scottish legal complaints commission slcc

CONSULTATION REPONSE

Response to SG Consultation on the Draft Gender Representation on Public Boards (Scotland) Bill.

January 2017

A. INTRODUCTION

The SLCC welcomes the opportunity to respond to the Scottish Government's consultation on the Draft Gender Representation on Public Boards (Scotland) Bill.

B. ABOUT US

The Scottish Legal Complaints Commission (SLCC) is an independent statutory public body providing a single point of contact for all complaints against legal practitioners operating in Scotland. The SLCC investigates and resolves complaints about inadequate professional services; refers conduct complaints to the relevant professional body, and has oversight of complaint handling across the legal profession.

Our annual report[1] and website[2] have more information on our work.

We are one of the authorities listed in schedule 1 of the draft bill.

We comment only on issues within our direct interest and experience. Our strategy[3], which guides all our work, sets keys values for the organisation around respect for diversity, and has specific objectives around the attraction and retention of diverse talent to all our key roles.

C. OUR RESPONSE

Last year, we became a 50:50 by 2020 organisation. We have had two recent rounds of appointments to replace board members who had completed their statutory terms; the final appointments were made in April 2016 and then in January 2017. The current board composition is seven female and two male (including the current chair).

We fully support the Scottish Government's goal of encouraging greater equality on boards and appreciate why it is taking action to build on the progress that has been made so far in this area. We support the draft bill.

[1] https://www.scottishlegalcomplaints.org.uk/media/68340/slcc_annual_report_2015-16_-_final_version.pdf
[2] http://www.scottishlegalcomplaints.org.uk
[3] https://www.scottishlegalcomplaints.org.uk/media/65532/slcc_strategy_2016-2020.pdf

We would however, provide three comments which we hope will be helpful in the development of the final bill.

Specific roles within Boards

Firstly, not all board members perform exactly the same role – some act as Chair, for example. While men are currently significantly underrepresented on the SLCC's board, the next free board role will be that of the Chair (which will, in our statutory appointments cycle, always be recruited as a single role at a different time to other appointments). The draft bill, if applied, would require us specifically to target men for this vacancy AND in an 'equally-qualified candidate' situation, appoint a man. That could be seen as:

- ***an intended consequence of the bill*** - positively helping with the overall gender balance on our board

  OR

- ***an unintended consequence*** – due to the cycle of statutory terms set in our legislation the Chair appointment will always be primarily aimed at a single gender based on the current composition of the Board. The SLCC would not ordinarily wish to, or be seen to, target one specific gender for its most senior role, without absolute clarity that is the intended policy and legal aim of the bill.

We recognise that any legislation is likely to have such 'accidental' implications for some boards. Whether that is an acceptable consequence for a net improvement in equality is something which government should consider? Likewise, the government may need to consider whether it wishes, as part of the bill, to amend other legislation which has highly prescriptive recruitment cycles likely to lead to these sorts of consequences.

Wider considerations of diversity

The draft bill explicitly prioritises gender above any other protected characteristic, and limits options in a tie break situation.

Where one gender is under-represented, and there is a choice between equally qualified candidates, then the person of the underrepresented gender must be appointed. However, this may be to the specific detriment of other equality and inclusivity issues.

For example, two candidates are rated as equal – one is gender A (which is underrepresented), but one is gender B and also has a disability, is from a remote rural area of Scotland, and is young person. The person of gender A must be appointed, although in many aspects other than gender this may limit the overall diversity of the Board rather than improve it.

There is an 'exceptional circumstances' test in the draft bill. However, would appointing for another issue of equality be exceptional? The groups mentioned above (people with a disability, people from rural communities, and young people) are also typically underrepresented on boards across Scotland, thus such a need would not be 'exceptional' but quite normal.

The SLCC considers that as part of the impact assessment work for this bill, and for its implementation, there will need to be monitoring that a successful implementation in terms of gender diversity has not actually, and unintentionally, limited wider diversity considerations. This may need to be in relation to the statutory 'protected characteristics', but could be wider. The SLCC's own definition of diversity is very broad:

> *"Here, and throughout our strategy, we refer to the diverse people of Scotland who use our services and those services provided by lawyers. In this term we include the protected characteristics from the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation). However, we also include wider issues of socioeconomic status, geographic and digital exclusion, literacy, and circumstance (like fleeing domestic violence or oppression abroad).[4]"*

[4] https://www.scottishlegalcomplaints.org.uk/media/65532/slcc_strategy_2016-2020.pdf

Concern at the binary definition of gender in the bill

Thirdly, while the draft bill is positive in that it reflects people who are one gender, or identify as that gender, it still relies on a binary definition of gender – that is, that people must identify as one gender or the 'other'. Indeed, legally to dispense the new duty there is a risk organisations could feel forced to categorise people as *male/identify as male* or *female/identify as female* even if those individuals wished to describe their gender in a different way. The practical operation of the bill will require this counting in only two groups, otherwise the decision on targeting and the 'equally-qualified candidate' situation cannot be made.

This might been seen to fail to recognise those who do not identify with a single binary definition of gender, and seems at odds with the commitment in the Scottish Government Programme for Government 2016/17[5] to consult on a 'Gender Recognition Act' which may well widen options for legal gender recognition (as has already been done in other countries such as Australia, Denmark and New Zealand).

Our main concern is the potential personal impact on individuals of such an approach, but there may also be specific legal risks to an organisation in applying a binary gender classification – other organisations will be better placed to comment on their assessment of that. The SLCC would prefer to recognise and celebrate the breadth and diversity of gender identity in Scotland, unless there is absolute clarity that it is the intended policy and legal aim of the bill that all individuals must be counted, for this purpose, as being one of only two gender options.

We hope these observations facilitate useful further discussion. Overall, we support the aims of the bill, and are grateful for the opportunity to contribute to the consultation.

[5] http://www.gov.scot/Resource/0050/00505210.pdf