must publish reports on the carrying out of its functions under sections 5 and 6 in accordance with provision made in regulations under subsection **(6)**.
20. Under subsection **(6)**, the Scottish Ministers may by regulations: specify appointing persons for the purposes of subsection **(4)**; specify public authorities for the purposes of subsection **(5)**, and make further provision about reports mentioned in subsections **(1)** to **(5)**. Section 8 will be used to ensure appointing persons and public authorities report on the operation of the Act.

Section 9 – Power to modify schedule 1

21. Under section 9 the Scottish Ministers may modify schedule 1 by regulations so as to add an entry, vary the description of an entry or remove an entry. This would allow the Scottish Ministers to add a new public authority should one be created in the future, or similarly to remove such an authority should it be disbanded.

Section 11 – Equality Act 2010

22. **Section 11** makes provision in relation to the Equality Act 2010. Sections 158 (positive action: general) and 159 (positive action: recruitment and promotion) of that Act are disapplied to action taken under the Act so as to prevent overlap. Section 10(2) specifies that action under the Act is not prohibited by Part 5 of the Equality Act (work).

Schedule 1

23. **Schedule 1** lists the public authorities covered by the Act and includes certain public sector bodies, colleges and Higher Education Institutions in Scotland where that body has a board that includes non-executive members who are appointed to the board. In addition, schedule 1 specifies any “non-executive member” positions which are excluded from the terms of the Act in relation to the authority in question. Where a position is excluded under schedule 1, it does not count as a ‘non-executive member’ position as defined by section 2. As a result, excluded positions do not count for the purposes of the gender representation objective at section 1 and an appointing person is not required to take action under sections 3 and 4 in relation to any such excluded position.

Schedule 2

24. **Schedule 2** makes special provision for certain public authorities covered by the Act where this is required. An example of the need for such provision would be where there is more than one appointing person. This is the case with the Judicial Appointments Board for Scotland where the Lord President makes appointments of judicial members and Scottish Ministers make appointments of legal or lay members.