



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Equalities and Human Rights Committee

**Thursday 21 September 2017**

**Session 5**



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**EQUALITIES AND HUMAN RIGHTS COMMITTEE  
21<sup>st</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:**

Suzanne Conlin (Scottish Women's Convention)

Professor Susan Deacon (Institute of Directors Scotland)

Rory McPherson (Law Society of Scotland)

Lindsey Millen (Close the Gap)

Professor Muriel Robison (University of Glasgow)

Talat Yaqoob (Women 50:50)

**CLERK TO THE COMMITTEE**

Claire Menzies

**LOCATION**

The Robert Burns Room (CR1)



# Scottish Parliament

## Equalities and Human Rights Committee

Thursday 21 September 2017

*[The Convener opened the meeting at 09:32]*

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

**The Convener (Christina McKelvie):** Good morning and welcome to the 21st meeting in 2017 of the Equalities and Human Rights Committee. We have received apologies from David Torrance. I make the usual request that mobile phones be switched to silent or to airplane mode. I also remind members to keep mobile phones off the table.

Agenda item 1 is the first part of our stage 1 scrutiny of the Gender Representation on Public Boards (Scotland) Bill. We have two panels of witnesses, so I am minded to give about 50 minutes for each one. I hope that we will be concise with our questions and I will allow the witnesses to give us full and detailed answers if they can. That would be incredibly helpful.

I welcome Talat Yaqoob, who is the chair of Women 50:50; Suzanne Conlin, who is a board member of the Scottish Women's Convention; and Lindsey Millen, who is the policy manager at Close the Gap. The broadcasting person will deal with microphones, so the witnesses do not have to worry about pressing buttons. I hope that we will have a free-flowing conversation but, if any of the witnesses wants to come in, it would be incredibly helpful if they would catch my eye.

For the sake of transparency, I declare an interest as a steering group member of Women 50:50. I am very passionate about that. We should hear good stuff from Women 50:50 and all the others, too.

The witnesses have provided us with excellent written evidence. We have received a lot of written evidence that has been incredibly helpful in understanding the bill and what it does. All three witnesses come at the bill from slightly different angles, so I ask them to tell us why it is necessary and how it will make a difference.

**Talat Yaqoob (Women 50:50):** Women 50:50 advocates 50 per cent representation of women across all decision-making positions. Our public boards make key decisions for the good of Scotland, and that includes the 51 per cent of the population who are women. While there is only 35

per cent representation of women on public boards, there is a deficit in decision making.

Fairness on our boards makes for better decisions. The evidence that McKinsey & Company has collated and what the Davies review says about private boards reveal to us that, when there is more diversity around a decision-making table, we have more effectiveness, higher productivity and better profitability. Therefore, it makes sense for there to be diversity in the people who make fundamental decisions about Scotland when those impact a diverse population in the first place.

I am positive about the bill. Women 50:50 has proposed amendments to strengthen it, which will come as no surprise. However, it is an excellent step in the right direction. It is one of the Women 50:50 campaign's three asks.

**Suzanne Conlin (Scottish Women's Convention):** One of the reasons why we think the bill is important is that women tell us that it is. Our role is to tell politicians and policy makers what women think, and they tell us that the measure is important to them. It is also important because the services that public bodies provide, or the decisions that they make, predominantly affect women more than men. Therefore it is important that women are on the boards of those organisations so that they can influence the decisions that they make.

**Lindsey Millen (Close the Gap):** Women's employment is our main focus. Occupational segregation, whereby women and men do different types and levels of work, is a major issue in Scotland's labour market and a drag on growth. Close the Gap research has shown that, if we addressed occupational segregation at all levels of the labour market, it could be worth £17 billion to the Scottish economy.

Occupational segregation is also bad for women and for the workplace because it leads to a waste of women's talent. We want to ensure that women can access the roles on public boards, because we will then be able to create a new generation of role models for young people—in particular, young women, who will be able to see that those jobs are for them.

Obviously, we agree with Women 50:50 that it is essential that women's voices be represented at all levels of decision making, because we know that, when they are included, the context and content of the discussions change, as do the decisions that are made.

We are very positive about the bill.

**The Convener:** One of the questions that started some of the debate on the issue is about how we encourage more women to step forward.

We are looking for ideas on that, so we would be keen to hear yours.

We have received written evidence on the golden skirts syndrome, whereby one woman is on many boards because she is incredibly talented and incredibly busy. How do we widen it out to get greater diversity and people from different socioeconomic backgrounds and other backgrounds? If you have any ideas about that, we could interrogate some of them in the legislative process.

**Talat Yaqoob:** The golden skirts phenomenon is referred to in Norway, where a number of women are on multiple boards. However, it has been exaggerated to quite an extent. The golden skirts—the women who are on more than one board—are 15 per cent of board members who are women. For men, the figure is 10 per cent, so there is a 5 per cent difference. It is important that we do not exaggerate the number of women who are on multiple boards. In fact, Norway has gone quite far in ensuring that that does not happen. It is not a huge concern.

A concern is to ensure that we have diversity of women around the decision-making table. It is critical that we have women from different socioeconomic backgrounds, black and minority ethnic women, migrant women and lesbian, gay, bisexual and transgender women, because that is part of the diversity that makes good decisions. We can do that by ensuring that outreach happens not only among women who are already well networked. That requires public boards and public organisations to link up with community groups, such as Amina—the Muslim Women’s Resource Centre or the Equality Network, to ensure that vacancies are advertised at the most grass-roots level possible.

An example of that is that, at the moment, the south east of Scotland transport partnership—SEStran—is advertising vacancies through Equate Scotland, of which I am the director, to ensure that women are aware that they can be board members. That is specifically to advertise to women.

There are already examples of organisations taking that leap, but the most important thing that we can do is ensure that public boards have their own networks of community groups and ensure that those community groups support the boards in the advertising, training and development that are required for women to become board members.

**Suzanne Conlin:** I very much agree with that sentiment. When we ask women about being a board member, the questions that they ask are, “How do I find out?”, “Where do those vacancies exist?” and, “How do I reach them?” How do

women find out if they are not in existing networks?

For a lot of women, becoming involved is about time. If a woman works full time and has children, her time will already be very precious and she will probably already struggle with childcare. It is not just about how we encourage women; it is about how we make things accessible to them so that they can feel free to give up their time to be a board member, which will often involve being away from their children. It is about how we get to them, encourage them and give them support to do that.

**Lindsey Millen:** Obviously, I agree with what my colleagues have said. A number of measures can be taken to encourage women to be involved. For example, very clear written policies on how a board plans to increase the number of women on it can be established. There can be an overarching strategy. Boards can review their recruitment strategies and policies and consider specifying in them that the women whom they seek to recruit will be as diverse as possible.

Creating a national pool of candidates who are skilled and prepared for public appointments is really important. We would like prescriptive guidance that details the steps that must be taken and that puts the onus on the appointing person and the public body to encourage women, to ensure that women receive adequate capacity building and to take steps to advance women’s equality. It is important that that is done not just at board level; those steps must be taken at every level of public bodies, because women will not develop the experience and skills that they need without the encouragement of progression throughout the whole organisation.

Organisations must ensure that they effectively communicate with women that board memberships are for them, and they must consider the timing of board meetings, how they are scheduled and access to childcare.

We have done a lot of work on the public sector equality duty and compliance with it across public bodies. There is a lot of overlap between what public bodies are required to do under that duty and what they will be required to do under the Gender Representation on Public Boards (Scotland) Bill. A lot of things should already be happening that will contribute but, unfortunately, as part of our assessment of the duty over the previous three reporting cycles, we have seen that there is a real lack of evidence of specific steps being taken. It is really important for the bill that public bodies are required to give evidence that they have taken steps and not just assurances that they are committed to equality.

**The Convener:** Gail Ross has a brief supplementary question.

**Gail Ross (Caithness, Sutherland and Ross) (SNP):** A lot of women I spoke to when we were trying to get people to go on to a certain board that I was on were unsure of a board's functions. They were quite intimidated because boards are, as we know, predominantly male dominated. We have to look at a culture shift as well as legislative change. How can elected members, members of the public, community councils and local authorities get out the message about how women can be effective and build up their confidence to apply for those positions?

**Suzanne Conlin:** A lot of it is about language. We often find that the language is overwhelming and that women are simply intimidated by that. I agree with you. A lot of women tell us that they do not understand what being a board member means. They do not know what they would have to say and contribute, what skills they would need and how much time it would take up. Women tell us that they need more information about what is involved, what would be asked of them and what they would be expected to do. A lot of women tell us that there is a huge confidence issue. They are not confident in their skills and abilities. There is a role in changing the culture of how women view their value and how they can contribute.

**Talat Yaqoob:** With a different hat on, I am the director of Equate Scotland, which has a partnership with the Scottish Government. We run evening training sessions on how to be involved in a public board and what public boards are. Women who are on public boards come along and talk about why they are involved, what they have learned from that and what expertise they use while they are on the board. Every time that we hold those events, they are sold out. There is no lack of talent or interest among women regarding being on public boards, and the events that we hold shape the likelihood of women pursuing that further rather than just being enthusiastic about it.

It is critical that we balance the confidence-building aspect for women with culture change. For instance, I could give women all the confidence building that they require, but if there are cultures that are hostile or exclusionary with regard to women, that confidence will not matter. It is important that we balance the development of women with the challenging of male-dominated boards so that, when women are on boards, they are included. The last thing that we want is for a woman to make the effort to tackle barriers and become a board member and then to experience exclusionary behaviour while she is there. While developing the women, we should also develop our boards.

09:45

**Lindsey Millen:** The word "confidence" comes up again and again in this context. Whenever it does, I view it as being about confidence that the system will treat women fairly. Women should have that confidence, because they have the ability and capacity to sit on public boards. It is important to have discussions with women to ensure that they are aware of opportunities and what is involved. However, we also need to have discussions with men on boards about the culture of boards and how challenging it can be for women to come into that culture and stay. That is the flipside of what should be happening.

**Alex Cole-Hamilton (Edinburgh Western) (LD):** Good morning, panel, and thank you for coming to see us. In the spirit of transparency, I should say that I, too, am a signatory to Women 50:50 and, through that, have sought to bring about improvements to the Liberal Democratic Party selection process. We had our first all-women shortlists at the recent snap general election.

I have a number of questions around the tension that will exist when we introduce the bill's provisions. I am supportive of the bill, but there is a lot of pressure on boards nowadays to professionalise, for want of a better word, so that, when boards are recruiting new members, they will seek a mix of skills that fit the challenges that the board faces. Those skills might involve expertise in the financial sectors, in business development, in law and so on. We are therefore already asking boards to apply one matrix of filtration to their selection process, but we need to apply a second matrix of filtration, which will be welcome.

Can the panel speak to the issue of the tension that will exist? A lot of the skill sets that we are asking boards to recruit for are from professions that have traditionally been dominated by men, certainly at a senior management level. It is often difficult to find women in very high positions in, say, a financial services organisation, given male domination. How do we address that? How do we have both the skills mix and the diversity that we seek?

**Suzanne Conlin:** I am not sure that it is so difficult to find those women. They are there if we look hard enough.

I accept that organisations need people with professional skills, but they also have to think about the organisation's purpose. It is about not just professional skills but who influences what the organisation does. For example, if an organisation influences public policy, it needs to represent within itself the public that it serves. It cannot just be about professionals; the organisation must

represent the whole population that it serves. Yes, organisations need professional skills, but they also have to look at what other skills are important to them.

**Talat Yaqoob:** If we want more women to be at the head of finance or higher up in the legal field, giving them board membership could give them the experience to get those jobs—the two aspects are intrinsically linked. Surely, we want our public bodies to fulfil their equalities duty in order to help in the widest way possible. The vast majority of middle managers and those below that level in the finance and legal fields are women, and the vast majority of law graduates are women. If financial or legal organisations are looking for expertise, they can create expertise in their boards as well by providing job experience opportunities.

As Suzanne Conlin said, our public boards also require members with lived experience. We should not downplay the importance of lived experience when seeking people with professional skills or those who are at the top of their professions. That lived experience in public policy making is critical and is one of the many things that women can bring to public boards.

**Alex Cole-Hamilton:** That was an excellent answer.

The meat of the bill is sections 4(2) and 4(3), which are on the consideration of candidates—that is where the mechanism for achieving diversity is set out. However, I am concerned that we are leaving a lot of that to personal judgment, which is influenced by prejudice, culture, patriarchy and so on.

Let us explore the issue of selection. In preparation for the bill, we talked about things such as anonymous sifting, whereby all the biometric details are taken out. I am concerned that that also has inherent bias, because, as we know, men tend to talk about their achievements far more readily than women and they will have had opportunities that women might not have had as a result of the prejudices within our system, which the bill is trying to break down. How can we improve the bill to ensure that it is not left to a subjective view on who is the best qualified candidate before we get to the tiebreaker situation that is defined in section 4(2)?

**The Convener:** Before I ask the panel to answer that question, I will bring in Annie Wells, because I know that her line of questioning complements those points. That will allow our witnesses to answer more fully.

**Annie Wells (Glasgow) (Con):** My questions follow on from what Alex Cole-Hamilton just said. In the section of the bill that is on the consideration of candidates and appointments, it appears that merit underpins the way in which we achieve the

aim of getting the best candidate for the role. Alex Cole-Hamilton talked about the anonymity of applications. However, let us say that an organisation has a vacancy on an eight-person board and there are already four males and three females on the board. There does not seem to be any way to ensure that the vacant position is filled by a female. At the end of the day, if the two candidates are the same, merit underlies the decision to appoint a certain person and, as long as there has been scrutiny, a man can be appointed to that position. How can we achieve 50:50 representation when merit is at the heart of the bill?

**Lindsey Millen:** That is one of the reasons why the bill must be supported by prescriptive guidance that details exactly the steps that must be taken. From the performance of the public sector equality duty, we know that one of the biggest barriers for public bodies is the lack of clarity in the guidance on the particular actions that they can take to advance equality for each of the protected characteristics. As a result of that lack of specificity, what we have seen in the performance of the duty is a real homogenisation of equalities work, which does not really result in a positive change for anyone.

When it comes to the issue of merit, there are reams of evidence to show that having a gender diversity quota will bring merit to a board. Quotas increase the overall level of merit because they draw candidates from a wider pool than just the old boys' networks that are typically where board candidates come from. There are also questions of what we consider to be merit and what the requirements for the role are. That goes back to the mix of skills and perspectives that having gender diversity on boards brings, because not just particular skills but lived experience is key for excellence in public service delivery.

**Suzanne Conlin:** On the first question, about the selection process, I agree that it will be a challenge to remove bias. However, organisations that are currently male dominated will have to ensure that their selection process is not influenced by that. For example, if they struggle with the fact that they cannot have an all-male panel, they will need to look at sourcing other support to get women on the panel so that there is a balanced view.

On merit, we argue that, where the balance is not 50:50, quotas should apply rather than merit. If a board does not have a 50:50 gender balance, resolving that balance should be more important than merit.

**Talat Yaqoob:** As Lindsey Millen said, there is no shortage of evidence that those measures do not prevent appointment on merit—they have promoted it time and time again. It is important



that the measures mean that we look at a wider talent pool and reach out to the people with merit who we have not had on board thus far. That is the point of them.

The vast majority of evidence in European countries is on political representation on private boards, not public boards. However, if both types of board are looked at, average merit will be seen to have increased because women have joined boards. If anything, women increase the skills base—that point is critical. Section 4 of the bill is entirely about the point at which a tiebreaker decision is made between two people—a man and a woman—with equal merit. I do not think that there is any issue whatsoever in picking the woman provided that we are able to show evidence that she can support and enhance the work of the board. That is the purpose of the bill.

On the second part of the question, about selection processes, the response from Women 50:50 says that the responsibility of the appointing person is important. They need to be educated about unconscious bias and trained in good outreach and recruitment to ensure that individual and panel biases do not get in the way of good decision making and that there are no all-male panels making recruitment decisions.

**Lindsey Millen:** I forgot to make that point, but we echo Talat Yaqoob on the support that must be given to people who have responsibility for recruitment. It is essential that guidance on transparent and robust recruitment and decision-making processes includes an equalities aspect, including details of how decisions can be influenced by assumptions about women's skills and capabilities. Public bodies should be required to report publicly on the steps that they have taken to encourage and deal with applications from women.

Evidence from Muriel Robison and Nicole Busby of the University of Glasgow said that the legislation should include a redress mechanism for unsuccessful candidates of the underrepresented sex, so that an organisation is obliged to provide on request the qualification criteria on which a selection was based, the objective comparative assessment of those criteria and, where relevant, any considerations that tilted the balance in favour of the other candidate when there was a 50:50 situation.

**Annie Wells:** I do not think that anyone here would not want to encourage more women into STEM subjects and on to public and political boards. I am all for encouraging women into those things, but what do the witnesses suggest should happen if we have anonymous sifting at the beginning and two males come out as the two best candidates for one place on the board?

**Talat Yaqoob:** I question whether the direction of the bill is to pursue guidance to have anonymous applications—I do not know whether that is the case. First and foremost, we are trying to pursue gender equality, which is not the anonymity of names but the tackling of bias. It is more critical that, when names are in front of an appointing person, they look at them objectively than that the names are removed from the application process, particularly if the entire purpose is to get more women on boards. The tiebreakers—whether between a man and woman or between two women or two men—are about favouring women, so anonymity might get in the way of what the bill is trying to achieve. Anonymity might be a way forward, but that cannot be instead of training and development in tackling unconscious bias and predetermined judgments.

**Alex Cole-Hamilton:** That point touches on what Talat Yaqoob and Lindsey Millen have said about the guidance that will underpin the legislation. I was a public policy operative in the voluntary sector for 15 years before I was elected, and my experience is that guidance is often where good legislation goes to die despite the best intentions. Unless it is implemented properly or has robust teeth, it means absolutely nothing and will gather dust on the shelf. Refreshes to the guidance do not help, as many as there may be.

You both hit upon the fact that guidance about training and the rest of it is crucial to the bill. Is there something that needs to be escalated from the guidance that you would like to see put in the bill? Talat, would you delineate the amendments that you mentioned you would like to see?

10:00

**Talat Yaqoob:** Yes. This is an opportunity for me to talk about non-compliance sanctions. Including some kind of non-compliance sanctions is critical to creating a bill with teeth, otherwise it will be just a set of recommendations that people can choose whether to take. There is a perfect example of that in Spain, where a bill was passed to make private boards at least 30 per cent women. Because the bill contained no sanctions, the figure is currently only 19 per cent. There has been some change, but it has been slow. There needs to be mandatory reporting, a mandatory action plan of steps to be taken in the run-up to December 2022 and non-compliance sanctions to ensure that we have 50:50 representation when we get to December 2022.

**Alex Cole-Hamilton:** I have just been passed a note by my colleagues that says that the Scottish Government does not intend to publish guidance under the bill, which is troubling. I fully support what you say about non-compliance sanctions, but how do we police that? A lot of what we are talking

about is unconscious bias, and it is difficult to evidence that that has been a factor.

**Talat Yaqoob:** I do not mean non-compliance in terms of how biased someone has been; I mean non-compliance with the bottom line of having 50 per cent women. This is not about what judgments someone has made; it is about what steps they have taken to reach 50 per cent representation. That, in itself, overcomes some of the bias, because it means that people have to make extra effort to get women in the room. Non-compliance is about the numbers, not necessarily about whether someone was biased in their judgment.

**Alex Cole-Hamilton:** Okay.

**The Convener:** Jamie, do you still have a supplementary question on the subject? Mary Fee wants to come in from a different angle.

**Jamie Greene (West Scotland) (Con):** It depends on what Mary wants to ask.

**The Convener:** Go for it—I trust you.

**Jamie Greene:** It is all relevant. This goes back to Annie Wells's original question about how we approach the perception of selection on merit and how the bill does or does not achieve that.

My understanding, having come to the issue fresh and having read the bill as it is currently drafted, is that, when there is a vacancy on a public board and there is at least one male candidate and one female candidate, the appointing person will have to go through the following process. The first selection criterion will be that the appointing person should appoint the best-qualified candidate; however, if no candidate is best qualified, they should identify candidates who are equally qualified. If two candidates are equally qualified and one is male and one is female, the appointing person will have to give preference to the female candidate in order to achieve the gender representation objective. I may be corrected by the clerks or the bill team, but that is my current understanding.

How does that address the critique of the bill that, when it comes down to the wire, assuming that both candidates are, subjectively, of equal merit—that is a vague statement—preference will be given to the female candidate and the appointment will not be made on merit? How does someone determine whether one candidate is best qualified or the candidates are equally qualified? The wording seems very loose, and I find it a little confusing. If I were the board member making an appointment, I would be confused by that wording.

**Suzanne Conlin:** We talked about the appointing person making a decision based on merit, but, if they establish that candidates are of equal merit, the merit discussion is not really relevant any more. We have to go back to the

spirit of the bill, which is to achieve 50:50 representation. I would argue that, if the appointing person has established that candidates are of equal merit, the merit discussion has been had. I grant that people perhaps need to be supported in making that assessment, but the merit discussion has been had at that point, and the spirit of the bill is to achieve 50:50 representation.

**Talat Yaqoob:** The vagueness that you highlight between what is best qualified and what is equal merit emphasises, if anything, why there should be guidance alongside the bill. Guidance needs to be created about how to establish merit, how to do outreach, how to do training and development and how to ensure that there is the widest possible circle of women to choose from so that people can get the merit that they are looking for.

I think that the spirit of the bill is to get women there, and, if you reach out to a wide range of women, you will get the merit that you are looking for. I do not see any evidence that the merit that you need is not there. However, your point emphasises the need for guidance alongside the bill.

**Lindsey Millen:** That shows why it is absolutely essential that we have robust recruitment processes that deliver an objective comparison of criteria, that that comparison is recorded and that public bodies are required to report on the steps that they have taken.

**Mary Fee (West Scotland) (Lab):** In a way, my question follows on from the previous line of questioning. My colleague Alex Cole-Hamilton highlighted section 4 of the bill. Sections 5 and 6 are just as important. Some of the criticism that we have heard is that although the bill is a positive step, it does not go far enough, because there are no sanctions in it.

I am interested in your views on the wording of section 5(1), where it says:

“An appointing person for a public board must take such steps as it considers appropriate to encourage women”.

I think that that language is far too loose. Again, the next paragraph talks about

“steps ... it considers appropriate”.

The two words “considers appropriate” are repeated frequently. What I consider appropriate, what you consider appropriate and what someone else considers appropriate could be entirely different. Is that wording strong enough or does it need to be strengthened to be far more descriptive and explicit about what is expected of boards in relation to encouraging women?

**Suzanne Conlin:** We agree that the wording should be stronger and if it is not made stronger within the bill, the guidance on what is appropriate needs to be clear. To be honest, it comes back to the bottom line. If organisations do not meet 50:50, they should have to publish that information and be accountable for how they have got to where they are. What they deemed appropriate and whether they did enough should be reviewed. They should be subject to more scrutiny.

Any bill or any guidance will never cover everything and what we view as appropriate can be subjective. It is about how we review the bottom line—the outcomes and how they got there—and how we critique it. Organisations need to learn that, but it is about supporting them and ensuring that we hold them accountable.

**Talat Yaqoob:** I do not think that the wording is strong enough. I think that the word “appropriate” is vague. Does it mean financial investment, outreach, training and development, or taking on their own quotas? Those boards that are already close to 50 per cent and have a strategy or an internal wish to be diverse will go further than those boards that perhaps need to do it but do not know where to begin or have a resistance to it. That is why there should be guidance on what the words “considers appropriate” actually mean.

I would recommend that such guidance is written with equality organisations such as ours and that it sets out five things that boards can do that the bill deems appropriate. That would create some coherence across recruitment and around the actions being taken. That would mean that the compliance and reporting would be much easier to assess because there is something that they are being assessed against; “considers appropriate” is too vague a measurement for any action to be taken or for any support of a board.

**Lindsey Millen:** I share Engender’s concern that it may create an inadvertent loophole that would allow public bodies to appoint men where they should be appointing women. There is evidence that shows that a group that is adversely impacted by gender quotas is the men who are already in those leadership positions—male incumbents can respond strategically in order to circumvent the impact of those quotas.

It comes back to our point that we want to see clear, prescriptive guidance on what steps should be taken. Precedent exists of public bodies not complying with equalities legislation. The public sector equality duty is a good example—or a bad example—in that it is not uncommon for public bodies still, in 2017, even though the public sector equality duty came into play in 2012, not to publish their gender pay gap or occupational segregation information. Those things exist in the equality duty legislation, but when we look underneath the steps

that bodies are required to take and the requirement to use that information to advance equality, which in this case would be about how they are going to take steps to get women on to the boards, there is even less evidence of that happening.

We want the steps that are required to be taken to be included in the bill so that public bodies are required to produce an action plan and report on it. We also feel very strongly that non-compliance sanctions and robust enforcement are essential.

**Mary Fee:** I will ask about the bill’s financial implications in a second, but I want to ask you another brief question before that. One of the other criticisms that we have heard is that the bill represents a missed opportunity in relation to people with disabilities. I absolutely accept and understand the ethos of the bill to encourage more appointments of women, but there has been criticism that it represents a missed opportunity for disabled people. There has also been criticism that the bill uses a binary definition of gender, so a section of people are completely missed out. I would be interested in your views on that.

**Talat Yaqoob:** Women 50:50 supports the Equality Network’s response, which discusses the need to ensure that the pursuit of women on boards is inclusive of trans women. It is important to note that, when we talk about women being 51 per cent of the population, we are talking about those who self-identify and report as women, and I think that they should be included. Given that only 36 per cent of people on our boards are women but 51 per cent of the population identify as women, it is fair that the bill is about that 51 per cent, but it needs to be inclusive of trans women.

I return to the point that I made about a diverse set of women being included in the reach of the bill, including disabled women, LBT women, BME women and women from different socioeconomic backgrounds. It is important—I keep coming back to this—that the guidance is about pursuing a diverse audience of women so that we ensure that disabled women are engaged through the bill.

**Suzanne Conlin:** We would agree with that. We believe that, when it comes to the reporting aspects, it should not just be about women on boards. It should be about all the protected characteristics. Organisations should be open and clear about who is on boards and who they open them up to. Women are not just one group of people. There are many different types of women. It is about how organisations report on all the protected characteristics and not just on gender.

**Lindsey Millen:** Going back to the public sector equality duty, we have seen an increasing homogenisation of equalities work that shows little recognition that the causes of the inequality that is

experienced by protected groups are different, as are the solutions. It is absolutely right that the bill targets the barriers that are faced by women in the workplace but also the systemic barriers to representation that are faced by women who share other protected characteristics. For instance, disabled women experience higher levels of discrimination and stigma in employment and in trying to progress and to access positions such as board membership. We want to see included in the guidance a specification that the group of women that we are targeting goes beyond just the characteristic of being a woman, and that organisations have to strive to have a diverse group of women represented.

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

My next question is about the financial burden that will be placed on boards if the bill is enacted. The explanatory notes on the bill say that appropriate steps could include

“evaluating and targeting advertising strategies and outreach events to better reach and appeal to women”

However, the financial memorandum says:

“The Scottish Government does not consider that there will be resources attached to making the case for greater board diversity, given that the majority of boards covered by the Bill are already working towards achieving this outcome or greater gender diversity via voluntary commitments.”

If we want to have a programme to attract women to become board members, whether that is through advertising or any other means, it seems to me that there will be a cost implication for boards.

10:15

If we have greater diversity and there are more women on boards, there might be a need to support women with childcare or maternity leave, or to support men with paternity leave. There is a financial implication for boards, mostly at the outset as they try to encourage women to apply, and, if we want to promote inclusion, we need to do something about that. Advertising strategies are not cheap; they do not come with no cost. What will the financial burden on boards be?

**Suzanne Conlin:** A public board that influences public policy has a duty to have a diverse board, and that should not be thought of as an extra thing that the board has to pay for. It is not just about diversity of gender, but diversity of skills, which should apply to the whole board. The board should represent the population. It is not an extra thing that we have to do; public boards should be doing it already as they have a duty to ensure that they represent the people of this country, which is not just about getting women on boards.

**Lindsey Millen:** The work to encourage applications from women overlaps with the work that public boards should already be doing under their public sector equality duty, so it does not represent an additional legislative burden. If they are already doing the work that they are required to do in gathering data on recruitment, development and retention, analysing that data and developing action plans and equality outcomes that seek to advance equality across their organisations, there will be a massive overlap with what they will be asked to do to get more women on to boards.

We know that greater gender diversity on boards leads to excellence in public service delivery and efficient use of public funds so, if there is a cost involved, there will be a quid pro quo.

**Talat Yaqoob:** There is a financial implication in, for example, outreach work, which should already be happening, as Lindsey Millen said. I do not concede that it could be called a financial burden and I am leery of referring to it as that, because it is a financial responsibility.

**Annie Wells:** Following on from Mary Fee's point, I listened to what was said about ensuring that we have a diverse group of women, whether that is LGBT women or women with disabilities. Should we look at ensuring that male appointments to boards include men who are LGBT, BME or have other protected characteristics? Should we ensure that there is a more diverse range of men on boards, so that boards are more representative of society? How would we do that? Would we need a campaign that reaches different groups of people to encourage applications?

**Talat Yaqoob:** That comes back to my point about boards having connections and working with community groups to ensure that they pursue diversity across the board.

It is absolutely right and proper that the bill is about the 51 per cent of the population who are women. They are grossly underrepresented at every level of decision making in Scotland and it is right that the bill focuses on that.

Part of the public sector equality duty is the public sector being diverse across the board and for all protected characteristics. If a board just has white, able-bodied, straight men, there is already an imperative on it to pursue diversity. The bill is about the 51 per cent of the population who are grossly underrepresented, but there is already a duty on public sector boards to pursue diversity.

**Gail Ross:** I am sorry that I jumped in earlier without saying, “Good morning, welcome and thank you for coming.” As we are declaring interests, I am also a signatory to Women 50:50.

We spoke to officials last week and I made a point about Christina McKelvie and I speaking to the resolution on that issue at the Scottish National Party conference. I am convinced that the legislation is required, but what would you say to such groups as the Institute of Directors, which is not

“in favour of a random proportion being attached to one group”?

It would rather that a “holistic approach” to reporting on diversity was taken, as well as action to encourage women through training and mentoring. We hear that that is already happening and we know that the proportion of women on boards is already increasing, so why is the legislation needed?

**Talat Yaqoob:** Holistic approaches are welcome, but we have been doing them for a long time and we are at only 36 per cent. The data in front of us tells us why the bill has been introduced. Voluntary mechanisms that have no non-compliance sanctions and which do not come with a push from Government get us to around 30 to 35 per cent, which is where we are. Evidence tells us again and again that we reach a plateau in the number of women who come forward and are recruited on to boards.

I believe that there should be a holistic approach, but the bill ensures that a holistic approach will be taken. That is its purpose. Right now, a holistic approach can be taken or not taken.

If you look at what countries across Europe have pursued, particularly with regard to private boards, you see that, where there are voluntary mechanisms involving holistic approaches in training and development, they tend to put the onus on the women, not on the culture change and board change that we have discussed, and they do not get us to 50 per cent.

We are talking about decision makers and fair representation, and holistic measures have not worked. Soft and gentle approaches involving training and development have been done for decades, and they have not got us to 50 per cent.

**Suzanne Conlin:** Holistic approaches have been in place, but they have not done enough. If they were adequate, we would be at 50:50.

The women who speak to us directly say that they want the bill because there are barriers. All that we are looking for is a level playing field. We are not looking for special treatment; we just want to level the playing field and let those women have the same access. That is very simplistic, but that is what the women who want the bill say clearly.

**Lindsey Millen:** We know that homogenised equalities work does not work. You cannot do

something that will advance the equality of all the nine protected characteristics at once without taking specific steps that meet each group’s needs and challenge the barriers that each group faces. It is absolutely right that the bill is looking at advancing equality for women.

**The Convener:** I have a final question. Who should do the monitoring?

**Lindsey Millen:** There is potentially a role for the Equality and Human Rights Commission, because it is already responsible for monitoring compliance with the public sector equality duty. Obviously, there is a question of resource. If the commission was required to do the monitoring, it would be essential that it was adequately resourced to do so.

In its submission, Engender suggested the Commissioner for Ethical Standards in Public Life in Scotland. What Engender said on that made a lot of sense, but again resource is an issue. Whoever is asked to enforce compliance should be given the teeth and resources to do so.

**Talat Yaqoob:** Women 50:50 completely backs Engender’s proposal on that. In both our submissions we said that whoever is doing the monitoring should report to the Scottish Government and the Scottish Parliament so that everything is public and not happening behind closed doors, and so that the debate takes place in our chamber.

**The Convener:** I do not think that we have exhausted all our questions, but we have exhausted our time—we have a second panel to hear from.

We are incredibly grateful for your contributions this morning. If you go away and think, “I should have said this,” please let us know, because we still have a way to go on the journey with the bill. Thank you so much.

10:24

*Meeting suspended.*

10:30

*On resuming—*

**The Convener:** Welcome back. We continue our scrutiny of the Gender Representation on Public Boards (Scotland) Bill with our second panel of the morning.

I am delighted to welcome to the committee Rory McPherson, who is chair of the Law Society of Scotland’s equalities and law committee; Professor Susan Deacon, who is chair of the Institute of Directors Scotland—good morning and welcome back to Parliament, Susan; and

Professor Muriel Robison, who is a guest lecturer at the University of Glasgow's school of law. Thank you all so much for coming to the committee this morning. I know that you were in the public gallery to hear the evidence that we took from several organisations in the previous evidence session.

Given that you come from three different areas, I am keen to hear summaries of your views on the bill and what you think it means. We will start with Rory McPherson.

**Rory McPherson (Law Society of Scotland):**

Thank you, convener. In 2017, across the European Union, five countries already have mandatory quotas for female board membership—Belgium, France, Germany, Italy and Norway—and 10 have either an optional quota or a comply-or-explain best practice, such as Denmark, Greece, Austria, Slovenia and Finland. In the United Kingdom, after 10 years of voluntary schemes, we are yet to achieve gender diversity on public boards.

Against that background, the Law Society supports the bill, as we see other jurisdictions in Europe where comparable legislation has been used successfully. Although Norway's approach might have been seen as relatively controversial when it was introduced in—I think—2006, all the evidence shows that the discussion moved on very quickly and that, in Norway now, there is simply no debate about the issue.

**Professor Muriel Robison (University of Glasgow):** I have taken an interest for a very long time in positive action and legislation in relation to positive action, so I am particularly interested in and pleased to see legislation that essentially introduces a requirement to undertake positive action measures. Most legislation is permissive rather than prescriptive—it is voluntary rather than creating a requirement—so it is good to see a bill of this nature.

Along with a colleague from the University of Strathclyde, I submitted a response to the Government's consultation on the draft bill. Some very welcome changes have been made in the bill that has been introduced—the bill that the committee is consulting on—in particular the duty to take steps in relation to the objective, the duty to report and the target date. Those are all good developments. There are also some less welcome changes, including the apparent removal of transgender women from the bill and the removal of the "exceptional circumstances" defence and its replacement with a justification-type defence, which we might pick up on later.

The bill seems to be limited in its scope. It is important that it is as efficient and effective as it can be, given that, in this case, we are restricted

to looking at non-executive, non-employee members of boards so, even if the legislation achieves 100 per cent success, we will still not have gender balance as such on our boards. It interests me, given the limited scope of the bill, that everything that it seeks to do could be applied to employees. That would not breach European law or the Equality Act 2010, and I therefore think that it would be permitted by the new section 37 exception, which is the broader and more general exception in relation to the functions of public authorities.

Those are my opening remarks. I am happy to follow up on any of those and any other issues.

**Professor Susan Deacon (Institute of Directors Scotland):**

I thank the committee for giving me the opportunity to be here today. The discussion on the bill is important, as is the wider discussion on related issues. The convener nodded to the fact that I have been around various debates for some 30 years both about how we ensure that more women get into leadership roles across business and public life and about how we get good governance, not least of our public services. The area that the committee is discussing is therefore of real interest to me, and I am very happy to do anything that I can to help and to feed in thoughts and ideas to the committee.

As many of you will be aware, the IOD was set up as an organisation by royal charter in 1906. It operates across the UK and its members span the private, public and third sectors in big and small organisations, commercial and not-for-profit organisations and many other variations in between. Many of our members have board positions across different sectors and organisations, which is something that we actively encourage. I chair the IOD in Scotland, among a number of things. I am appointed from among the volunteer membership, if you like, to take on the chair's role for a fixed period, and that is where I am coming from for this meeting.

If it is of use to the committee, I will comment today on some of the wider issues around boards and governance considerations and how we achieve gender balance in that regard. I think that we all want really good and effective balanced boards, not least in our public bodies. I think that we all share that aim. The question is how to achieve it. As I said, I am happy to contribute to that discussion.

**Alex Cole-Hamilton:** Good morning, panel, and thank you for coming to see us today. I am aware that you were in the public gallery for the earlier evidence session and will have heard the arguments that were deployed.

I was talking at the margins with my colleagues while the meeting was suspended, and it was clear to me that, although we all agree that the bill is important, some of us feel that it could be strengthened in the way that the previous panel defined, particularly with regard to the use of sanctions. Scots law has a range of existing sanctions around recruitment for certain areas, with perhaps the most extreme example coming from the Protection of Vulnerable Groups (Scotland) Act 2007, which makes it an offence to knowingly employ somebody who is barred from working with children or vulnerable adults—that is why we have the protection of vulnerable groups scheme. However, there is a spectrum of options for sanctions. If we were to strengthen the bill by including sanctions, what would be available to us in that regard and what would be proportionate?

**Professor Robison:** I would like to see further sanctions in the bill and I think that not having them is a weakness in it. As you said, it is important that sanctions are proportionate. We have to take account of the fact that we are talking about public authorities, so some of the sanctions that we see in Europe, such as striking off and large fines, would probably not be appropriate or proportionate.

As I think has been discussed, we should look to an alignment with the public sector equality duty and its requirements on reporting and the like. If there was alignment with the public sector equality duty, the Equality and Human Rights Commission could play a role, as was discussed earlier, in relation to sanctions or failures with regard to that duty. Sanctions of that kind would be appropriate.

**Rory McPherson:** As you will have seen from our submission, the Law Society is sceptical about the effectiveness of the bill. One of the important concepts of legislation is that it should have an impact. Although I have not analysed Muriel Robison's helpful description of the possible penalties or civil remedies, absent some form of sanction or remedy system, the bill could be described as, in essence, legislation that reflects the voluntary codes. The reason why the Law Society is sceptical is that we have had the voluntary codes for a number of years and they have not achieved the desired end.

Across Europe, there are countries that have enforcement regimes. The most famous is the Norwegian regime, under which the requirement was for women to make up at least 40 per cent of company board members or the company would be delisted. That could not apply to a public sector board, but one can envisage possible remedies through the courts system if boards did not achieve their gender quotas.

One wonders what other type of socially useful legislation would succeed in the absence of a

sanction. Would road traffic legislation operate if there was no sanction for people speeding, to be simplistic? It would therefore seem logical to have some form of enforcement mechanism. In the absence of such a mechanism, the Law Society is sceptical.

**Alex Cole-Hamilton:** We would all agree that a reporting duty would strengthen that. It would concentrate minds and embarrass bodies that were falling behind into pulling their socks up.

You touched on guidance. It was something of a revelation to some of us that the Government does not plan to put statutory guidance behind the bill. Is that a mistake? Does it give the lie to the idea that the bill does anything more than, as you say, reflect good practice and give away that that is all that the Government wants to do with it? If so, what teeth can we give the bill under statutory guidance?

**Rory McPherson:** It is helpful to provide guidance on the interpretation of any legislation. Legislation is a useful instrument for the courts or other bodies to interpret, but guidance on how it is meant to be interpreted can be incredibly useful and can provide subtle guidance for the people who are required to implement it daily—in this case, the appointing person or the board in general.

The bill provides that

“A public authority ... must publish reports on the operation of this Act”.

There have been comments that there are requirements in other legislation, such as the public sector equality duty, to publish reports. However, publication can be a fairly broad concept. Where the reports were published and whether they were readily available to people outwith the organisation would be critical. Internal publication of an organisation's report might not have a useful impact.

**Alex Cole-Hamilton:** My colleague Mary Fee rightly pointed out the weakness of the language in the phrase

“An appointing person for a public board must take such steps as it considers appropriate”,

which is repeated several times in the bill in respect of the duties on those who appoint persons. Do the witnesses have experience of that phrase working in the past? Is it strong enough? How can we strengthen the language of the bill?

**Professor Robison:** I do not have experience of that particular phrase but, in my response to the consultation, I said that the problem with that and similar phrases such as “have due regard to” is that a public authority or an appointing person could say that they have thought about it and they do not think that there is anything appropriate. It

looks as though that would comply with section 5. If there were sanctions for failure, any court that was considering the matter would say that the authority or appointing person had thought about it, which was all that the section required them to do.

There needs to be specific provision on what the steps are in relation to all the good practice that colleagues on the previous panel discussed. It seems to me that requirements to report, review and revise are needed. They might be in guidance or even in a code of practice or regulations. They do not necessarily have to be in guidance; there could be something stronger than guidance in a code of practice or regulations.

10:45

**Professor Deacon:** I would like to pick up on the themes that Alex Cole-Hamilton raised, but I would like to come at them from a different angle. By definition, any piece of legislation should be precise, so the committee is right to think about the detail of the bill. That is also one of the challenges of legislating in this area. You are in terrain that is about culture change and achieving change across a wide range of areas. In some respects, the more precise you are, the more problems and possible unintended consequences you can stack up in getting to where you want to be.

The shared objective for everybody is to have good, strong and balanced boards for all our public bodies and to get more women into leadership roles. I therefore urge caution. In all its work and research in this area, in Scotland and in the United Kingdom, the IOD has urged caution on other occasions when legislative proposals have been considered because, although the right intent might underpin proposals, there can sometimes be unintended consequences as a result of precision.

Let me take the example of reporting. We should never underestimate how much reporting and transparency, in and of itself, can be a huge driver for change. In the private sector, a lot of work has been done on the FTSE 100 and FTSE 250 companies over recent years. That transparency—that shining a light on what is going on—has in and of itself driven a lot of change. We can increase by a factor of 100 the number of different ways that we can shine a light on what is going on in Scottish public bodies that do not require us to put everything into the letter of the law.

It is nearly 20 years ago that I, as Minister for Health and Community Care, did a review of national health service governance in Scotland. Many of the measures are still in place. We spent an inordinate amount of time really thinking about

how we could get the mix of structures, people and practices that was needed for that particular service at that particular time. Obviously, others since then have done more—and I am sure that they have done better—but my point is that the changes that have been made that have delivered changes in culture and practice have not necessarily been made by legislative measures and with the precision that is in legislation; they have been made by comprehensive efforts to drive culture change, part of which is reporting and transparency.

In Scotland, there is the Parliament, Audit Scotland, various inspectorates and ministers, who are the people in question in the bill. Through their actions and through being held to account by the Parliament, ministers have an enormous capability to drive change and transparency to ensure that there is a really clear and shared understanding of what is going on in our public bodies.

I will add one other point, which we can perhaps come back to and discuss in more detail. A number of people—including us—have mentioned this in their submissions. The bill focuses on non-executive members of boards because that is where the power to legislate exists, but what is going on with the executive appointments in our public bodies across Scotland is every bit as—if not more—important. There is a danger that, through a focus on the areas that it is possible to legislate on, energy, attention and effort will be displaced from carrying out some of the big changes that need to be made to get better gender balance and better balance more generally in many of our executive appointments to our public bodies in Scotland.

**Gail Ross:** Good morning, panel. Alex Cole-Hamilton asked about sanctions and Rory McPherson has spoken about what happens in other countries. I have some wide-ranging questions. Does the bill meet your expectations? How does it compare with legislation in other countries? I am thinking, in particular, of Norway, if that is a good example. Can anything be done to strengthen the bill?

We have touched on some areas, and an interesting point was made during the discussion with the first panel about encouraging women to have the confidence to be on boards. We know that there are women with the right skills, and having role models will have a knock-on effect in encouraging younger people into other areas of public life. Is there any knock-on effect for the private sector?

**Rory McPherson:** The bill is very different from the Norwegian example, which was a stringent imposition of a requirement. There was a comparable approach in other Nordic countries.



Sweden did not introduce equivalent legislation. As I understand it, it achieved gender equality without legislation. In Scotland, the bill builds usefully on the experience of voluntary codes and picks up the non-executive directors in the area of competence of the Scottish Parliament precisely because the voluntary codes have not achieved the relatively low levels of gender equality that it was their aim to achieve. The debate about the governance of public bodies is slightly different from the debate about the governance of private organisations, where the governance is not of public resources and the provision of support to the Scottish population.

A comment was made earlier about encouraging people to come through to be on public boards. The Law Society of Scotland is a body of slightly more than 11,000 Scottish solicitors. It is well reported that more than half of those are women, so there is a pool of slightly more than 5,500 people who, I would suggest, are relatively well qualified to be on public boards. There is the capability to achieve gender equality if only from the legal profession; other professions could equally come up to that kind of standard. Many individuals at different parts of their professional careers would see the benefit of being on a public board, partially for career advancement and also to enhance their greater understanding of the role of a solicitor in society.

I am sorry if I have not answered all your questions.

**Gail Ross:** That is grand—thank you.

**Professor Deacon:** I want to pick up on the last part of Gail Ross's question. These days, I am something of a zealot in encouraging cross-fertilisation across sectors, boundaries and organisations. An enormous amount of learning can be done in that space across the private, public and third sectors. Across all those sectors, there are examples of really good practice that is driving sustained culture change. Frankly, one of the reasons why I am involved with the IOD in Scotland is because it is one of the few organisations that draw a thread across the leadership community in Scotland, and people who are working across boards in various organisations. I believe passionately that Scotland plc needs to have good boards across all those good organisations, so that we do our best for the country and the economy. We do a lot in encouraging that cross-fertilisation. A growing number of people are taking on non-executive positions alongside their executive roles and crossing sectors, in different directions, to do that. That is healthy, and the more we can do to encourage it, the better.

Similarly—here I must pay tribute to a range of organisations, including the likes of Women's

Enterprise Scotland and Changing the Chemistry—we are engaged in systematic efforts to train and develop potential board members, with much of the focus being on women, and, critically, to train others, such as board chairs, in what they can do to ensure that they put balanced boards in place and create an environment that is effective in enabling different people to participate and contribute. They need to ensure that they get a genuine mix of skills and experience around the table. That is why I stress the importance of what is sometimes dubbed cognitive diversity. It is really important that we do not just focus on the kind of diversity that is measurable and tangible in getting a balanced board together; we need to think about the diversity of thought and experience that is so important.

The more that any of us can do to drive change and learn across sectors, the better it can be. Scotland is a small country and we can do that at scale in a way that other parts of the UK cannot.

**Professor Robison:** Gail Ross also asked about what works in other countries, and I mentioned one or two things about fines and the like. There is a limit to what can be done, given the powers that the Parliament has.

Another thing that I could mention in terms of sanctions is the possibility of giving redress to individuals, whereby they could challenge why the public body did not apply the gender equality objective to their appointment. At the very least, that would focus the minds of the public authorities. If you know that you will be asked for detailed feedback, you need to think very carefully about why you made the decision and why you did not use the objective in particular circumstances. Interestingly, that was suggested in the draft EU directive on increasing diversity on company boards, so it has been proposed at the European level.

**Gail Ross:** I want to follow up on that with a small legal point. If boards are to be required to tell people why they were not suitable for the job, and a male applicant finds out that he was overlooked in favour of a female candidate, will the proposed legislation prevent him from taking any legal action?

**Professor Robison:** It would not prevent him from doing so, but it would be used as a defence by the public authority. It could use the Equality Act 2010, where that was appropriate, and the bill as enacted to explain and justify its position.

**Rory McPherson:** The converse is also true. When boards do achieve gender equality, the female candidate would be able to take that information back.

One can speculate about the hypothetical situation of two precisely equally qualified

candidates, but I do not think that the experience in Europe is that such difficulties with identically qualified candidates have caused a hindrance in other jurisdictions that have brought in mandatory quotas.

**Gail Ross:** Is it not true, then, that the person will always be appointed on merit rather than because of their gender?

**Rory McPherson:** The Law Society's view is that the bill encourages appointing the person out of the 100 per cent of the Scottish population who is best suited on merit. Given the gender profile, a question might arise about why, against the 100 per cent of the Scottish population, the profile of public boards seems to represent a smaller group in society.

**The Convener:** Susan, did you want to come back in?

**Professor Deacon:** I suspect that Annie Wells will cover the same terrain.

**Annie Wells:** It is a similar point. Obviously, if there is anonymity of applications, you could have two male candidates who come out as the lead candidates. It would be quite difficult to achieve a 50:50 ratio if we do not have something set down to start with.

11:00

**Professor Deacon:** I am glad that you raised that point, because that is exactly the sort of terrain that I wanted to comment on further. It is incredibly difficult in discussions such as this to drill down into how you operationalise some of these kinds of practices. However, having been involved in quite a lot of board recruitment and so on in my time, I tried quite hard when I was reading through the bill and the various explanatory notes to think through how I would apply the proposals and how they would marry with the current public appointments process in Scotland. There are a number of operational challenges that I do not think can be addressed fully in this type of discussion, as I said. However, I encourage the committee and the Scottish Government to test fully and widely how some of the issues that have been raised would play out in practice and whether there are changes that would need to be made in the current practices around the public appointments process in Scotland to ensure that everything works in tandem.

I have expressed concern about the bill as it stands partly because of the point about how legislation can sometimes be a blunt instrument that has unintended consequences. We are in terrain in which everything—from people being encouraged to apply, through the sift process, the selection process, the appointment process and

the training process—has to work together to get a good outcome. However, at the moment, it seems to me that a lot of these issues are in danger of perhaps not getting the attention that they deserve because people are—rightly—keen to achieve gender balance. It is important that those questions are worked through.

**Mary Fee:** Ms Deacon, when you answered Gail Ross, you spoke about driving change and taking a more holistic approach across the areas that you represent. Can you tell us what is currently done to share good practice across those areas?

**Professor Deacon:** I do not purport to represent all those areas, and I would always say that everybody could do a lot more.

The Scottish ecosystem, as it were, has had almost 20 years of devolution and all that has gone with that, and there are networks and connectivity between organisations that are really quite special and which we can build on and do a lot more to learn from. For example, IOD Scotland often tries to do the things that it does in partnership with some of the other organisations that I have mentioned and with certain companies and, indeed, the Scottish Government, with which we have worked to develop trustees in charity boards and so on. Some of the activity is simply very good practical and grounded training and development activity, and some of it is mentoring—anyone who has acted as a mentor knows that it is a hugely rewarding thing for the mentor as well as the mentee.

The big challenge, which I touched on earlier, is how we can develop what is generally called the executive pipeline in any organisation. I have been party to more discussions and events on that than I care to remember over the years. I think that there are areas in which significant change and progress have been made—I am talking about the wider culture shift, not just the gender balance or diversity within top teams—but there are many other areas in which, 30 or so years ago, those of us of a certain age would have expected there to have been greater change by this time in our lives.

I am not sure that compulsion, whether through legislation or other measures, is necessarily the best way to get underneath what is stopping some of that deeper culture change. I do not purport to have the answers, but organisations such as the IOD and some of the others that I have mentioned can be hugely effective at brokerage between different organisations.

I meant to say at the beginning that one of the core royal charter purposes of the IOD is

“to promote the study, research and development of the law and practice of corporate governance”.

The organisation has a big research capability, as well as lots of networks and connections, across the UK and within Scotland. Irrespective of where the committee decides to go with the bill, there has to be, in addition, a wider array of activity that seeks to drive that change in culture and practice.

I hope that that answers your question; I do not know whether I gave you enough specifics.

**Mary Fee:** Yes, it does—it was very helpful.

If some of the language in the bill was tightened up, and there was statutory guidance and some kind of reporting or audit mechanism, do you think that it would be helpful to put something in the guidance about building on and developing the shared practice that already exists and building on the networks that are already there?

**Professor Deacon:** I think that we would continue to urge caution about what is put into primary—or, indeed, secondary—legislation. That is one of the main messages that I want to feed into the committee today.

**Mary Fee:** Does Muriel Robison want to come in on that before I ask another question?

**Professor Robison:** It is interesting that Professor Deacon says that we have been expecting greater and better changes for 30 years but that we have not had them. We have had the voluntary approach for all those 30 years and many more, and that is why provisions requiring positive action such as those that are in the bill are required.

I want to pick up on one or two other things in relation to the point about merit, which Ms Wells mentioned. In my response to the consultation on the draft bill, I talked about the fact that merit is contested. That is a difficulty. It comes back to the need for guidance in order to channel people in the right direction.

There are issues with the bill. For example, it gives no further help with what “equally qualified” might mean. Unlike Mr McPherson, I think that there are often situations where two candidates are equally qualified and the panel weights some factor or other that suits them, such as the fit with the organisation. Here we are saying that the panel must weight gender. If there is underrepresentation, that is what the panel must weight. The bill would ensure that people were thinking it through and actually doing that.

**Professor Deacon:** Can I come back on a couple of points, convener?

**The Convener:** Yes, of course.

**Professor Deacon:** On my reference to change over 30 years, I want to be clear that I was talking about the broad culture change that I think many of us wanted to see in organisations generally and

in society more widely. My point is that a very complex mix of factors feeds into that. We are really only going to get sustained change in the workplace when we have a much more holistic conversation about life, work, family and a whole bunch of other stuff.

In my view, that is all the more reason why we have to be cautious about quotas of any sort. I feel that I have been involved in debates around quotas throughout my adult life, whether in organisations, in politics or wherever. I totally understand why quotas have a place and why some boards voluntarily choose to have them when they think that it is right for their organisation and the kind of skills mix that they need. I—and the IOD as an organisation—worry greatly about having a quota that applies across a very diverse range of boards and in one area alone. We worry how that might impact on the desire to get the balanced board that is wanted.

The other thing I am going to say—as a woman who has held leadership roles in my time—is that we have to respect the fact that a number of women are still uncomfortable about being part of a process that involves a quota system.

There are very different views among women—as there are among all people—about quotas. However, I would like it to be noted, for the record, that I know that a number of women are still very uncomfortable about them. No matter how robust a selection process is, rightly or wrongly, I would argue that using a quota creates a climate in which it starts to be implied or suggested that women are not there on merit. That is a potential unintended consequence of heavy overreliance on quotas. However, none of those points should go against the high-level aims that everybody here has; they are just words of caution along the way.

**The Convener:** We have only a few minutes left. Mary Fee wants to come in. Mary, you will have to be very quick, as Jamie Greene wants to come in as well and I want to give him some time.

**Mary Fee:** I will be very brief. I asked the same question of the previous panel, but I will shorten it. Does the panel see any financial implications for boards of taking steps to increase and improve diversity, given what the previous panel has said, which was that boards should be doing that already?

**Rory McPherson:** No.

**Mary Fee:** That was short and sweet. Thank you. Excellent.

**Professor Robison:** I tend to agree, partly because, as the previous panel said, the public sector equality duty already requires people to think about positive action. In my view, that is a requirement of the duty, so people should be

thinking about positive action in relation to protected characteristics across the board. They should already be doing that; the focus here is on one protected characteristic.

**Professor Deacon:** It could be argued—I was thinking this while I was listening to the previous discussion—that if it is all already happening, and therefore there is no cost, there is no need for legislation. If we need legislation, we will need to spend money too, if we are to drive the kind of change that is needed.

**Jamie Greene:** I am sorry that we do not have a lot of time left. I want to check a statistic because I am reading conflicting figures. The IOD's submission says that the current level of female representation on public boards is 42 per cent and increasing. Is my understanding of the submission correct?

**Professor Deacon:** I did not write the submission, but I saw the 42 per cent figure. I think that it is in the Scottish Parliament information centre document and that that is where it came from.

**Jamie Greene:** The only reason that I flag it up is because the Close the Gap figure was 36 per cent, so that is why I am confused. I ask not just to be fiddly with the numbers, because six percentage points make quite a difference psychologically. To me, 36 per cent sounds like a third, while 42 per cent and increasing sounds as though we are heading in the right direction. That is where, for me, the dichotomy in the bill manifests itself.

I hear both sides of the argument. Susan Deacon is probably one of the few voices that we will have in this room who represents a substantial part of Scotland's economy and business community and who thinks that the legislation is not required. That is why I want to check that figure. If you are saying to me that it is 42 per cent and it is increasing, so that we are heading towards 50 per cent anyway and therefore there is less requirement for the legislation, your argument makes more sense. However, 36 per cent means that we are still far away from 50 per cent.

**Professor Deacon:** The 42 per cent figure is on page 3 of the SPICe briefing, so I presume that that is where our people took it from.

**Jamie Greene:** I guess that my question—

**Professor Deacon:** On reading that number in the SPICe briefing, my question about it was whether that had looked at boards as a whole or just at non-executives. I thought that there needed to be more clarity around that. More statistical information needs to be flushed out.

**Jamie Greene:** I agree. Obviously, people can be selective with statistics, to show one side of an

argument over another. What strikes me about the bill is how narrow it is. It focuses only on public boards—not on those in public organisations but on the non-executive boards within those organisations—and it applies only to situations in which there is no best-qualified candidate. The conversation seems to be more around how the bill should be beefed up and strengthened or should have more provisions, such as on sanctions and reporting requirements. It has been intriguing to hear somebody say why they do not think that there is a need for quotas at all—which I believe is what you are arguing—and that the bill imposes a mandatory duty that they do not think needs to exist.

**Professor Deacon:** To be clear, I—and the IOD as an organisation—completely respect the right of the Parliament to work with Government on working through the issue to get the best outcome, which, as I have said, is one that we all want. Both in the written submission from the IOD and in the comments that I have made today, we are urging caution. As you rightly say, this is about legislating across the piece, in the same way, for all public bodies; for one part of each board, which is the non-executives; and for one aspect of diversity on a board.

Given that the overarching aim and purpose from a good governance point of view is to get good, strong, balanced boards with a rich mix of skills, experience and diversity, we are really just posing the question, “Are you sure that this is actually going to deliver that outcome, or might there be unintended consequences?” In a sense, we are then putting it back to you, as policy makers, to keep working that through, having, we hope, taken some of our questions and thoughts on board.

11:15

**Jamie Greene:** It very much seems that voluntary measures are not working, because we are not achieving true proportionality in representation, so I am sympathetic to the objectives of the bill. However, I take your point about the unintended consequences of a quota, which might divert attention from the real issue of getting proper representation at executive level across business, the third sector and the public sector. I still do not fully understand why a quota will do less than a voluntary measure. Voluntary measures seem not to be working, so there is a gap in my understanding of how organic processes will get us to where we need to be. Is it your view that representation does not need to be 50:50 on certain boards?

**Professor Deacon:** I must stress again, because I want to be very clear, that we do not seek to be prescriptive. I think that everyone who

is involved in work and discussion in this area is open-minded about trying to develop the most effective ways of getting to the place that we all want to get to. I see this as a bit of a shared learning journey. I would hate for either me as an individual or the organisation that I represent to adopt a black-and-white, yes or no position. I really stress that.

Your questioning raises exactly some of the things that I would encourage you to look into further. On your question about numbers, as I said, the 42 per cent figure is lifted directly from the SPICe briefing. What exactly does it mean? Is the gap eight percentage points, or is it one of the figures that others have quoted? I do not know; we have just operated from that information.

I must stress the overarching point about balanced boards. We must not divorce equalities issues from governance issues. We are talking about boards that have oversight of hugely complex and important public services across Scotland and billions of pounds of taxpayers' money. We all want to ensure that there is a rich mix of people around those tables. As the previous panel explored, diversity comes in many shapes and forms, and there has to be a diverse mix, including among the men and the women themselves. We are not talking about boards of thousands of people; we are talking about 10 or a dozen non-executive appointments, and perhaps fewer in some cases. There are knock-on effects—one appointment might have a knock-on effect for someone else—and you cannot afford to leave a big, important, complex board with a real gap in terms of the skills and knowledge that it needs. We encourage the committee to explore those things further.

**The Convener:** You mentioned operational challenges. Do you have an example of such a challenge?

**Professor Deacon:** It is really to do with the terrain that we have discussed. I am sure that the Scottish Government has done this and can provide further information—I just have not come across it—but we need to work through whether, if we play out the letter of the bill as it is currently proposed alongside the existing public appointments process in Scotland, everything will actually hang together and take us to the place that we want it to take us. Will the people involved in that process actually be able to manage the issues to do with the numbers, the merit question, anonymity and so on?

**The Convener:** At the beginning, Muriel Robison mentioned two things that are not in the bill. You said that it does not include trans women, and we will interrogate that as we go along, but you also mentioned the removal of exceptional

circumstances. Can you give us some insight into what you meant by that?

**Professor Robison:** I was referring to section 4 in the consultation draft. The issue involves ensuring that there are circumstances in which, in cases where a disabled person is as well qualified as a non-disabled person, an organisation can say that, because it has a problem with its diversity in relation to disabled people, it will select the disabled person. I think that the change in language from “exceptional circumstances” to a scenario involving a much broader justification perhaps gives too much scope to the appointing board in terms of when it can say that it is not going to follow the requirement to achieve the objective.

**The Convener:** That gives us some other avenues to explore.

**Rory McPherson:** Earlier, Muriel Robison discussed the issue of circumstances in which there were candidates of equal standing. I responded to what I understood was essentially a hypothetical scenario involving two identically qualified candidates, but I am happy to defer to her expertise in this area and to concede that there will be instances in which there are two identically qualified candidates. The Law Society does not have a difficulty with the bill in that context. I was simply responding to the hypothetical position that is sometimes put forward involving the difficulties that would arise in cases involving two identically qualified candidates. In my own experience, individuals who are characterised as being identically qualified turn out not to be when we look more closely. The bill is useful in that it identifies an opportunity to consider gender capacity in that regard.

There are some challenges in the bill around the appointing persons' rather subjective assessment. One would hope that the reporting requirements would tease that out. On the broader issue, as we have said, the Law Society hopes that there will be opportunities to come back at a future date to consider further legislation dealing with other protected characteristics. However, that might be tied in with issues of legislative competence.

At present, the society's concern is that, with regard to the end that the legislation seeks to achieve, the absence of a form of penalty or redress, such as saying that the court can enforce the duties with appropriate remedies providing penalties for non-compliance, means that the legislation might be criticised as providing essentially a statutory voluntary code.

**The Convener:** We have run out of time. You have given us lots of questions to ask the Government, and we are grateful for your contribution. As I usually say to witnesses, if you

go away and think of something that you should have said, please let us know in writing while we are still deliberating on the bill.

11:23

*Meeting continued in private until 11:35.*

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