

Dissenting Report by Senators Xenophon, Lambie, Lazarus, Waters, Gallagher and Moore.

Walking the walk, not just talking the talk

- 1.1 At the outset, we would like to thank the organisations and individuals who made submissions to this inquiry. It is not an exaggeration to say there are many strong and passionate supporters of gender balance on boards, although their advocacy takes many forms. It is our hope that, working together, we can continue to make headway towards much-needed equality in representation.
- 1.2 It is interesting to note that the Chair's report, while strongly supporting the existing policy of 40:40:20 representation on government boards and acknowledging that '*(t)he research on this matter is clear: gender diversity on boards improves overall outcomes.*'¹, it is still the position of the Chair that the bill should not be supported. This is disappointing, to say the least, and particularly so in light of the new Turnbull Government's initial steps toward increasing the representation of women in leadership roles. It is also puzzling that, in making so many arguments in support of the bill, that the Government will not vote for these measures in Parliament.
- 1.3 It is clear that, while the Government is willing to talk the talk in relation to gender balance on government boards, they are not yet willing to walk the walk.
- 1.4 It was demonstrated during the inquiry process that research on the benefits of gender balance on boards is clear. As the second reading speech to the bill outlines, '*a significant body of research has shown that boards with more balanced gender representation lead to better financial outcomes for companies*'.² This research includes studies by Credit Suisse in September 2014³ and in 2012⁴, as well as a paper produced by Professor Robert Wood

¹ *Chair's Report*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015, p. 12, 1.44

² *Senate Hansard*, 24 June 2015, pp 4465-4465. Leave was granted for Senator Xenophon to have the second reading speech incorporated into Hansard when the EM to the bill was tabled.

³ '*The CS Gender 3000: Women in Senior Management*', Credit Suisse, September 2014

⁴ '*Gender diversity and corporate performance*', Credit Suisse, August 2012, pp. 12-19.
<https://publications.credit--suisse.com/tasks/render/file/index.cfm?fileid=88EC32A9--83E8--EB92--9D5A40FF69E66808>.

from the University of Melbourne's Centre for Ethical Leadership, which summarises over forty pieces of research that support the argument that gender equality on boards leads to better outcomes.⁵

- 1.5 The Chair's report also went so far as to acknowledge the numerous submissions to the inquiry that gave evidence of research '*demonstrating the benefits of gender balanced boards*',⁶ and cited the submission from the Women's Leadership Institute Australia⁷, The Australian Institute of Company Directors⁸, The Community and Public Sector Union (CPSU)⁹ and the Equality Rights Alliance¹⁰.

The Government's role as a leader in gender equality

- 1.6 It is our view that the Government not only has the opportunity to role model best practice in gender equality, but it has the obligation to lead by example. As stated by leading company director Carolyn Hewson during the public hearing on the 12th of October, '*corporate Australia does look to the government to guide and influence in this area*'.¹¹
- 1.7 The Community and Public Sector Union (CPSU) agreed with this position, and stressed that the '*government must provide leadership to the private sector in this area, where despite positive trends gender diversity among company directors and key executive management personnel remains generally poor*.'¹²
- 1.8 Beyond this, government boards can play a particular role in fostering gender balance and female talent. As Ms Hewson asserted, access to government boards '*allow(s) women to gain experience of government boards before or along with the time moving to corporate boards*'.¹³ She also highlighted the significance of her personal experience on a government board early in her career; noting that it '*allowed me to roll up my sleeves and become very, very*

⁵ '*Building a Business Case for Gender Diversity*', Professor Robert Wood, Centre for Ethical Leadership, The University of Melbourne, July 2014. <https://cel.edu.au/our--research/building-a--business--case--for--gender--diversity>

⁶ *Chair's Report*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015, p. 6, 1.20

⁷ *Submission 5*, p. 2.

⁸ *Submission 12*, pp 1-2.

⁹ *Submission 6*, p. 1.

¹⁰ *Submission 13*, p. 2.

¹¹ *Committee Hansard*, 12 October 2015, p 10

¹² *Submission 6*, p. 1.

¹³ *Committee Hansard*, 12 October 2015, p 10

*involved in strategy, ... it was an excellent board to have in a portfolio and certainly one that I look back on as a great training ground*¹⁴.

- 1.9 Ms Amy Mullins, Executive Director, Women's Leadership Institute Australia, also commented along this line, noting that *'that experience on a government board can be a valuable stepping stone from men and women seeking to become professional company directors in the corporate sector.'*¹⁵
- 1.10 Similarly, the Equality Rights Alliance sees that greater gender equality on government boards will directly *'increase women's representation, participation and leadership in the public domain'* and that government boards are an opportunity for the Federal Government to lead by example on increasing women's leadership and participation.¹⁶
- 1.11 It is our view that government boards can play a vital role in this regard, particularly in response to those who claim a lack of experienced female non executive directors is the reason for the significant and marked gender imbalance we see on Australian boards today.

The private sector in desperate need for leadership

- 1.12 The hearing heard of the 'bleak picture' painted in the Credit Suisse Research Institute report of 2014, titled *The CS Gender 3000: women in senior management*, which highlights that in Australia the level of women in senior management positions or on boards is much lower than other countries in our region, such as Indonesia or Malaysia.¹⁷
- 1.13 It is vital to note that the argument for gender balance on boards is not a superficial one; the research referenced earlier in this report clearly outlines that businesses with gender diverse boards perform better than those without.
- 1.14 Ms Carol Schwartz, Founding Chair of the Women's Leadership Institute Australia noted that *'(w)ith women making up 20.6 per cent of directors on ASX 200 company boards and men at 79.4 per cent, the corporate sector has a very long way to go to reach gender balance'* and that *'government can play,*

¹⁴ *Committee Hansard*, 12 October 2015, p 10

¹⁵ *Committee Hansard*, 12 October 2015, p 2

¹⁶ *Submission 13*, p. 2.

¹⁷ *Committee Hansard*, 12 October 2015, p 10

and does play, a very strong role in influencing change by establishing an even stronger pipeline of potential company directors and by setting an example for the corporate sector.’¹⁸

- 1.15 Ms Hewson reiterated the need for Government leadership on this matter, stating at the public hearing that *‘(d)espite a lot of talk over a long period of time, Australia is not doing well in increasing the number of females in executive positions in corporate Australia. I think passing this bill would send a very positive message.’¹⁹*
- 1.16 In the words of Ms Schwartz: *“why don’t we just put some heat into this ... let’s actually show our real support and put it into legislation”*.²⁰ It is Ms Schwartz’s view, and we agree, that *‘(t)he Australian Government Boards (Gender Balanced Representation) Bill 2015 would move the dial on government boards and have significant flow-on effects for listed company boards.’*
- 1.17 It is our belief that Australia is, quite simply, missing out on the performance and economic opportunities gender balanced representation provides.
- 1.18 Enshrining the existing Government policy – which was strongly supported in the Chair’s report – into legislation sends the strong message that the Government views gender equality as more than a token aspirational ‘nice-to-have’ target, but instead as an essential ingredient of good governance.
- 1.19 Passing this bill should be seen as a catalyst for much-needed change, both in the public and private sectors.

A deeper issue than worrying statistics alone

- 1.20 While it is the committees view that the business case for the bill relies solely on the decrease in female representation on Government Boards reported for 2013-14 and 2014-15²¹, this does, with respect, rather miss the point.

¹⁸ *Committee Hansard*, 12 October 2015, p 2

¹⁹ *Committee Hansard*, 12 October 2015, p 10

²⁰ *Directors argue for more women on boards, but against quotas*, *The Australian*, 6th August 2015

²¹ *Chair’s Report*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015, p. 12, 1.46 & 1.47

- 1.21 The committee excuses this downward trend by equating it to ‘change and transitions within portfolios and across government, which have impacted on the makeup of Australian Government boards and the rationalisation of the number of boards’.²²
- 1.22 Senator Gallagher, however, highlighted that this explanation is not entirely accurate, revealing at the public hearing that *‘the reduction of women has been more than the reduction of men... male appointments have been maintained to a greater degree than the women even though there was a reduction.’*²³
- 1.23 But the case for establishing a sustainable model for the policy of gender balance for Government boards in legislation reaches far beyond this worrying decrease. As Ms Hewson illustrated, the current policy is not achieving its aims: *‘the bipartisan policy of 40-40-20 and its accompanying reporting arrangements do not appear to have the support of, nor be taken seriously by, a number of government ministers. Even after five years, there are still nine of the 18 portfolios currently not meeting the targets and two portfolios remain under 30 per cent for female representation.’*²⁴
- 1.24 In particular, the exchange between Senator Waters and Ms Mullins during the public hearing highlighted that the status quo is not enough, and that vigilance must be maintained:

Senator WATERS: ... why do you think that—even though we have had a commitment to this non-legislative target to date, which this bill seeks to legislate—in the last two years, under the figures just most recently released, have we gone backwards on the overall number of woman on boards and, in particular, the number of female chairs or deputy chairs?

Ms Mullins: I believe, and it has been our experience watching other sectors, that you need to be vigilant about maintaining successes that happen. ... I think the main problem is that it (the policy) is aspirational and, where things have worked and where momentum has been maintained was when targets were instituted and they had teeth. ... I believe the ASX has implemented, what they could call 'targets with teeth' quite successfully recently in terms of their executive management team. I think the bill is important because it actually follows that next step to say: 'We've had it (the

²² *Chair's Report*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015, p. 12, 1.46

²³ *Committee Hansard*, 12 October 2015, p 25

²⁴ *Committee Hansard*, 12 October 2015, p 9

policy) in for five years. We've made some progress, but not enough has changed. What is the corporate sector doing? What is the next logical step for us to take that still maintains the flexibility and ease of implementation of the policy itself.'²⁵

- 1.25 The public hearing also uncovered inadequacies in the reporting framework of the existing policy: for example, the current report does not provide a breakdown of new appointments by chair and deputy chair broken down by each department²⁶. The bill would introduce these requirements, as well as consistency in the data and how it is reported, which would address the issue of changing formats over the years.
- 1.26 Particularly of note is the fact that formatting changes have led to the data on the percentage of men on boards being dropped from the annual report completely²⁷.
- 1.27 While the committee acknowledges this in the Chair's report, stating that '*(i)n the committee's view, the 2013-14 Report provided more details on the context of the 40:40:20 policy and a more expansive explanation of the measures that the government are investing in order to assist portfolios to meet the targets (compared to the 2014-2015 Report)*'²⁸, it does not offer solutions on how this might be remedied without passing the bill.
- 1.28 In short, the bill will ensure that reporting against the 40:40:20 target doesn't erode further and will require '*each portfolio department to prepare a report each financial year, setting out the gender composition of each Government board within that portfolio. Further, the Minister for Women must then publish that information in a consolidated report, to be tabled in Parliament.*'²⁹
- 1.29 It is our view that the need for a 'legislative seatbelt' has been clearly proven. While the existing policy is supported by the current Government, it does not prevent against future governments paying lip service to the policy and allowing what gains have been achieved to slide further backwards.

²⁵ *Committee Hansard*, 12 October 2015, p 4

²⁶ *Committee Hansard*, 12 October 2015, p 26

²⁷ *Committee Hansard*, 12 October 2015, p 25

²⁸ *Chair's Report*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015, p. 12, 1.48

²⁹ Explanatory Memorandum, p. 2.

- 1.30 It is also unclear how the current policy interacts with the recruitment process and the operation of board appointments. This was outlined in an exchange during the public hearing between Acting First Assistant Secretary, Department of the Prime Minister and Cabinet, Mr Troy Sloan and Senator Xenophon³⁰:

Senator Xenophon: [A]re there any guidelines ministers should follow, either generally or within each department, to engage in a transparent recruiting process?

Mr Sloan: That is set out in the cabinet handbook that is available on the PM&C website.

Senator Xenophon: It is in the cabinet handbook—it sets out the level of transparency required?

Mr Sloan: I have it here in front of me. It is on page 22 of the cabinet handbook.

Senator Xenophon: So page 22 has the relevant criteria, and that applies to all departments?

Mr Sloan: Correct. All portfolios.

Senator Xenophon: Can you tell us ... what it actually says?

Mr Sloan: The minister needs to confirm several things, including the appropriateness of the expertise that the person brings; the qualifications; the experience; whether it is consistent with any applicable legislation; and whether due regard to gender balance been paid—that is part of it.

Senator Xenophon: Is there any definition of 'due regard'? Is that the wording—'due regard'?

Mr Sloan: 'Due regard' is the wording. I do not know if there is a definition. I am not sure if there is. 'I do not think so' is the answer.

Senator Xenophon: I am happy for you to take that on notice.

Answer to Question on Notice: There is no definition of due regard in the Cabinet Handbook.³¹

³⁰ *Committee Hansard*, 12 October 2015, p 26

³¹ *Questions on Notice – Department of the Prime Minister and Cabinet*, Senate Finance and Public Administration Legislation Committee, Australian Government Boards (Gender Balanced Representation) Bill 2015

- 1.31 The bill provides a solution to these deficiencies in the current policy by outlining how these measures should interact with recruitment and appointments. It requires an explanation as to why the 40:40:20 target could not be met under 'extraordinary circumstances'. The Explanatory Memorandum (EM) clearly outlines what constitutes reasonable efforts to achieve the gender balance targets, eliminating ambiguity and ensuring equality and transparency, through a clear list of practical steps:

For the purposes of this bill, extraordinary circumstances may be considered to have occurred when the Government appointer can demonstrate that reasonable efforts have been made to find a candidate of the appropriate gender, and despite these efforts it has not been possible to appoint a suitable candidate of the necessary gender to meet the requirement of at least 40 per cent men and at least 40 per cent women on the relevant Government board.

For these purposes, reasonable efforts would include where all of the following steps have been taken:

- a. the board vacancy has been advertised and/or there has been a call for expressions of interest in the board position;*
- b. relevant government databases such as AppointWomen or BoardLinks have been searched for potential candidates;¹⁷*
- c. a gender balanced shortlist of candidates has been compiled;*
- d. candidates have been interviewed that reflect the gender balanced shortlist; and*
- e. each candidate has been evaluated against a consistent set of selection criteria.³²*

- 1.32 Ms Mullins reiterated the importance of a clear set of guidelines and transparency around appointments, stating at the public hearing '*the bill starts to have a conversation about ... having guidelines that suggest to appointers what might be the best process to take when recruiting and to increase the transparency around appointments. I think that is particularly critical. The Victorian government has a very clear set of guidelines for appointers which allows for that transparency of process and, obviously, they are doing*

³² Explanatory Memorandum, p. 4.

*extremely well with their aim to have 50 per cent of all new appointments to be women and 50 per cent men.*³³

- 1.33 As highlighted at the public hearing; ‘(n)etworks, unconscious bias and exposure and opportunity for women are the top three barriers for greater female participation or greater gender diversity³⁴. The bill provides a clear set of guidelines and encourages transparency around appointments to create an environment that can expose unconscious bias and increase gender balance.

Conclusion

- 1.34 The aim of this bill is to increase gender balance on government boards. It does this by implementing an existing policy that was introduced under the Gillard Government and, as the Chair’s report acknowledges, is strongly supported by the current Government. It creates a positive obligation to meet the currently aspirational target of 40:40:20 gender balanced representation. The debate about whether or not this bill imposes a “quota” is a matter of semantics. It includes a generous exception to the obligation to achieve the 40-40-20 target where a government appointer can show that they have made reasonable efforts to meet the target but have not been able to do so. We anticipate that these situations will be rare. The bill provides a useful, practical and robust framework to ensure the bipartisan 40:40:20 target is met.
- 1.35 The Turnbull Government has taken significant steps to establish its position as inclusive, balanced, and supportive of women in leadership positions. The Opposition has likewise reaffirmed its support for gender balance, the bipartisan 40:40:20 policy and the intent of this bill. If the Government cannot and will not support this legislation alongside the cross-bench representatives and the Opposition, we would be interested to see what positive steps it intends to take in this regard beyond the measures it currently has in place. In particular, addressing concerns relating to the recruitment process would be beneficial, and we would suggest looking at the Victorian Government’s appointment procedure and guidelines³⁵ as well as the supporting toolkit by the Victorian Public Sector Commission as an example of best practice.³⁶

³³ *Committee Hansard*, 12 October 2015, p 3

³⁴ *Committee Hansard*, 12 October 2015, p 5

³⁵ *Appointment and Remuneration Guidelines*, Department of Premier and Cabinet, State Government of Victoria, October 2015.
<http://www.dpc.vic.gov.au/index.php/policies/governance/appointment-and-remuneration-guidelines>

³⁶ *Recruitment and Appointment Toolkit*, Victorian Public Sector Commission, March 2015.
<http://vpssc.vic.gov.au/resources/recruitment-and-appointment-to-the-board-toolkit/>

1.36 In short, to support the existing policy is to support this legislation. There is no reason to vote against it but, as this inquiry has shown, there are countless reasons to support it.

Recommendation 1

1.37 That the Bill be passed.

Senator Nick Xenophon

**Senator Katy Gallagher
Deputy Chair**

Senator Jacqui Lambie

Senator Claire Moore

Senator Glenn Lazarus

Senator Larissa Waters