



**Coalition for Racial Equality and Rights response to
Scottish Parliament's Equality and Human Rights Committee Enquiry
on Gender Representation on Public Boards
August 2017**

CRER is an independent NGO working to eliminate racial discrimination and promote racial justice across Scotland. Through capacity building, research and campaigning activities which respond to the needs of communities, our work takes a strategic approach to tackling deep rooted issues of racial inequality. CRER has experience of anti-racist work covering areas such as community engagement and empowerment, research and resource development, practical training and equality mainstreaming support for public and voluntary sector organisations.

Representation

As an equalities organisation CRER welcomes all efforts that aim to reduce inequality/counter discrimination and tackle under representation of individuals, based on their protected characteristics. We are therefore supportive of the Scottish Government's commitments to improve representation of women on public boards, and to work towards achieving a gender balance when making public appointments. However CRER remains concerned that this legislation applies only to gender representation and overlooks other groups that may benefit from targeted action from the Scottish Government.

The table below has been taken from data published in the Commissioner for Ethical Standards in Public Life in Scotland Annual Report 2015/16¹. It shows the Commission's own targets in terms of achieving greater equality on public boards and highlights the number of applicants and successful appointments over the past 4 years.

Target Group	Target %	2015 %	2015 %	2014 %	2014 %	2013 %	2013 %	Scottish Population %
Female	40	40.8	53.6	37.9	34.1	31.4	34.5	51.5
Disabled	15	12.7	10.3	10.4	7.2	12.6	10.9	19.6
Black and minority Ethnic	8	5.3	5.2	4.9	*	3.8	*	4.0
Aged 49 and under	40	27.4	24.7	29.4	24.0	24.6	20.0	54.3
Lesbian, gay, bisexual and other sexuality	6	4.1	5.2	3.9	*	2.6	*	6.0

Key:

Applications

Appointed

* Values for less than 5 have been suppressed

¹ Commissioner for Ethical Standards in Public Life in Scotland, [Annual Report and Accounts 2015/16](#) September 2016

As can be seen by the data supplied, the gender target for applications was exceeded in 2015, with over half of all appointees being female. Yet for the other protected characteristics measured (age, disability, ethnicity and sexual orientation) the targets for applications were missed, in some cases, quite significantly, with the appointment rate being significantly lower than the application rate.

This suggests that sex is no more in need of targeted legislation than other under-represented groups and any further regulations introduced should look to improve outcomes across all protected characteristics and not just sex. Indeed, a target focussed on sex only could lead to regression of the number of people with other under-represented protected characteristics. This also reinforces the response that CRER submitted to the Scottish Government as part of their public consultation on this bill in March this year. We reiterate that:

“Whilst the Bill itself is exclusively focussed on gender representation, there should be wider equalities considerations within this. For example if representation of women is already above 50% on a certain board, then it may arise that a white male is appointed over a BME woman, or a woman with a disability. If such a circumstance were to arise, then it may potentially inhibit diversity rather than improve it.”²

Under the Scotland Act 2016 there are provisions available to the Scottish Parliament “relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.”³ With this in mind, CRER believes that the legislation should be amended to refer to protected characteristics in line with the Equality Act. If amended this Bill has the potential to improve representation across all minority groups, and those that face discrimination based on their protected characteristics. Section 4 (4)(a)(b) of the proposed legislation states:

4) The appointing person—

(a) must consider whether the appointment of a candidate identified under subsection (2) who is not a woman is justified on the basis of a characteristic or situation particular to that candidate, and

(b) if so, may give preference to that candidate.”⁴

At present the terms of reference in Section 4 does not make it clear what “characteristics” or “situation” would allow the appointing person to give preference. From an equalities perspective this section must be more robust to ensure that there are clear regulations as to when exceptions can be made and why. The ambiguity of this section reinforces our call that the Scottish Government amend this Bill to cover all under-represented protected characteristics in order to meaningfully embed equality law into everyday practice.

CRER iterated this point in our written evidence to the Scottish Government earlier this year:

“There are too many potential loopholes that may exclude persons with a certain protected characteristic which may create a barrier to improved representation across the other protected characteristics.”

² CRER, submission to A Scottish Government Consultation on the Draft Gender Representation on Public Boards (Scotland) Bill 17.3.2017

³ [The Scotland Act 2016](#)

⁴ Scottish Government, [Gender Representation on Public Boards \(Scotland\) Bill](#) [As Introduced]

“We strongly feel that the Bill as it currently stands is a real missed opportunity to embed the provisions laid out in the Equality Act. This could be done by including the full range of protected characteristics within the proposed legislation, and by making the intentions of the Bill clearer through statutory guidance which would support its implementation.”

Objective

CRER is concerned that the 50% representation target may prove problematic to implement and would recommend that instead of working towards 50% representation, that a minimum level of 40% of board members be female. This would remove the need for special provisions for boards with uneven numbers and by setting a minimum representation standard rather than a 50% target it may also allow for up to 60% representation of women on a board. This would be particularly important for areas or sectors that currently employ high numbers of women. As they should have the freedom to have higher than 50% representation within their boards, if this would better represent their workforce and service users. Conversely, setting a minimum of 40% for either gender, would ensure that there must be a clear commitment to market to and recruit from a wide pool of diverse candidates. The manner of implementation of this would remain the same as laid out in the Bill in that achieving the minimum would only apply to the appointment of new candidates. It is probable that the majority of executive Board members, who are not affected by this Bill, are likely to be male, and allowing for up to 60% of non-execs to be women may be useful to ensure a truly balanced board.

Further to this, not all roles within a board are equal. For example the chair of the board is likely to have more responsibilities and potential influence. Some boards recruit the role of a chair separately and at present there is under representation of women (and other minority groups) in chair positions on public boards. By imposing a 50/50 target it may well be that due to individual board recruitment practices, when a female chair resigns that they must then be replaced by a male successor to maintain the gender balance. By setting a minimum standard of 40%, this would again allow for more flexibility around potentially regressive cases such as this.

Encouragement of Applications

This section must be expanded to include wider representation considerations. Whilst the Bill itself is exclusively focussed on improving gender representation, there should be wider equalities considerations within this. Despite mentions under Section 4 that preferences can be made based on “a characteristic” or “situation” the efforts to encourage applications will only apply to female applicants. This is another missed opportunity in this Bill. As noted above, at present the percentage of female applicants is in line with targets set by the Commissioner for Ethical Standards in Public Life, yet the number of BME applicants, those under 49 and applicants who do not identify as heterosexual are well below their target. This evidence suggests that more can be done to encourage applications from these under-represented groups and this Bill could provide the leverage to do so.

Reporting

We would expect that public boards publish details of all applications that have been processed. This should include details of the applicants protected characteristics and whether they have been successful in gaining an interview, and if they have subsequently been appointed to the board. As there may be a small number of board appointments each year across all public bodies CRER would advise that this information is submitted to a third party, for example the Commissioner for Ethical Standards in Public Life, as they already hold much of this information, and would protect the identities of individual appointments.

Enforcement

As the Bill stands, there are no sanctions for boards that do not follow these rules. It could be argued that without sanctions there is no enforcement of this legislation which may allow for non-compliance. Furthermore, there is nothing outlined to give protection to candidates who may feel that they have been unfairly discriminated against. There should be an independent overseer of this new legislation to ensure that it is implemented as intended and help offer guidance to all candidates and public boards.

This regulator should also provide guidance on how to attract a broad range of candidates, especially those with a protected characteristic to enable public bodies to achieve their objective creating public boards that are more representative of the Scottish population.

Key definitions

CRER supports the concerns raised by the Equality and Human Rights Commission⁵ around this issue the term “gender” in this bill. Whilst there are distinctions made in the Bill through the use of the term “women”, and “female” appointments, decisions are still laid out to allow the authorities to make appointments based on “gender representation”. This further consolidates CRER’s view that the Bill must refer to protected characteristics which would improve under-represented groups with varying protected characteristics and would resolve any potential issues around “gender” with clear provisions laid out under gender reassignment.

⁵ EHRC [A Scottish Government Consultation on the Draft Gender Representation on Public Boards \(Scotland\) Bill](#) March 2017