

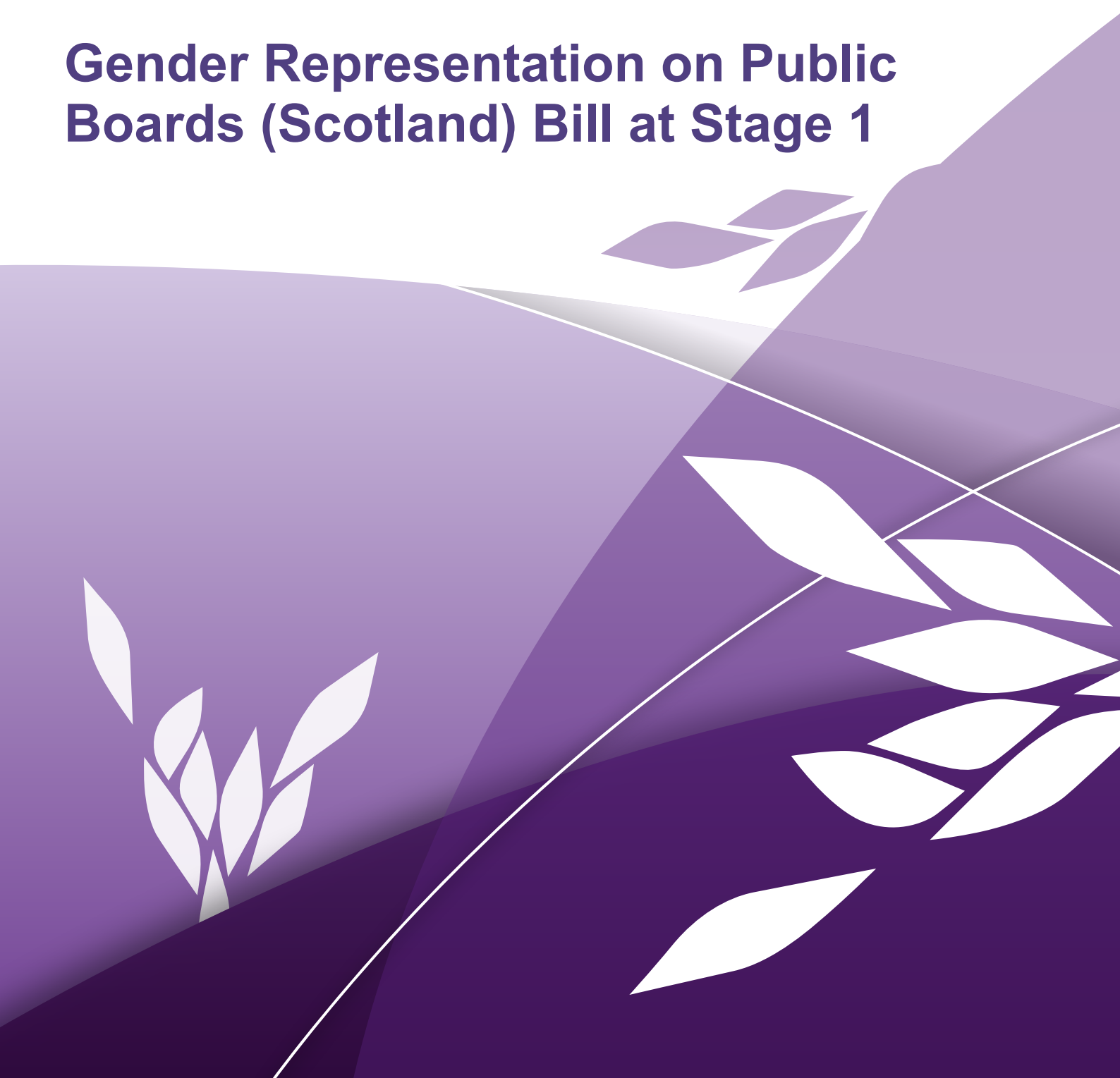


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Gender Representation on Public Boards (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 5 September and 3 October 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Gender Representation on Public Boards (Scotland) Bill ("the Bill") at Stage 1.ⁱ The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum ("DPM") on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Gender Representation on Public Boards (Scotland) Bill is available here:

[http://www.parliament.scot/
Gender%20Representation%20on%20Public%20Boards%20\(Scotland\)%20Bill/
SPBill16S052017.pdf](http://www.parliament.scot/Gender%20Representation%20on%20Public%20Boards%20(Scotland)%20Bill/SPBill16S052017.pdf)

ⁱⁱ The Delegated Powers Memorandum is available here: [http://www.parliament.scot/
Gender%20Representation%20on%20Public%20Boards%20\(Scotland\)%20Bill/
SPBill16DPMS052017.pdf](http://www.parliament.scot/Gender%20Representation%20on%20Public%20Boards%20(Scotland)%20Bill/SPBill16DPMS052017.pdf)

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 15 June 2017. The lead Committee is the Equalities and Human Rights Committee.
4. The Policy Memorandum explains that the objective of the Bill is to increase the representation of women on public boards in Scotland. It follows the devolution under the Scotland Act 2016 of the competence to legislate on equal opportunities relating to *“the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities”*.
5. The duties in the Bill apply to the boards of certain public sector bodies, colleges and higher education institutions in Scotland, but not to the boards of voluntary organisations or private companies. The particular bodies the duties apply to, together with a list of particular positions in those bodies excluded from the duties, are set out in schedule 1 of the Bill. Schedule 2 makes special provision for certain public bodies covered by the Bill where this is required (e.g. where there is more than one appointing person).
6. The Bill sets a “gender representation objective” for public boards to have 50% of female non-executive members. It requires positive action to be taken towards the achievement of this objective. Specifically, in situations where there is more than one equally qualified candidate for appointment, at least one of whom is a woman, an appointing person must give preference to appointing the woman if doing so will result in the board achieving or making progress towards achieving the gender representation objective.
7. Both the public authority, and the person responsible for making appointments to the authority's board, are required to take steps to encourage women to apply for relevant board positions. They are also both required to take such steps as they consider appropriate with a view to the gender representation objective being achieved by 31 December 2022. The Bill also enables the Scottish Ministers to require such authorities as it specifies in regulations to report on the operation of the Bill once it has been enacted.

Delegated Powers Provisions

8. At its meeting on 5 September 2017, the Committee considered the three delegated powers in the Bill. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
 - Section 7 – Reports on operation of Act
 - Section 12 – Commencement
9. At this same meeting, the Committee agreed to write to the Scottish Government to raise three questions on the one remaining delegated power, in section 8 of the Bill. A copy of all correspondence with the Scottish Government is reproduced in Annex A.
10. Following consideration of the Scottish Government's responses to these three questions, the Committee is content in relation to the issues raised in its first two questions.
11. In relation to the issue raised in the Committee's third question, however, the Committee is not content with the Scottish Government's response and makes one recommendation as set out in the next section of this report.

Recommendations

12. The Committee's comments and recommendation on the delegated power in section 8 of the Bill are detailed below.
13. **Section 8 – Power to modify schedule 1**
Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provisions

14. Section 8 enables the Scottish Ministers to make regulations modifying schedule 1 so as to add or remove an entry of a public authority caught by the requirements of the Act or to vary the description of such an entry.
15. In terms of section 11(1), regulations under section 8 may include incidental, supplementary, consequential, transitional or saving provision and may also make different provision for different purposes. Section 11(2) provides that regulations under section 8 may also modify the Act (which is currently the Bill).
16. By virtue of section 11(3), regulations made under section 8 are subject to the negative procedure.
17. The DPM explains that the power in section 8 will allow the Scottish Ministers to add a new public authority, if for example a new public body is created, or to remove a public authority in the event that a body is dissolved. Other examples of

where the power in section 8 may be used include renaming, merging or reclassification of public authorities.

18. The DPM also explains that the power in section 11(2) for regulations to be capable of modifying the Act (rather than just schedule 1) is included because a future addition to schedule 1 may require a consequential change to the Act. It provides the example of an addition to schedule 2 being required if there were two different persons responsible for making appointments to the board of the public authority added to schedule 1.
19. The Scottish Government's position is that taking a power to modify schedule 1 by regulations as opposed to primary legislation is proportionate and will allow the Scottish Ministers to make such technical amendments swiftly.

Comments

20. Among other things, the Committee agreed to explore with the Scottish Government whether, given that the regulation-making power in section 8 permits amendment to any provision of the Bill as enacted, it would be more appropriate that the affirmative procedure applied to ensure sufficient parliamentary scrutiny.
21. The Scottish Government's response was that the negative procedure was appropriate for regulations made under section 8 which modify the Bill as enacted. This is because the power is limited insofar as it must relate to the modification of schedule 1, which in turn is limited to adding, varying or removing an entry to that schedule (i.e. a public body caught by the duties in the Bill). The types of modifications will arise out of the particular circumstances of the public authority, which will be a technical matter.
22. The Scottish Government provide as an example of the kinds of modifications which might be made the entries in schedule 2 of the Bill. The Scottish Government also state in its response that the circumstances of a particular public authority might require the modification of a section of the Bill.
23. The Committee is content that in principle there is a regulation-making power to allow modification of the Act as a whole arising from a modification made to schedule 1. The Committee agrees with the Scottish Government that the regulations made under the powers in section 8 are limited insofar as they must relate to modifications made to schedule 1 to add, vary or remove an entry to the schedule, and that such modifications will be technical in nature.
24. However, the Committee considers that the power to modify the Act as a whole is one which, although technical in nature, should be subject to the affirmative procedure. This is particularly in circumstances where the power is not limited to amending schedule 1, or even schedules 1 and 2, but instead allows amendment to the Act as a whole. The Committee considers that there should be the opportunity for enhanced oversight to ensure that the Bill as enacted applies appropriately to any public authority added to, varied in or removed from schedule 1.

Recommendation

25. **The Committee therefore calls on the Scottish Government to amend the Bill to change the regulation-making power in section 8 from being subject to the negative procedure to being subject to the affirmative procedure.**

Annex A

CORRESPONDENCE WITH SCOTTISH GOVERNMENT

LETTER TO THE SCOTTISH GOVERNMENT FROM THE COMMITTEE (11 SEPTEMBER 2017)

Gender Representation on Public Boards (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 5 September and seeks an explanation of the following matters:

Section 8 – Power to modify schedule 1

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Section 8 enables the Scottish Ministers to make regulations modifying schedule 1 so as to add or remove an entry of a public authority caught by the requirements of the Act or to vary the description of such an entry.

In terms of section 11(1), regulations under section 8 may include incidental, supplementary, consequential, transitional or saving provision and may also make different provision for different purposes. Section 11(2) provides that regulations under section 8 may also modify the Act (which is currently the Bill). By virtue of section 11(3), regulations made under section 8 are subject to the negative procedure.

Section 9 introduces schedule 2, which is stated to make provision about the application of the Act in relation to certain public bodies.

The Committee is not clear why the power to make regulations under section 8 includes, by virtue of section 11(2) a power to modify the Act as a whole, rather than being limited to amending schedule 2 in relation to the particular public authority.

The Committee therefore asks the Scottish Government to explain why it is necessary that section 11(2) provides power to modify the Act as a whole, rather than being limited to amending schedule 2. In particular, the Committee requests examples of when it would be necessary for regulations made under section 8 to modify a provision of the Act other than schedules 1 and 2.

Separately, in relation to the parliamentary procedure that applies, regulations made under section 8 of the Bill are subject to the negative procedure. The Freedom of Information (Scotland) Act 2002 provides for a different approach and is a useful comparator. Section 4 of that Act includes a power allowing the Scottish Ministers by order to add or remove the public authorities listed in schedule 1 to which the right of access to information applies. Such an order is to be made under the negative procedure except in particular circumstances where the affirmative procedure applies by virtue of section 7 of that Act. These circumstances are where regulations list the authority only in relation to information of a specified description.

Bearing in mind the approach taken to the regulation-making powers in sections 4(1) and 7(1) of the Freedom of Information (Scotland) Act, the Committee asks the Scottish Government whether it considers that it would be appropriate for regulations made under section 8 of the Bill to be subject to the affirmative procedure where those regulations make any provision in the second column of the table in schedule 1 to exclude certain positions within a public authority from the requirements of the Bill.

Finally, regardless of whether or not section 11(2) is limited to making modifications to schedule 2 (rather than the Act as a whole), the exercise of such a power in regulations made under section 8 would amend primary legislation. Accordingly, the Committee asks the Scottish Government to consider whether it would be more appropriate for the affirmative procedure to apply.

RESPONSE FROM THE SCOTTISH GOVERNMENT (19 SEPTEMBER 2017)

Thank you for your letter of 11 September 2017 on behalf of the Delegated Powers and Legislative Reform Committee to James Hynd, Head of Cabinet, Parliament and Governance Division. In the letter the Committee asked three questions relating to the Gender Representation on Public Boards (Scotland) Bill, to which I am providing the following responses.

1. The Committee is not clear why the power to make regulations under section 8 includes, by virtue of section 11(2) a power to modify the Act as a whole, rather than being limited to amending schedule 2 in relation to the particular public authority.

The Committee therefore asks the Scottish Government to explain why it is necessary that section 11(2) provides power to modify the Act as a whole, rather than being limited to amending schedule 2. In particular, the Committee requests examples of when it would be necessary for regulations made under section 8 to modify a provision of the Act other than schedules 1 and 2.

Answer

Regulations under section 8 may need to modify the Act because a future addition to schedule 1 may result in the need for consequential change to the Act (other than by amending one of the schedules). An addition to schedule 2 might be required if there were two different persons responsible for making appointments to the board of the public authority added to schedule 1. If adding to schedule 1 a public authority with an unusual structure or with unusual statutory duties, the application of the Act might need to be modified to fit those circumstances. Modification of the Act itself (as opposed to modification of a provision in the schedules) might be the best way of making a particular change.

As a specific example, extra provision might need to be added to the definition of “public board” in section 2 in respect of a new public authority. Depending on when a public authority is added, the way section 6 applies might also need to be adjusted.

Therefore, there may be situations when the Act as a whole might require to be modified, and not simply modification of one or both of its schedules.

2. Separately, in relation to the parliamentary procedure that applies, regulations made under section 8 of the Bill are subject to the negative procedure. The Freedom of Information (Scotland) Act 2002 provides for a different approach and is a useful

comparator. Section 4 of that Act includes a power allowing the Scottish Ministers by order to add or remove the public authorities listed in schedule 1 to which the right of access to information applies. Such an order is to be made under the negative procedure except in particular circumstances where the affirmative procedure applies by virtue of section 7 of that Act. These circumstances are where regulations list the authority only in relation to information of a specified description.

Bearing in mind the approach taken to the regulation-making powers in sections 4(1) and 7(1) of the Freedom of Information (Scotland) Act, the Committee asks the Scottish Government whether it considers that it would be appropriate for regulations made under section 8 of the Bill to be subject to the affirmative procedure where those regulations make any provision in the second column of the table in schedule 1 to exclude certain positions within a public authority from the requirements of the Bill.

Answer

The power to restrict the application of the Freedom of Information (Scotland) Act 2002 (FOISA) to a public authority (to apply to specified information only) has been considered. However, the Scottish Government's view is that the FOISA power is of a different nature to the power in the Bill to exclude board positions.

When a public authority is added to FOISA, the default position is that a wide range of information (recorded in any form) becomes accessible to those who request it. Public authorities hold an extremely wide range of information, so the type of information that may be excluded is also very wide. The types of information held by an authority will not be readily identifiable. Therefore, when an authority is added to FOISA in relation to specified information only, it is appropriate to have a higher level of scrutiny, for example, to scrutinise what type of information that body holds at that point in time, to see whether the exclusion of some of that information is appropriate.

In contrast, the potential for excluding members from the Act is much narrower because only non-executive members can be excluded, and all of the non-executive members will be readily identifiable. They will be readily identifiable because they will be set out in legislation or, where the public authority is a company, will be named as directors in Companies House records. The types of excluded positions that are most likely to arise are of the types set out in the second column of the table in schedule 1. These are, for example, ex officio members and members who are appointed by virtue of an election.

Because the exclusion is limited to readily identifiable non-executive members, and there are limited reasons for why those members would be excluded, the Scottish Government's view remains that negative procedure is appropriate.

3. Finally, regardless of whether or not section 11(2) is limited to making modifications to schedule 2 (rather than the Act as a whole), the exercise of such a power in regulations made under section 8 would amend primary legislation. Accordingly, the Committee asks the Scottish Government to consider whether it would be more appropriate for the affirmative procedure to apply.

Answer

The Delegated Powers Memorandum set out that negative procedure is appropriate because of the limited nature of the enabling power in section 8 to modify the Act, which

must relate to the modification of schedule 1 and that modification itself is limited to the addition, variation or removal of an entry in schedule 1. Any modification of the Act would be limited to its application to the circumstances of a public authority. The kinds of modifications that are most likely to arise are set out in schedule 2. There may be occasions where it would be more appropriate to modify a section of the Act, for example, to deal with the circumstances of a particular public authority.

Therefore the Scottish Government's view is that these modifications would be, and should be treated as, technical matters for which negative procedure is appropriate.

I hope this response is helpful.

