

Women on South African boards – facts, fiction and forward thinking

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WDBIH aims to be a catalyst of reform through strategic investments in the corporate sector and the development of women entrepreneurs.

WDBIH understands that women who sit on boards face many challenges, and that research can help address these challenges so that we can create more inclusive workplaces.

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About this report

Women make up 51% of the South African population¹, but only 20,7% of directors of JSE-listed companies are female². It's clear that there is work to be done to equalise the gender imbalance in the top tier of business leadership.

This report aims to help board members, management teams and the public to understand how South Africa got to this point, and what we can do to change it. There are five sections to the report:

1. *Facts and fiction* presents statistics on how many women are on boards, both in South Africa and abroad. We will then explore how statistics can be misleading when taken out of context. The part concludes by debunking five misperceptions about women on boards.
2. *True stories: lessons from the rest of the world* looks at Australia, Germany, Norway, Spain, and the United Kingdom to determine how quotas and targets have been used to encourage gender parity on boards.
3. *The limits of the law: the South African legal framework* has two parts. The first looks at the current legislation, the second highlights the gaps in the framework.
4. *Forward thinking: getting more women on boards* explores what it takes to get more women on boards, and more out of the women that are on boards. It looks at what it takes for women directors to be able to effect change through power, influence and critical mass.
5. *Moving forward: turning theory into action* lays out actions for directors, activist shareholders and institutional investors to consider to encourage inclusive boards.

Gender is a multi-faceted set of characteristics and identities relating to masculinity and femininity, and not a purely binary state. Companies report on the number of men and women on boards, and this report works within these constraints.

1 Statistics South Africa. (2019: v). *Mid-year population estimates, July 2019*. 2 BWASA (2017: 11). *BWASA South African Women in Leadership Census*.

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Facts and fiction



Women on South African boards

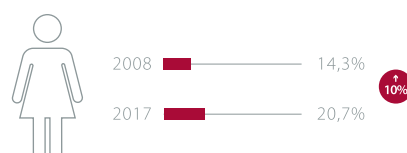
Most years, the **Business Women's Association South Africa (BWASA) Women in Leadership Census reports** how many directors of JSE-listed companies and State-Owned Enterprises (SOE) are women. Here are some highlights from the 2017 report:

South Africa right now:

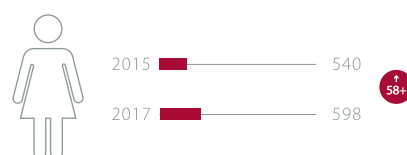
A step in the right direction – but not far enough

In 2008, 14.3% of JSE-company directors were women. Eleven years later, in 2017, 20.7% were women. The number of female directors on JSE-listed companies increased from 540 in 2015, to 598 in 2017³.

Percentage of female JSE-listed company directors



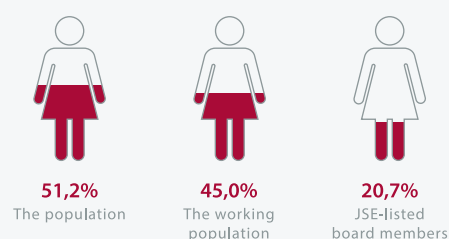
Number of female JSE-listed company directors



Board positions in the broader context

Women make up **51.2%** of the population, **45%** of the economically active population⁴, but only **20.7%** of board members of JSE listed company boards.

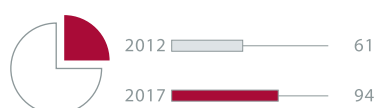
Women as a percentage of



Some companies are leading the way

In 2012, 61 companies had +25% female board members. In 2017, 94 companies had 25%+ female board members. While this seems impressive, the gains have been variable and erratic. From 2012 to 2017, only 26 companies have consistently had a 25%+ female board.

Number of JSE-listed companies with 25%+ female boards



³ BWASA (2017: 11). BWASA South African Women in Leadership Census. ⁴ Statistics South Africa. (2019: v). Mid-year population estimates, July 2019.

Consistent star performers: These 26 companies have consistently had a 25%+ female board from 2012 to 2017: AdaptIT Holdings, Adcorp Holdings, African Dawn Capital, African Media Entertainment, Afrocentric Investment Corporation, Atlatsa Resources Corporation, Arcelormittal SA, Cargo Carriers, Clicks Group, EOH Holdings, Grand Parade Investments, Hudaco Industries, JSE, Keaton Energy Holdings, Merafe Resources, Metrofile Holdings, MPACT, Primeserv Group, Rolfes Holdings, African Equity Empowerment Investments, Imbalie Beauty, Standard Bank Group, Telkom SA, CSG Holdings, Winhold, Woolworths Holdings.

However, there are some companies that have not left the starting block: a significant proportion of JSE-listed companies have no female directors, and there has been a decrease in the number of companies with three or more female directors.

SOEs are increasing representation of women on boards: Women hold 41.2% of all directorships in SOEs – and all SOEs have at least two female directors.

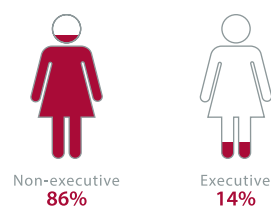
Power and responsibility: executive and non-executive directors

Executive directors are directly involved in running the company while non-executive directors are appointed by shareholders in an oversight capacity. Independent directors have no interest, position, association or relationship with the company.

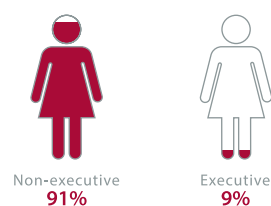
The King IV Report recommends that at least 25% of the board should be non-executive, most of whom should be independent.

Over 80% of women directors are non-executive directors⁵. The absence of female executive directors indicates that there are not enough female senior managers in South African companies.

Female directors of JSE-listed companies



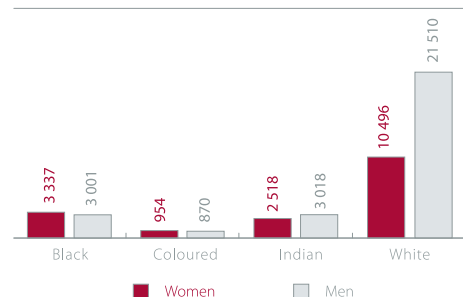
Female directors of SCE's (2017)



A focus on Chartered Accountants (CAs)

In South Africa, many board positions are held by CAs. Historically, these positions were held by men – but the pattern is changing according to SAICA statistics. In 2019, there were more black African women CAs than there are black African male CAs, and more coloured women CAs than there are coloured male CAs⁶.

Registered CAs (2019)



⁵ BWASA (2017: 11). BWASA South African Women in Leadership Census. ⁶ SAICA. (2019). South African Institute of Chartered Accountants, <https://www.saica.co.za/>

The stretch factor: over-boardedness

Over-boardedness is the idea that directors who sit on too many boards may not have enough capacity to fulfil their duties effectively on all the boards that they sit on. There are different opinions on how many boards is too many:

Table 1 The number of boards a director can sit on before being over-boarded

	As an executive director	As a non-executive director
National Association of Corporate Directors (USA)	3	6
Institutional Shareholder Services (USA)	3	5
Academics like Viviers and Mans-Kemp (SA)	3	3

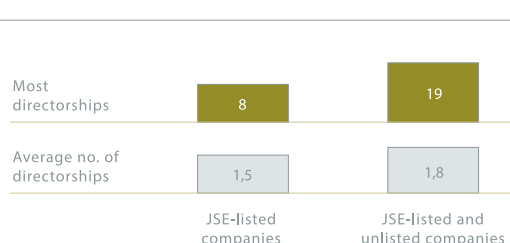
Viviers and Mans-Kemp found that in South Africa, many companies are using the same small pool of leaders to serve on their boards, and these leaders may be over-boarded⁷.

However, the notion of over-boardedness is contested. The capacity to serve on more than one board might be more limited for an executive director than for a professional non-executive director or a board member who represents institutional interests – these directors might find as many as six board seats quite manageable.

Directors who serve on more than three boards JSE-listed and unlisted companies



Over-boardness in South Africa



For JSE-listed companies, the average director served on 1.5 boards, and the highest serving director served on eight boards. When you include unlisted companies and other entities, the average director serves on 1.81 boards, and the most overboarded serves on 19 boards.

⁷ Viviers & Mans-Kemp (2019). Director overboardedness in South Africa: Evaluating the experience and business hypotheses. *International Journal of Disclosure and Governance*, 16(1): 68-81. <https://doi.org/10.1057/s41310-019-00057-x>

Looking at racial equality

This table presents directorships, not directors: if a director sits on more than one board, they are counted twice.

Table 2 Racial profiles of female directorships of JSE-Listed Companies and SOEs, 2017 (number of directors in brackets)

2017					
Race	JSE-listed companies ⁸		SOEs ⁹		Economically active population (women) SA ¹⁰
Black African	58.7% (300)	<	82.8% (72)	>	79%
Coloured	7.4% (38)	<	2.3% (2)	<	9.7%
Foreign	2.5% (13)		0.0% (0)		
Indian	8.2% (42)	>	6.9% (6)	>	2.4%
White	21.9% (112)	>	8.0% (7)	-	8.8%
Other	1.3% (6)		0.0% (0)		

JSE-listed companies: compared to the number of economically active women (female workforce), black African and coloured women are under-represented, Indian and white women are over-represented.

SOE: compared to the female workforce, black and Indian women are over-represented, coloured and white women are under-represented.

⁸ BWASA (2017: 11). BWASA South African Women in Leadership Census. ⁹ BWASA (2017: 11). BWASA South African Women in Leadership Census. ¹⁰ Department of Labour (2018: 18). Commission for Employment Equity Annual Report 2017/2018.

1. Facts and Fiction

Half-truths and fictions: *looking beneath the surface*

This report uses more than one data source for **two reasons**: different reports show parts of the picture, but never the full one; and comparing data from more than one source aids in cross-checking to identify errors and anomalies.

There are two sets of factors that make direct comparisons between countries' board representations difficult:

1. How data is collected and analysed differs between reports, and each report may include different sets of companies including the market capitalisation of companies and exchange rates
2. Each country's cultural, historical, size and strength of the economy, and legislative context is unique

Data collection and analysis

Reports use different methodologies and statistics are not calculated in the same way across reports. This makes it nearly impossible to compare results accurately.

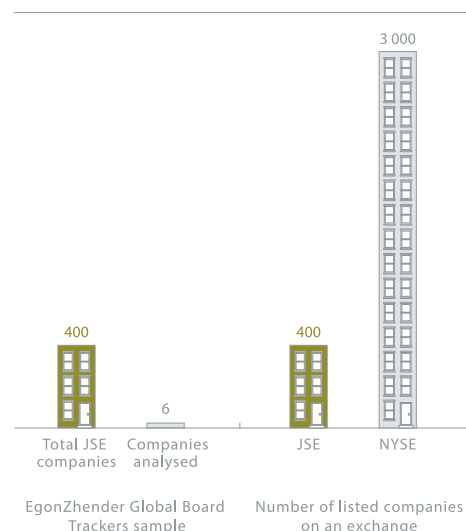
The **EgonZehnder Global Board Tracker**¹² has tracked and reported on board diversity for 14 years. In 2018 it included *"public companies with market caps above seven billion euros, if a country does not have enough companies that qualify – it takes the six largest companies by market cap."*¹³

In South Africa, six companies were included in the analysis – there are around 400 JSE-listed companies. There is no evidence that large and small listed companies have the same attitudes towards gender diversity, so this limited sample might not reflect the broader reality.

Also, some countries have more listed companies than others so the indices are not comparable. For instance, there are around 3 000 listed companies on the NYSE¹⁴.

Lastly, reports may have different criteria for which companies to exclude from their diversity reports. This means that the reports have different sets of companies included in them. This will affect both the results of a single report, and the conclusions we can draw from comparing them.

EgonZehnder Global Board Tracker¹²

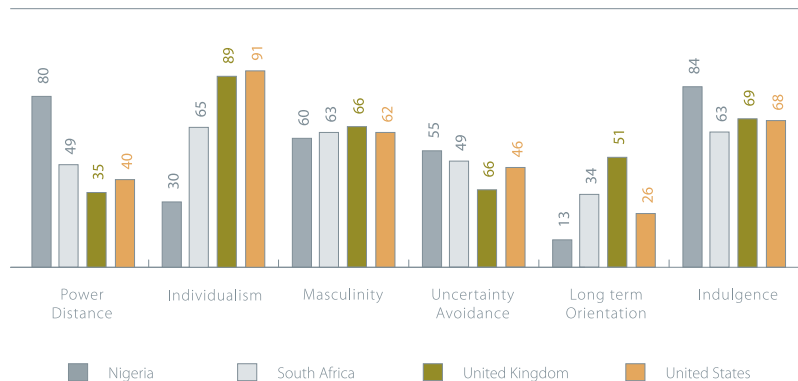


¹² EgonZehnder Global Board Diversity Tracker 2018 <https://www.egonzehnder.com/global-board-diversity-tracker>. ¹³ EgonZehnder (2018: 3) Global Board Diversity Tracker: Who's really on board? ¹⁴ ADVFN. New York Stock Exchange: Company Listings (cited 2019 August 14). <https://www.advfn.com/nyse/newyorkstockexchange.asp>

History, culture, economy and governance structures

It's also a problem to directly compare countries' board representation because each country's history, culture and governance structures is unique¹⁵.

Figure 1: Comparison of Hofstede's country culture dimensions¹⁶



Culture through Hofstede's lens

'Hofstede dimensions' identifies six elements of culture: power distance, individuality, masculinity, uncertainty avoidance, long-term orientation and indulgence.

Of these, a culture's power-distance and masculinity ratings have been linked to gender inequality, and therefore would impact board gender diversity¹⁷.

Masculinity: Hofstede defines masculine cultures as those that prefer "achievement, heroism, assertiveness, and material rewards for success". Feminine cultures prefer "cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented¹⁸."

Cabeza-Garcia et al. have shown that, the more masculine a culture is, the more unlikely it is that women will be accepted in positions of power, such as senior management – consequently it is less likely that women will become board members¹⁹.

South Africa has similar masculinity ratings to the United Kingdom, the USA, and Nigeria (Figure 1), countries where the number of women on boards are also low.

Power distance: Hofstede defines power distance as "the degree to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally"²⁰.

This influences interaction between hierarchical levels within power structures, as well as the achievement of power equality. With low power distances, there is a more consultative style of leadership, as well as greater aspirations to achieve power equality – and women are more likely to be listened to and followed²¹. Countries with higher power distances are more likely to have male-dominated business environments – so women are less likely to become board members²².

South Africa has higher levels of power distance than the United Kingdom or the USA (Figure 1).

¹⁵ Gladman, K (2012: 1) *GMI Ratings' 2012 Women on Boards Survey*; ¹⁶ Hofstede Insights, <https://www.hofstede-insights.com/product/compare-countries/>; ¹⁷ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 57. ¹⁸ Hofstede Insights, <https://www.hofstede-insights.com/models/national-culture/>. ¹⁹ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 60. ²⁰ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 64: 61, citing Hofstede et al. (2010), *Cultures and organizations: Software of the mind, revised and expanded* (3rd ed.). New York: McGraw-Hill. ²¹ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 60. ²² Glick (2006: 283-302). Ambivalent sexism, power distance, and gender inequality across cultures. In: Gulmond (Ed.), *Social comparison and social psychology: understanding cognition, intergroup relations and culture*. Cambridge: Cambridge University Press; Grosvold & Brammer (2011). National institutional systems as antecedents of female board representation: An empirical study. *Corporate Governance*, 19(2): 116-135; Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 64.

Working past a history of racial segregation

South Africa's history of racial segregation and the ensuing need for racial transformation resulted in laws such as the Broad-Based Black Economic Empowerment Act 53 of 2003. This act includes both race and gender targets for black people.

Many companies have met these targets, and more black women have been appointed to boards. This shows that legislation can act as a catalyst to increase the number of women on boards.

Macroeconomic factors

Research also shows that macroeconomic factors like economic growth and education can impact attitudes towards women on boards:

Economic growth: wealthier countries are more likely to have women on boards than poorer ones²³. South Africa's economic growth has recently stalled.

Level of education of women: If women do not finish school, they are less likely to make it to the board. Cabeza-Garcia et al. found an increased number of women on boards in countries with greater proportions of women in secondary education. South Africa's secondary education²⁴ levels are, in some instances, higher for women than for men.

Governance structures

Unions, governments or founding families can impact the way a board is constituted. The impact of this differs from country to country²⁵.

Unions: In Germany, listed companies have both management and supervisory boards. The management board is responsible for day-to-day decision-making, while the supervisory board offers strategic guidance to the company, and monitors the performance of the management board. Unions influence who is appointed to the supervisory boards of listed companies: for companies with more than 500 employees, unions appoint one-third of board members; for companies with more than 2 000 employees, unions appoint 50% of board members.

Unions are more likely to appoint women than shareholders are, and there are more female union representatives than shareholder representatives on German boards²⁶.

Government: The South African government drives race and gender transformation. In SOEs, government is the majority shareholder and determines who sits on the board. South Africa has one of the highest global rates of women in parliament and women are well represented on the boards of SOEs in South Africa.

This strategy only works if there are enough experienced and qualified women, both in government and in the government networks, to fill these seats.

Founding families: India is an example of a country with a high concentration of family firms (where the founding family or promoter owns at least 20% of the voting rights); 95% of manufacturing companies on the National Stock Exchange of India²⁷ are family firms. Family firms are more likely to have women on their boards than non-family firms²⁸.

²³ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 64. ²⁴ Cabeza-Garcia et al. (2019). Legal and cultural factors as catalysts for promoting women in the boardroom. *Business Research Quarterly*, 22: 64. ²⁵ Gladman, K (2012: 1) *GMI Ratings' 2012 Women on Boards Survey*. ²⁶ Gladman, K (2012: 10) *GMI Ratings' 2012 Women on Boards Survey*. ²⁷ Sarkar, J & Selarka, E (2015) *Women on Board and Performance of Family Firms: Evidence from India*. ²⁸ Bang, NP, Ramachandran, K, Vishwanathan, A, & Chittoor, R. (2018). *Standalone family firms lead the path to gender parity*, *Indian School of Business*, <https://isbinsight.isb.edu/standalone-family-firms-lead-the-path-to-gender-parity/>

Understanding the difference between quotas and targets

There are two legal mechanisms that countries around the globe have used to increase the number of women on boards: **voluntary targets** and **mandatory quotas**.

The differences between them are explained below:

Voluntary targets	Mandatory quotas
<p>The features of a voluntary target include:</p> <ol style="list-style-type: none">1. realistic numerical objectives2. flexible application3. may have legal implications, but are not mandated. <p>For example, the South African BBBEE Act uses numerical targets and is an example of the type of remedial measure (<i>affirmative action</i>) expressly allowed under the equality clause in the Constitution.</p> <p>Targets can be set out as gender-neutral or women-based.</p> <ul style="list-style-type: none">• Women-based targets specify a minimum goal for female representation (e.g. <i>women should have at least 30% representation on the board</i>).• Gender-neutral targets define a maximum amount for both genders (e.g. no gender can hold more than 60% of the board). <p>Gender-neutral targets may benefit women in male-dominated industries, but not on boards where most board members are women²⁹.</p>	<p>The features of a quota include:</p> <ol style="list-style-type: none">1. a rigid percentage of representation to be met2. a date by which the quota must be met3. penalties for non-compliance³⁰. <p>A quota means that a number or percentage of positions is reserved for a female candidate with no possibility of filling it with a male, regardless of the availability of suitable female candidates or the degree of under-representation.</p> <p>In the case of board gender diversity, quotas mean that a qualifying company must have at least a certain percentage of female directors on its board by a certain date. If they do not, the company will be penalised. These penalties could include a financial penalty, suspension from a stock exchange, or liquidation³¹.</p>

²⁹ Dahlerup & Freidenvall (2005). Quotas as a 'fast track' to equal representation for women: Why Scandinavia is no longer the model. *International Feminist Journal of Politics*, 7(1): 38-39. ³⁰ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489; Leszczynska (2018). Mandatory quotas for women on boards of directors in the European Union: Harmful to or good for company performance? *European Business Organization Law Review*, 19(1): 35-61. ³¹ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489.

In South Africa, quotas are considered unconstitutional. Government and industry use targets to support gender transformation. Since 2017, all companies listed on the JSE were supposed to report on their progress towards their self-determined board diversity targets³². Not all companies have complied.

Monitoring and reporting are key

Having quotas does not automatically mean that they will be reached. Dahlerup and Freidenvall's global analysis of quota systems found that countries using mandatory quotas did not automatically have higher female representation than countries with voluntary quotas.

They conclude that how a quota is implemented and enforced is as important as having a quota³³, and the greater the level of public visibility, the greater the incentive for companies to strive to get women on their boards.

³² Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ³³ Dahlerup & Freidenvall (2005). Quotas as a 'fast track' to equal representation for women: Why Scandinavia is no longer the model. *International Feminist Journal of Politics*, 7(1): 37-41.

Shining the light on misperceptions

In this section, we argue that commonly held misconceptions should be reviewed.

Misconception	Counter to misconception
1. If barriers to the appointment of women are removed, there will be a natural incremental increase in female representation.	<p>The increased presence of women on boards are a direct consequence of governance mechanisms and legislation and did not happen organically.</p> <p>South Africa still needs to overcome ingrained prejudice against women on boards, together with 'old boys' clubs' of director networks.</p> <p>The 'old boys club' does not consciously conspire to keep women out of leadership, but is rather a place of unconscious bias.</p>
2. Targets will be automatically met without further intervention.	<p>Targets can be met only if they are actively managed, and are only as effective as:</p> <ol style="list-style-type: none"> 1. the law or governance that defines them 2. how they are monitored and reported on 3. the consequences for not meeting them.
3. There are not enough women qualified to serve on boards.	<p>There is a vast, untapped pool of qualified and talented women who could add value to a board.</p> <ul style="list-style-type: none"> • In 2017, there were 867 female Professors and 1040 female Associate Professors at South African public universities and universities of technology. • In 2012, 24 071 women graduated with Master's degrees and 6 113 with PhDs. In 2017, the figures increased to 31 127 Master's and 10 159 PhDs³⁴. • In July 2019, 38% (17 149) of all SAICA-affiliated chartered accountants were women. This is 38% of all CAs in South Africa³⁵. • From 2010 to 2017 there have consistently been more women candidate attorneys registered than male ones³⁶.
4. The few suitable women are over-boarded, and neglect their directorial duties.	<p>Viviers and Mans-Kemp show that directors who sit on three or more boards are no more likely to miss board meetings than those who sit on fewer boards. Also, a professional non-executive director who serves on many boards brings deep board experience, substantial networks and focused attention³⁷.</p>
5. All women support targets.	<p>Some women do not support targets. Their resistance stems from a fear of being perceived as token women appointed to fill a target.</p>

³⁴ Council on Higher Education, Vital Stats 2017. ³⁵ SAICA does not provide age-statistics on their website which limits us in reporting on the age distribution of female CAs. Information about women's post-article experience is also not available for analysis. ³⁶ Meyer, T. 2018. Female Attorneys in South Africa: A statistical analysis, *African Journal of Employee Relations*. ³⁷ Viviers & Mans-Kemp (2019). Director overboardedness in South Africa: Evaluating the experience and business hypotheses. *International Journal of Disclosure and Governance*, 16(1): 68-81.

True stories: lessons from the rest of the world



Legislated quotas: *Germany, Norway and Spain*

Germany

In Germany, listed companies have both management and supervisory boards. The management board is responsible for day-to-day decision-making, while the supervisory board offers strategic guidance to the company, and monitors the performance of the management board.

In 2015, the German parliament legislated that at least 30% of all listed companies boards must be female, and around 3,600 DAX-registered companies and large co-managed companies were given a year to comply.³⁸ Companies that did not have at least 30% female board representation could not appoint another male board member, and the seats would remain open until a suitable female candidate could be found. By May 2018, all DAX30 companies had reached this goal.³⁹

There are still not enough women on management boards and at top-leadership levels - another 1,100 female top executives need to be appointed to DAX30 companies to reach the 30% target for top executives⁴⁰.

Norway

In 2003, the Norwegian parliament passed a law that at least 40% of all listed companies' board members should be female⁴¹. Compliance with this law was voluntary.

By 2005, only 24% listed company directors were female. In 2006, the quota became mandatory, and companies were given two years to reach the quota. Companies which did not comply would be fined, or even dissolve⁴². By 2009 all companies had reached the quota⁴³.

However, between 2003 and 2008, the number of listed companies more than halved from 380 to 186, and it could be argued that companies delisted to avoid the quota⁴⁴.

The companies that remained listed benefited from a new wave of qualified talent: the women appointed after 2006 were generally more qualified than those already appointed, and the gender pay gap decreased from 36% to between 24% and 26%. This shows that the necessary talent is available if the correct networks are tapped and that board transformation leads to benefits for women across all levels of the company⁴⁵.

Spain

In 2007, Spain passed the Gender Equality Act: neither men nor women could make up more than 60% of the board. Companies were given eight years to comply.

However, unlike Norway and Germany, there were no penalties for not reaching the quota. Instead, the Spanish government gave preferential points to gender-neutral companies when evaluating which companies to contract with⁴⁵.

³⁸ Worker-participation.eu. (2016). 30% female quota in supervisory boards of German DAX companies. <https://www.worker-participation.eu/About-WP/What-s-new/30-female-quota-in-supervisory-boards-of-German-DAX-companies>. ³⁹ Russell Reynolds Associates (2018). DAX30 – Supervisory Board Study 2018. https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/DAX%2030-Supervisory%20Board%20Study_eng.pdf. ⁴⁰ Russell Reynolds Associates (2018). DAX30 – Supervisory Board Study 2018. https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/DAX%2030-Supervisory%20Board%20Study_eng.pdf. ⁴¹ Betrand et al. (2018: 3). Breaking the glass ceiling? The effect of board quotas on female labor market outcomes in Norway. <http://ssrn.com/abstract=2488955>. ⁴² Davies. (2011: 22). *Women on boards: February 2011*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf; Betrand et al. (2018: 3). Breaking the glass ceiling? The effect of board quotas on female labor market outcomes in Norway. <http://ssrn.com/abstract=2488955>. ⁴³ Davies. (2011: 22). *Women on boards: February 2011*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf. ⁴⁴ Betrand et al. (2018: 7). Breaking the glass ceiling? The effect of board quotas on female labor market outcomes in Norway. <http://ssrn.com/abstract=2488955>. ⁴⁵ Betrand et al. (2018: 10). Breaking the glass ceiling? The effect of board quotas on female labor market outcomes in Norway. <http://ssrn.com/abstract=2488955>.

There was limited success: the number of compliant companies only rose from 4.25% to 4.98% between 2005 and 2014; female directorships increased from 6.8% to 11.6%, and companies with at least one female director increased from 26% to 42%⁴⁵.

Mateos de Cabo et al. found that companies who earn more than 5% of their income from government contracts were more likely to comply with the quota. In 2005, 11.11% fell into this bracket, by 2014 the number had fallen to 10.42%.

However, the analysis shows that the incentive was not being carried through: the revenue that these compliant companies generated from government did not increase significantly.



⁴⁵ Mateos de Cabo et al. (2019: 3). Do 'soft law' board gender quotas work? Evidence from a natural experiment. *European Management Journal*. <https://doi.org/10.1016/j.emj.2019.01.004>. ⁴⁶ Mateos de Cabo et al. (2019: 3). Do 'soft law' board gender quotas work? Evidence from a natural experiment. *European Management Journal*. <https://doi.org/10.1016/j.emj.2019.01.004>.

Voluntary targets: *Australia and United Kingdom*

Australia

In 2010, the Australian Institute of Company Directors (AICD) launched its Chair's Mentoring Program, followed by the board diversity scholarships a few years later⁴⁷. These programmes did not deliver the expected results.

The AICD then introduced a voluntary target - by 2018, 30% of the board members for ASX200 companies should be women⁴⁸. At the end of 2018, 29.7% of the board members of ASX200 companies were women.⁴⁹

The AICD suggest that extensive media coverage with monthly reports and collaboration with the 30% Club contributed to the success.

Additionally, institutional shareholder pressure helped: The Australian Council of Superannuation Investors (ACSI) introduced a voting policy of a 30% target for women on boards and a recommendation against re-election of directors on boards with poor gender diversity⁵⁰.

United Kingdom

The FTSE 100, 250 and 350 are indices of companies listed on the London Stock Exchange. The largest 100 companies are called the FTSE 100, the largest 350 the FTSE 350, and 101st to the 350th largest the FTSE 250. Size is measured by market capitalisation.

In 2011, the Davies Review set a voluntary target: by the end of 2015, 25% of the directors on FTSE 100 boards should be women. This target was achieved in 2015, six months ahead of schedule. From March 2015, there were no all-male FTSE 100 boards⁵¹.

The 2016, the Hampton-Alexander Review set new targets which include both board members and senior management: by 2020, 33% of the executive committee and their direct reports in FTSE 100 companies, and 33% of board members in FTSE 350, and should be women.

The results for board members and senior management are impressive: from 2011 to 2018, FTSE 100 representation increased from 12.5% to 30.2%, and FTSE 350 representation increased from 9.5% to 26.7%. The FTSE 250 was at 24.9%; 27% of the FTSE 100 executive committee and their direct reports were female. 19 companies achieved the 33% target, and another 21 companies well on track to do so by 2020.

⁴⁷ AICD (2017: 3). 30% by 2018: *Gender Diversity Progress Report*. https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-pol-gender-diversity-quarterly-report-jan19-a4_final.ashx. ⁴⁸ AICD (2017: 3). 30% by 2018: *Gender Diversity Progress Report*. https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-pol-gender-diversity-quarterly-report-jan19-a4_final.ashx. ⁴⁹ AICD (2017: 3). 30% by 2018: *Gender Diversity Progress Report*. https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-pol-gender-diversity-quarterly-report-jan19-a4_final.ashx. ⁵⁰ AICD (2017: 3). 30% by 2018: *Gender Diversity Progress Report*. https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-pol-gender-diversity-quarterly-report-jan19-a4_final.ashx. ⁵¹ FTSE Women Leaders (2016: 6). *Hampton-Alexander Review 2016*. <https://ftsewomenleaders.com/wp-content/uploads/2016/11/Hampton-Alexander-2016.pdf>.

The European Union's impact

In 2012, the European Union tried to institute a quota for all listed companies of the member-countries. The proposed quota stipulated that by 1 January 2020, neither men nor women could make up more than 60% of the non-executive directors of the board⁵².

The European Commission focused on non-executive directors as this allowed for a balance between promoting gender diversity and minimising interference with the day-to-day running of companies⁵³.

The European Commission stated that consequences for non-compliance 'must be effective, proportionate and dissuasive', and at a minimum include:

1. administrative fines
2. exclusion from public tenders
3. partial exclusion from funding by the European Union's structural funds, and
4. a court declaring the appointment or election of non-executive directors in conflict with relevant national legislation a nullity⁵⁴.

Member countries did not accept the quota, and it has not been adopted by member countries.

⁵² European Commission (2012, Article 4.1). COM(2012)614. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013AP0488&rid=14>. ⁵³ European Commission (2012: 5). COM(2012)614. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013AP0488&rid=14>. ⁵⁴ European Commission (2012, Article 6.2). COM(2012)614. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013AP0488&rid=14>.

The limits of the law: the South African legal framework



Current legislation and policy

Current legislation and policy

There is no legislation in South Africa obliging companies to include women on their boards of directors. However, there are several indirect legal measures to incentivise gender diversity on boards. The following legislation and instruments are relevant:

- The Constitution of the Republic of South Africa, 1996 (the Constitution)
- The Employment Equity Act 55 of 1998 (EE Act), only as regards to executive directors who qualify as employees
- The Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) and its Codes of Good Practice, only as regards to black women as defined in the Act
- The King IV Report, applicable on a voluntary basis to all organisations
- The listing requirements of registered stock exchanges (JSE, ZAR X, 4AX, A2X, and ESE), only as regards listed companies
- The Companies Act 71 of 2008
- The failed Women Empowerment and Gender Equality Bill B50-2013 (Gender Equality Bill)
- Policy documents (AsgiSA, National Development Plan – 2030).

The Constitution

The Constitution guarantees the right to equality⁵⁵ and prohibits unfair discrimination on any grounds, including gender⁵⁶. It also provides that affirmative action does not amount to unfair discrimination⁵⁷.

The Constitution paves the way for advancing the appointment of women to boards, if it appears that they are under-represented due to past discrimination. Although the right to equality enables a woman to bring an unfair discrimination claim if she was being considered for a position and was excluded on the basis of gender, such an action would have a poor prospect of success in the context of elected positions such as directorships. Directors are usually elected by shareholder.

The Employment Equity Act

The EE Act gives effect to the constitutional dictate of promoting equality in the workplace⁵⁸. It requires that designated employers have an employment equity plan containing targets for the employment of designated groups, including women, at various levels of seniority⁵⁹. The EE Act does not apply to non-executive directors, as they are not employees⁶⁰. Executive directors who qualify as employees of a company would fall under the occupational category, 'legislators, senior officials and managers'⁶¹, and so be included in the employment equity plan, along with other executive management employees who are not board members.

⁵⁵ Constitution of South Africa 1996, Section 9(1). ⁵⁶ Constitution of South Africa 1996, Section 9(4). ⁵⁷ Constitution of South Africa 1996, Section 9(2). ⁵⁸ EE Act 1998, Sections 2 and 3. ⁵⁹ EE Act 1998, Sections 13 and 20. ⁶⁰ EE Act 1998, Section 1, definition of "employee." ⁶¹ EE Act 1998, Section 10, Annexure 3.

The Broad-Based Black Economic Empowerment Act

The BBBEE Act identifies women (*along with others, for example, young people, and people living in rural areas*) as one of the specific categories of black people⁶² to be empowered in order to broaden the base of black economic inclusion⁶³. A company is evaluated in terms of a generic scorecard as having a particular BEE status, based on its overall performance on different indicators. The element of management control is relevant for present purposes.

The Act and its codes are binding on organs of state and public entities, who have to apply these when determining qualification criteria for the issuing of licences, concessions, or authorisations; when doing business with the private sector; and in developing incentive schemes⁶⁴. Since government is the largest buyer of goods and services in the economy, the ability to attract state contracts acts as a powerful transformation incentive in the private sector.

The inclusion of black people in the management control of a business is one of the elements contributing to the overall score⁶⁵. It is measured in terms of Statement 200 (revised 2013), which sets compliance targets and awards weighted points for achieving those targets. The Management Control score⁶⁶ contributes to the overall generic Scorecard score. Only 6 points⁶⁷ of the Management Control scorecard relate to board participation, while the remaining points focus on management employees at lower levels and on employment equity. Only 2 of the 6 board points are reserved for black female board members⁶⁸. Black female board members are, however, also counted towards the targets for black board members⁶⁹.

- The first weighted point for black women's participation is for the percentage of the total board votes held by them⁷⁰. The target is 25%, which means that a company where black women can exercise at least 25% of the total board votes will achieve the maximum score of 1. Companies are scored proportionately to the extent to which they meet the target, so that a company with, e.g., 10% black female votes will receive a score of 0.4⁷¹.
- The second female-specific point is for the percentage of executive directors⁷² who are black women⁷³. Again, the compliance target is 25%, and the maximum score is 1. Points are awarded pro rata towards the achievement of the target.

⁶² The BBBEE Act 2003, in Section 1, defines black people as Africans, Coloureds, and Indians who are citizens by birth or descent, or who became citizens by naturalisation before 27.04.1994, or who would have qualified to become citizens by naturalisation before that date. ⁶³ See the definition of "broad-based black economic empowerment" in Section 1 of the EE Act 1998. ⁶⁴ BBBEE Act 2003, Section 10. ⁶⁵ The others are ownership, skills development, enterprise and supplier development and socio-economic development. See the revised Codes of Good Practice in Government Gazette 36928 (11.10.2013). ⁶⁶ Management control contributes 15 points out of the total 105. But there are bonus points as well, giving 19 possible points on the management scorecard. Companies can therefore get the full 15 points without ticking all the boxes. However, once a company gets 100 or more points overall, it achieves the highest ranking – it makes no difference whether they scored 100 or 105 points. There are also three priority elements - ownership, skills development and enterprise development - where companies need to get a minimum score in order to qualify. Management is not one of the priority areas. ⁶⁷ The 6 points work as follows: (1) Percentage of black votes on the board - target 50% - weighting points 2; (2) Percentage of black female votes on the board - target 25% - weighting points 1; (3) Percentage of black executive directors - target 50% of executives - weighting points 2; (4) Percentage of black female executive directors - target 25% - weighting points 1. ⁶⁸ Under the previous scorecard an Adjusted Recognition of Gender formula was used to promote the inclusion of women. This has been replaced with the separate indicators for participation by women. ⁶⁹ The general target for black people on boards is 50% and it contributes 2 points for each of the two indicators, namely percentage of total board voting rights (item 2.1.1) and percentage of black executive directors (item 2.1.3). ⁷⁰ Item 2.1.2 on the Scorecard. ⁷¹ BBBEE Act 2003 – see the formula in Annexe 200(A) of the Codes. ⁷² The definition of 'Executive Members of the Board' appear in par 3.4.1 of Statement 200. ⁷³ Item 2.1.4 on the Scorecard.

3. The limits of the law: the South African legal framework

The King IV Report and Code

The King IV Report contains a Code setting out principles and recommended practices for the governance of companies and other organisations⁷⁴. Compliance with the Code is voluntary⁷⁵. The compliance model relies on the principle of ‘apply and explain’, which means that organisations are encouraged to apply the principles and explain how their practices demonstrate their application of the principles of the Code⁷⁶. Despite its voluntary nature as ‘soft law’, the King Code is increasingly seen as representing accepted practices (particularly the most observed principles), and could be taken into account by courts when assessing the conduct of companies and boards against prevailing standards. Thus, a company may indirectly breach the law by not complying with the voluntary standards of the King Code. Compliance with the King Code is also expected of listed companies, as all the registered stock exchanges in South Africa have, to varying degrees, embedded it in their listing requirements.

Diversity, including gender diversity, is one of the fundamental concepts underpinning good governance⁷⁷. According to the King IV Report, “Diversity should be understood as the varied perspectives and approaches offered by members of different identity groups”⁷⁸.

Principle 7 of the King Code deals with the composition of the board, and it again refers to diversity as an important component⁷⁹. In relation to board composition, recommended Practices 10 and 11 are instructive as regards gender representation.

- **Recommended Practice 10 reads:** The governing body should promote diversity in its membership across a variety of attributes relevant for promoting better decision-making and effective governance, including field of knowledge, skills and experience as well as age, culture, race and gender.
- **Recommended Practice 11 focuses on gender and race diversity, and reads:** The governing body should set targets for race and gender representation in its membership.

The gender theme is echoed in other recommended practices under Principle 7, namely:

- Practice 16 b, which requires of the board to consider the diversity of the board before nominating candidates for election
- Practice 30, which requires disclosure of the following aspects:
 - Whether the governing body is satisfied that its composition reflects the appropriate mix of knowledge, skills, experience, diversity and independence
 - The targets set for gender and race representation in the membership of the governing body, and progress made against these targets.

The King Code does not recommend similar practices for the composition of board committees, composition of each board committee.

⁷⁴ See King IV Report (2016: 36) on the link between governance outcomes, principles, and practices. ⁷⁵ King IV Report (2016: 35). ⁷⁶ King IV Report (2016: 37). ⁷⁷ King IV Report (2016: 28). ⁷⁸ King IV Report (2016: 12) - definition of “diversity” in the glossary. ⁷⁹ King IV Report (2016: 50ff). Principle 7, reads: “The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.”

Stock exchange regulation of listed companies

An exchange derives its powers from the Financial Markets Act 19 of 2012 (FMA), including the ability to regulate companies listed on it⁸⁰. It can enforce its listing requirements and rules through sanctions such as fines, the suspension of trading, or the removal of a listing⁸¹. The listing requirements set out the preconditions for listing, as well as the continuing obligations of companies while they maintain a listing on the exchange.

Four new exchanges were recently licensed, namely A2X, 4AX, EESE, and ZAR X. While the listing requirements of each exchange make some reference to the King IV Code, the requirements differ regarding the extent to which they require adherence to the Code's recommended practices.

The JSE Limited listing requirements

The JSE is the oldest and largest licenced exchange in South Africa, listing the shares of 388 companies. Section 3 of the Listing Requirements details the continuing obligations with which listed entities need to comply at all times. Corporate governance obligations are detailed in Section 3.84. The listing requirements make the implementation of specific King IV governance practices compulsory, thus elevating its voluntary basis to a mandatory one for listed companies⁸². In addition to expressly requiring listed companies to have a policy to ensure a clear balance of power and authority on their boards, an amendment to the listing requirements that took effect in July 2017 requires that either the board or the nomination committee should have a policy on the promotion of gender diversity at board level⁸³. It has to explain, in its annual report, how the policy was considered and applied in director nominations and appointments⁸⁴. If the company has voluntarily agreed on gender diversity targets for its board, it is also required to report on its progress in achieving those targets⁸⁵.

In addition to being a continuing obligation for already listed companies, compliance with the King Code, specifically in respect of board composition, must also be disclosed in the pre-listing statement of applicants for listing⁸⁶.

The A2X listing requirements

This exchange, which has 21 listings, offers secondary listings for companies already listed on another exchange in South Africa or elsewhere. In addition to complying with the requirements of the primary or host exchange, companies are required to apply the principles of the King Code⁸⁷ and to disclose how they applied them, or explain any non-compliance⁸⁸. Emphasis is placed on particular King Code provisions that must be complied with in the manner prescribed by the King Code, including that there must be a formal policy setting out how optimum board composition is achieved⁸⁹.

⁸⁰ FMA (2012), Sections 10 and 11. ⁸¹ FMA (2012), Sections 11 and 12. ⁸² Section 3.84(i) of the JSE Listings Requirements. A policy on race diversity is also required; see Section 3.84.1(j) of the JSE Listings Requirements. ⁸³ Section 3.84(i) of the JSE Listings Requirements. A policy on race diversity is also required; see Section 3.84.1(j) of the JSE Listings Requirements. ⁸⁴ Section 3.84(i) of the JSE Listings Requirements. A policy on race diversity is also required; see Section 3.84.1(j). ⁸⁵ Section 3.84(i) of the JSE Listings Requirements. The same information must be contained in the company's pre-listing statement, circulars, and in a prospectus offering further shares; see Section 8.63(q). ⁸⁶ See Sections 7.F.5 and 7.F.6 of the JSE Listings Requirements. ⁸⁷ Section 3.9 of the A2X Listings Requirements. ⁸⁸ Section 3.10 of the A2X Listings Requirements. ⁸⁹ Section 3.11.1 of the A2X Listings Requirements. This policy must also provide for a nomination committee.

3. The limits of the law: the South African legal framework

The 4AX (4 Africa Exchange) listing requirements

The 4AX currently has only 5 listings, and, although companies are required to report on their application of the King Code and explain areas where they do not comply⁹⁰, there is no specific reference to gender representation in the 4AX Listing Requirements. Companies are required to disclose their policy on the appointment of directors⁹¹.

The EESE (Equity Express Securities Exchange) listing requirements

This exchange lists BBBEE schemes and has 5 listings. Section 7 of the Listing Requirements deals with corporate governance. Companies must “endeavour” to apply the King Code⁹², and must disclose any instances of non-compliance with the Code, as well as the reasons⁹³. There is no direct reference to gender representation on boards.

The ZAR X listing requirements

ZAR X has three listings. It requires that companies “endeavour” to comply with the King Code and issue a narrative statement on their implementation of the Code, in particular Chapter 2 of the Code regarding directors and the board⁹⁴. The gender of a director must be indicated on the personal information form that is lodged in respect of directors⁹⁵, but there are no other references to gender representation.

The Companies Act 71 of 2008

The Companies Act is the main legislation regulating companies. Among its purposes are promoting compliance with the Bill of Rights in the Constitution, promoting the development of the South African economy, and reaffirming the concept of the company as a means of achieving economic and social benefits⁹⁶. The Companies Act does not, however, deal with gender inclusivity on boards. It prescribes the minimum number of directors that different types of companies are required to have⁹⁷. It further dictates that directors be elected by the shareholders, unless the company’s memorandum of incorporation provides for direct appointment by a specified person, or for the incumbent of a particular office, title, or designation to be an ex officio director⁹⁸. In a profit company other than an SOC, at least 50% of the directors must be elected by the shareholders⁹⁹.

Public companies, SOCs, and certain private companies are required to appoint a committee to advise and report on social and ethical matters¹⁰⁰. The Companies Act Regulations list a number of instruments to be considered by the social and ethics committee, including the company’s compliance with the EE Act, the BBBEE Act, and principles of good corporate citizenship, the promotion of equality, and the prevention of unfair discrimination¹⁰¹. The Companies Act does not attach any direct consequences to a board’s failure to heed the recommendations of the committee.

⁹⁰ Section 6.19 of the 4AX Listing Requirements. ⁹¹ Section 6.19.11 of the 4AX Listing Requirements. ⁹² Section 7(1)(a) of the EESE Listing Requirements. ⁹³ Section 7(1)(b) of the EESE Listing Requirements. ⁹⁴ Section 5 of the ZAR X Listing Requirements. ⁹⁵ See the form in Schedule 8 to the ZAR X Listing Requirements. Disclosure: names, gender, date of birth, residential address, regulatory history, criminal history, civil fraud history, company experience and other directorships, sequestration, garnishee orders and judgments. The Exchange does not keep this information aggregated form. Exactly the same form is also used for senior officials, major shareholders and related parties.

⁹⁶ Companies Act 2008, Sections 7(a), (b), and (d). ⁹⁷ Companies Act 2008, Section 66(2). The minimum number is 1 for private companies and 3 for public companies. Companies may need additional directors to meet the requirements pertaining to audit and social and ethics committees, see the concluding words of Section 66(2). A company’s memorandum of incorporation could specify a higher minimum, Section 66(3). ⁹⁸ Companies Act 2008, Section 66(4)(a). ⁹⁹ Companies Act 2008, Section 66(4)(b).

¹⁰⁰ Companies Act 2008, Section 72, read with the Companies Act Regulations of 2011. ¹⁰¹ Companies Act 2008; Regulations (2011), Regulation 43.

The failed Women Empowerment and Gender Equality Bill

In 2013, a Gender Bill was introduced in the National Assembly¹⁰¹. It was withdrawn for further consultation on 9 July 2014, and seems to have been abandoned¹⁰² as it has not been resuscitated or presented for further debate. The purpose of this Bill was to give effect to Section 9, the equality clause, of the Constitution. It provided for equal representation and participation of women in decision-making positions and structures¹⁰³, for gender mainstreaming¹⁰⁴, and for the empowerment of women and elimination of gender discrimination¹⁰⁵.

Clause 7(1) required at least 50% equal representation of women on the boards of public and designated private bodies¹⁰⁶. It also provided for the development and implementation of measures to achieve the progressive realisation of its targets, including capacity-building and addressing community attitudes¹⁰⁷.

Clause 3(b) of the Bill acknowledged the government's commitments under the following international instruments:

- Convention on the Elimination of All Forms of Discrimination Against Women (December 1979);
- Beijing Declaration and Platform for Action (September 1995);
- Millennium Declaration and Development Goals (September 2000);
- Solemn Declaration on Gender Equality in Africa (July 2004); and
- SADC Protocol on Gender and Development (August 2008).

While the Bill may have disappeared from the agenda, the government's commitments under these instruments remain.

Policy documents

The Accelerated Shared Growth Initiative for South Africa (AsgiSA) was formulated in 2006 as a policy document. It aimed to halve unemployment and poverty by 2014, and regarded the empowerment of women as essential to its purpose.

It was superseded as a policy document by the New Growth Path Framework in 2010, which was, in turn, replaced by the National Development Plan 2030, which aims to eliminate poverty and reduce inequality by 2030. The National Development Plan 2030 also proposes to advance gender equality through, for example, active participation and empowerment of women, and actively supporting the role of women as leaders in all sectors of society¹⁰⁸.

¹⁰¹ See Government Gazette (06.11.2013). ¹⁰² See <https://pmg.org.za/bill/26/>. ¹⁰³ Gender Equality Bill, Clause 7. ¹⁰⁴ Gender Equality Bill, Clause 8. ¹⁰⁵ Gender Equality Bill, Clause 9. ¹⁰⁶ The Minister would designate private bodies, probably based on factors such as size. ¹⁰⁷ Gender Equality Bill, Clause 7. ¹⁰⁸ See the Executive Summary 33. <https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>

Gaps in legislation and policy

The legal framework for gender inclusivity on corporate boards is fragmented

While the Constitution supports the progressive realisation of equality, it does not impose tangible obligations on companies and their shareholders to consider representativity when appointing directors.

The EE Act was enacted to give effect to the constitutional right to equality. It addresses equality in the workplace. Despite its purpose as part of employment law, it may be relevant to board composition to the extent that directors may be employees of a company. It is of limited use for the following reasons:

- It does not apply to directors who are not also employees of the company, so it excludes all non-executive directors and even some executive directors;
- Many of its provisions apply only to designated employers, so it excludes smaller companies with few employees from obligations such as having employment equity plans
- Its occupational levels are not designed to distinguish between board members and other senior officials and managers

The BBBEE Act is important for the inclusion of black women on boards. It does not, of course, advance the inclusion of women in general, as white women are excluded from its ambit.

Its limitations are the following:

- It defines and measures black women's empowerment, which may have certain consequences, but it does not directly compel any company to appoint women to its board
- Only companies operating in sectors where they depend on state concessions or contracts (*or those, in turn, doing business with such companies*) are incentivised by its measures
- The contribution of black female board membership to the overall BEE score of a company is only 2 points, and since the scorecard has a possible total of more than 100, a company could score full marks without having any female representation on its board
- There is no points incentive for a company with higher than 25% black female representation on its board

The King Code applies to all organisations, regardless of legal form or size. However, it is not legally binding, but relies on voluntary compliance. The King Code depends heavily on the disclosure of practices ("apply and explain"). This can serve as an important compliance incentive for companies in the public eye, as they may fear censure by the financial press and investors, particularly institutional investors, if they do not adhere to the King Code principles. Smaller companies, even if they choose to disclose non-compliance, would escape public scrutiny, and are thus not incentivised to adopt King Code practices. Moreover, some of these practices are expensive and impractical for smaller companies, which is why the King Code envisages proportionality. Of course, smaller companies account for the majority of registered companies in South Africa. Many of these companies have only one director, who is also usually the sole shareholder of the company, or, if the company has more directors, they are also shareholders.

The only companies that are obliged to comply with the King Code, or at least disclose any non-compliance, are listed companies. South

Africa has about 400 listed companies. The only exchange that forces companies to implement the recommended practices of the King Code is the JSE Limited. In addition, it requires a policy on gender diversity and disclosure of progress towards achieving voluntarily agreed targets. Other exchanges encourage companies to apply the King Code, and oblige them to disclose any non-compliance. In the listed environment, disclosure is, of course, an effective tool.

The Companies Act does not specifically advance gender inclusivity. As directors are, as a rule, elected by shareholders¹⁰⁹, which is a fundamental principle of company law, the most viable measure that might be included in the Companies Act to promote gender representation is compulsory disclosure in a company's annual report. Individual shareholders are allowed to vote as they please and in their own interests. However, large institutional investors can contribute to gender inclusivity through their voting policies and practices for the election of directors.

Overall impact of legal and regulatory framework

In short, the legal and regulatory framework offers several incentives for the transformation of board composition. These incentives can be described as:

- limited in scope, in that they target only certain race groups (black people) or certain categories of directors (employee directors), or certain categories of companies (listed companies)
- limited in relevance, in that they fail to incentivise companies unless they are active in certain sectors and environments (the BEE environment)
- limited in impact, in that they attach a relatively low level of recognition to promoting gender diversity (BEE Management Control Scorecard)
- limited in enforceability, in that compliance is voluntary (King Code).

¹⁰⁹ Unless the memorandum allows different appointment methods, which is possible for up to 50% of the positions, see Companies Act 2008, Section 66.

Forward thinking: getting more women on boards



This section explores how to **get more women on boards**, and how to get more out of those who are already there:

- **Part one** explores the ideas of power and influence and looks the role of CEOs, board committees and committee chairs. It also explores the weight of an interlinked, experienced director who sits on more than one board. Women who remain outside positions of power have limited ability to impact company strategy, and companies should strive to appoint women CEOs, committee members and committee chairs.
- **Part two** looks at how the number of women on a board impacts their ability to function. Having three or more women on a board can change the power dynamic of the board, and open the door for more critical conversations and richer decision making.
- **Part four** looks at short-, medium- and long-term tactics that companies have used to find and grow women board members. These range for closing the wage gap between male and female board members to establishing a shadow board to grow the next generation of women directors.
- **Part five** looks at different ways that shareholder activities can encourage companies to take female board representation seriously. These include selling shares (exit strategy) and engaging in formal and informal conversations (voice). The choice of which strategy to use depends on the level of shareholding in the company

Power and influence

Just being on a board is not enough. The power to influence strategy, and make a meaningful difference is determined by key positions like the CEO or committee chair.

Research reported by Viviers and Mans-Kemp conducted by Inoxico in 2013 indicated that women seldom replaced retiring directors but were rather added to an existing board¹¹⁰.

A diverse board opens the door for a female CEO

The low number of female CEOs raises two questions:

1. Are diverse boards more likely to *appoint* female CEOs?
2. Are diverse boards more likely to *support* female CEOs during their tenure?

Cook & Glass found that boards with one or more female board member are more likely to appoint and support female CEOs than all-male boards are¹¹¹.

The reverse is also true: all-male boards are less likely to appoint female CEOs. An all-male board that appoints a female CEO is also not likely to support her in her tenure. This behaviour risks entrenching the bias that female leaders are not as competent as their male counterparts¹¹².

Additionally, the authors found that it is both the number of female board members as well as their influence on and interconnectedness with the board that makes the difference¹¹³. When it comes to appointing women as CEOs, one highly influential female board member can be more effective than several less influential ones¹¹⁴.

However, when it comes to supporting a female CEO, many female board members are more impactful than one influential one¹¹⁵.

¹¹⁰ Viviers & Mans-Kemp (2019). Director overboardedness in South Africa: Evaluating the experience and business hypotheses. *International Journal of Disclosure and Governance*, 16(1): 68-81. <https://doi.org/10.1057/s41310-019-00057-x>. ¹¹¹ Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 142-144. ¹¹² Carton & Rosette (2011). Explaining bias against black leaders: Integrating theory on information processing and goal-based stereotyping. *Academic Management Journal*, 54: 1141-1158. ¹¹³ Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 143. ¹¹⁴ Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 143. ¹¹⁵ Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 143.

Board committees hold the power

Many board decisions take place in board committees, and women directors who sit on these committees, or are committee chairs, have more influence than those who do not. Green and Homroy argue that gender diversity in board committees may be a better predictor of company performance than overall board diversity¹¹⁶.

Globally, women are rarely appointed to head up these committees¹¹⁷.

The outside expert: interlinked directors

An interlinked director serves on more than one board, and can bring practices and innovation from one company to another¹¹⁸.

They have more authority and credibility than directors who sit on only one board, and are more able to influence the outcomes of board decisions¹¹⁹. This is even more so for women on male-dominated boards. As they are seen as outside experts, with exposure to minority issues, they have an opportunity to influence corporate strategy¹²⁰.

116 Green & Homroy (2018). Female directors, board committees and firm performance. *European Economic Review*, 102(C): 20. **117** Bilimoria (2012). Women on boards and professional networks. Conference presentation at the National Academy of Management, Boston, MA; Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53(2015): 141. **118** Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 141. **119** Shropshire (2010). The role of interlocking director and board receptivity in the diffusion of practices. *Academic Management Review*, 35: 246, 253; Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 141. **120** Cook & Glass (2015). Diversity begets diversity? The effects of board composition on the appointment and success of women CEOs. *Social Science Research*, 53: 141

4. Forward thinking: getting more women on boards

Critical mass: *from a lone voice to a significant say*

It takes at least three women on a board for the female directors to feel accepted and heard. Konrad defines three phases that trace the path towards acceptance: **invisibility, conspiracy and critical mass**¹²¹. This section of the report summarises each of these phases.

One woman on a board: the invisibility phase

A solo woman may be seen as a token appointment to meet the demands of gender diversity advocates¹²². This could have one of two consequences: they may be excluded, or they may be hyper visible¹²³.

The views of an excluded woman are intentionally or unintentionally ignored; while a hyper visible woman is seen as a woman first and an accomplished individual second.

There is a difference in attitude to the first woman, and the only woman¹²⁴. A competent first woman paves the way for women who come after her to be evaluated for her capabilities, not her gender¹²⁵.

Two women on a board: the conspiracy phase

Two women on a board may still struggle with the impact of entrenched stereotypes, but to a lesser extent than a lone woman would¹²⁵.

A female director has a voice to back her up and validate her opinions¹²⁶. However, when they agree, they could be seen to conspire with each other on the basis of their gender – not having reached the same conclusions separately¹²⁷.

Three women on a board: critical mass

Once there are three women on a board, women are no longer seen as outsiders on the board. They are no longer seen as voices for the entire gender, but as individuals with independent opinions. The stereotyping problems that exist with one or two women on the board fall away¹²⁸. Additionally, the boardroom dynamic changes: as women's voices are accepted, a wider range of issues are discussed from a wider range of perspectives. There seems to be an increase in collaboration and inclusiveness when women form part of the conversation¹²⁹.

Why three women?

It's useful to refer to Asch's study regarding conformity to a majority opinion. Asch proved that when a majority express an opinion, even if that opinion is wrong, the minority is more likely to agree with the majority than with the opinion of a single dissenter¹³⁰.

However, if the dissenter has even one ally, the minority are less likely to agree with the majority.

This leads to greater group examination of the issue under discussion and a higher quality decision¹³¹.

¹²¹ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147. ¹²² Torchia et al. (2011). Women directors on corporate boards: From tokenism to critical mass. *Journal of Business Ethics*, 102(2): 308. ¹²³ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147. ¹²⁴ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147. ¹²⁵ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 150. ¹²⁶ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147, 153. ¹²⁷ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147, 153. ¹²⁸ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147, 153. ¹²⁹ Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 147, 155. ¹³⁰ Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 148-149. ¹³¹ Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 149.

When applied to women on boards, a grouping of three women who strongly and unanimously advocate a specific point, in the absence of a dissenting view, leads to three outcomes:

1. They are more likely to persuade the rest of the board to follow their 'apparent majority decision'¹³².
2. If there is a persistent minority view in the face of a majority of three, this could lead to a more detailed exploration of the issue at hand, so the board may make a better decision¹³³.
3. Women are more likely to voice their opinions when they know there is another woman on the board, as the other woman may be seen as a supportive ally¹³⁴.

Konrad et al. illustrated this evolution from one to three women using interviews with women directors, CEOs, and corporate secretaries¹³⁵. Torchia et al. studied this phenomenon in companies in Norway, where there is a 40% mandatory quota for women on corporate boards¹³⁶. The study tested whether an increase in female representation would increase organisational innovation¹³⁷. The study showed that the presence of one or two female directors on a board had no effect on the level of organisational innovation¹³⁸. However, there was a significant and positive relationship between the critical mass of at least three women directors and the level of organisational innovation¹³⁹.

132 Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 149. **133** Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 149. **134** Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 149. **135** Asch (1955). Opinions and social pressure. *Scientific American*, (193): 31-35; Konrad et al. (2008). Critical mass: The impact of three or more women on corporate boards. *Organizational Dynamics*, 37(2): 145-164. **136** Torchia et al. (2011). Women directors on corporate boards: From tokenism to critical mass. *Journal of Business Ethics*, 102(2): 299-317. **137** Torchia et al. (2011). Women directors on corporate boards: From tokenism to critical mass. *Journal of Business Ethics*, 102(2): 299. **138** Torchia et al. (2011). Women directors on corporate boards: From tokenism to critical mass. *Journal of Business Ethics*, 102(2): 308. **139** Torchia et al. (2011). Women directors on corporate boards: From tokenism to critical mass. *Journal of Business Ethics*, 102(2): 308.

4. Forward thinking: getting more women on boards

Change from within

Companies can take an active role in identifying, training and promoting high-potential female candidates to their boards.

Short term	<p>Close the gender wage gap between male and female board members: this signals to women that they are valued equally and can contribute equally to board decision-making¹⁴⁰.</p> <p>Make the search for talent a high priority: companies that want to transform their boards should prioritise the process of identifying female candidates for higher management and board positions¹⁴¹. Progressive companies look outside of traditional networks and explore sources like academia, professional bodies, government, and non-profit organisations when looking for appointees¹⁴².</p>
Medium term	<p>Turn managers into directors by sponsoring emerging talent: a longer-term strategy includes investing in the next generation of female directors through an existing director actively vouching for a woman in senior management, opening opportunities for her and through this, and preparing her for a board position.</p> <p>Train, mentor and support: preparing for a board role takes more than technical skills transfer; these women may need tools to deal with the normative, male-dominated behaviour (The Old Boy's Club)¹⁴³. Companies can consider developing a 'shadow' programme where women can shadow sitting board members and learn the ropes regarding board protocol and decision making.</p>
Long term	<p>Change the culture of the company: removing gender biases and stereotypes throughout the organisation would have the most impact of all¹⁴⁴. This is a profound and difficult change which many companies struggle to implement.</p>

¹⁴⁰ Wiley & Monllor-Tormos (2018). Board gender diversity in the STEM-F sectors: The critical mass required to drive firm performance. *Journal of Leadership & Organizational Studies*, 25(3): 304. ¹⁴¹ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ¹⁴² Wiley & Monllor-Tormos (2018). Board gender diversity in the STEM-F sectors: The critical mass required to drive firm performance. *Journal of Leadership & Organizational Studies*, 25(3): 304. ¹⁴³ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ¹⁴⁴ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489.

Shareholder activism

Shareholders can encourage companies to take board gender diversity seriously. Here are **two strategies to consider**.

The exit strategy. If majority shareholders sell their shares, they can decrease the share price and impact a marked depreciation in a company's market capitalisation¹⁴⁵.

The voice strategy: conversations with directors, managers or other shareholders can be formal or informal, in private or in public and include:

Private, formal Filing shareholder resolutions, voting for the appointment or re-appointment of female nominees as directors	Public, formal Questioning management at annual general meetings about gender policies
Private, informal A private conversation among directors, managers or lobby groups	Public, informal Using media platforms to stimulate public debate on board gender diversity ¹⁴⁶

What works for large, institutional investors may not work for small shareholders

A larger institutional shareholder probably has a more voting power than individual shareholders with smaller shareholdings and have the power to informally apply pressure to directors and management. For smaller shareholders, public voice strategies probably have a more rapid and widespread effect than private ones¹⁴⁷.

Investment bankers and advisors

There are many players in the process of listing on a stock exchange, one of the most influential of which are the investment bankers who may also underwrite the initial public offering (IPO). Goldman Sachs Group Inc will not aid European or American companies with an all-white, all-male board with an initial public offering. They join BlackRock Inc. and State Street Global Advisors who have similar policies.¹⁴⁸

¹⁴⁵ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ¹⁴⁶ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ¹⁴⁷ Viviers et al. (2017). Mechanisms to promote board gender diversity in South Africa. *Acta Commercii*, 17(1): a489. ¹⁴⁸ Green, J. (2020). Goldman to Refuse IPOs If All Directors Are White, Straight Men. <https://www.bloomberg.com/news/articles/2020-01-24/goldman-rule-adds-to-death-knell-of-the-all-white-male-board>

[illegible]

This section gives recommendations on how to develop balanced boards. It has

four parts:

- **Part one** suggests a series of national interventions in target setting, monitoring and reporting to consolidate the existing laws and ensure that they are enforced.
- **Part two** focuses on directors and suggests critical conversations for boards. It also gives recommendations for directors to support ongoing research.
- **Part three** looks at shareholder activists and puts forward ideas for lobbying, media management and global networks.
- **Part four** looks at institutional investors and how they can change the attitudes of companies and boards to encourage them to increase board diversity.

Key recommendations

While gains have been made, the patterns remain stagnant. An increase of **women on boards is unlikely** without specific interventions.

South Africa already has legal mechanisms that nudge organisations towards increasing the gender diversity of their boards. These mechanisms are outlined in the section titled: *Current legislation and policy*. However, following good practice guidelines is for the most part, voluntary. For instance, there have been no consequences for JSE-listed companies that have not complied with listing requirements related to the advancement of gender diversity at board level.

In South Africa, quotas are regarded as unconstitutional so voluntary targets are the primary legislative means to bring about change. We believe that if properly monitored and reported, voluntary targets can be just as effective as quotas.

The key question is: which entity should monitor and enforce progress? All of the following could play a role: the Commission for Gender Equality, the Commission for Employment Equity, the BBBEE Commission, the Ministry of Women, Youth, and People with Disabilities, the Department of Trade and Industry, the Institute of Directors, and listed exchanges.

Establishing clear targets

Targets for listed companies:

- Listed companies should target at least 30% women's board representation - with 40% as a stretch target. One in three listed companies have reached the 25% level, so starting with a 30% target is reasonable and feasible.
- Listed companies should set specific targets for women representation as committee members and committee chairs.
- Listed companies should be required to show gender parity in the nomination of candidates at the long-list stage¹⁴⁸ and for companies to document reasons why short-listed candidates are backed.

Reporting for listed companies:

- The IoDSA could enhance existing recommended practices in King IV by setting a voluntary target for gender diversity at board level. This would ensure that JSE-listed companies must report on it.

Unlisted and private companies:

- When considering which types of targets would be appropriate for unlisted public companies and private companies, also bear in mind the size of the board and company.
- Small private companies with proprietary directors¹⁴⁹ probably hold limited potential for promoting board gender diversity and should not be targeted.

¹⁴⁸ The period when candidates are considered for appointment to a board. ¹⁴⁹ Sole or major shareholders who are also directors.

Monitoring targets: gathering data

It is difficult to analyse and measure progress without good quality data. Currently, researchers often need to compile their own diversity datasets by going through each company's annual report and manually capturing the data. However, there are more efficient ways of doing this:

- The Companies and Intellectual Property Commission (CIPC) should collate data on boards for listed and non-listed companies and make this public. This is in line with the CIPC's mandate as a regulatory agency.
- Stock exchanges should collate and share data on the gender, age and race of company directors.
- Companies that are regarded as designated private bodies¹⁵⁰ should be compelled to report the gender and race of board nominees, committee members, and committee chairs.

Monitoring targets: analysis, reporting and promoting

- Use regular reporting mechanisms of organisations like BWASA, IoDSA and 30% Club to keep board diversity on the national agenda.
- Use information from the stock exchanges to produce lists of companies that exceed, meet or do not meet the gender targets.
- Develop a national index, similar to the Female FTSE Board Report of the Cranfield School of Management (UK), to monitor progress.
- Partner with the media to provide an impetus for change and celebrate companies who achieve or exceed the targets.

5. Moving forward: turning theory into action

Critical conversations

Meaningful debate in government, political parties, educational institutions, professional bodies, businesses and homes may inspire new mechanisms and legislation that can progress this issue in a non-confrontational way. The following issues are starting points for productive discussions:

- International case studies show that the right legislation can encourage and enforce gender equality on boards. How can a Gender Equality Bill augment and support the EE and BBEE Acts?
- Rather than create a new Act, would it be more effective to amend the Companies Act, and embed reporting requirements and consequences for non-compliance within it?
- The BEE Act has been effective in increasing the number of black women on boards. How can board gender equality legislation embrace all women, taking the unique social positions of each race group into consideration?
- There are presently no consequences for companies that do not comply with or implement plans to increase the number of women on their boards. What consequences are appropriate and will be effective?
- **An appropriate watchdog: listed companies are expected to report on the gender composition of their boards, and the exchange on which they are listed should monitor this. No organisation monitors and enforces that these exchanges do so.**
 - Which entity should be responsible for monitoring reporting and compliance?
 - What mechanisms should this entity have to ensure compliance?
 - Would a Workplace Gender Equality Agency (such as in Australia) work in South Africa?
 - What is the role of government departments such as the Commission for Gender Equality, Department of Trade and Industry and the Ministry of Women, Youth, and People with Disabilities?
- Should the JSE Limited make public the information of companies that are non-compliant with its gender-related listing requirements?

How board members *can make a difference*

Developing the next generation of women board members won't happen without a concerted effort.

Board members can play a part by engaging in the following questions:

- What is your board doing, and what more can you do?
- Have you implemented a shadow board or other way of developing the next generation of women board members?
- How are you utilising directorships in non-profit, unlisted public companies and in larger private companies to increase the pool of experienced women from which listed companies can make board appointments?
- How can your company support women to take on independent board directorships whilst serving as executive directors?
- Are you implementing family and other support mechanisms to enhance the chances of women in their child-bearing years to serve on your board?

Look outside of the normal networks for new talent

There is a vast, untapped pool of qualified and talented women who could add value to a board. Women from government, business, academia and non-profit companies bring different perspectives to decision-making and strategy, and broader professional networks necessary to implement corporate ventures.

Support research on board gender representation

Rigorous research can reshape conversation. These questions are worth answering:

1. Are women CEOs in South Africa more likely to emerge out of companies with women on their boards?
2. Are older directors (men and women over 60 years old) over-boarded because of industry experience, education, and networks and affiliations? Are any of these problematic?
3. How many boards should a director in South Africa serve on before being classified as over-boarded?
4. What are the processes that gender-diverse boards have followed to ensure that women board members have voice and are supported?
5. How can South Africa harness its available female board talent in spite of a culture of high levels of Hofstede's cultural dimensions of masculinity and power-distance?

How shareholder activists *can make a difference*

Shareholder activists have the power to encourage change through applying pressure to regulatory and industry bodies, and within companies themselves.

- **Lobbying for more accurate reporting:** support the movement for the CIPC to report on gender diversity on company boards and for licenced exchanges to enforce gender, age and race reporting as part of their listing requirements.
- **Keep the conversation going:** partner with the media to ensure that diversity remains part of the national conversation.
- **Connect with global bodies:** engage with entities like the Australian Workplace Gender Equality Agency to understand the model and mechanisms that the Agency utilises toward workplace gender equality.
- **Nominate strong women directors:** shareholders who hold shares in multiple companies should nominate female directors who are performing their duties well on one board, for other boards of other companies they hold shares in.

How institutional investors *can make a difference*

Institutional investors have a fiduciary duty to their investors to look after the long-term value of their investments, which should include economic, social, and governance considerations. These include:

- **Shaping company strategy through private, informal conversations** – and in doing so, encourage each of the companies that they invest in to add at least one more woman to their board.
- **Give preference to boards that are making progress towards gender-balanced boards** when determining which companies to invest into.
- **Make their votes count and develop a co-ordinated voting policy** that prioritises gender-diversity when voting on new board members.

