



Diversity and inclusion on company boards and executive committees

Response to the Financial Conduct Authority's consultation

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Sex Matters is a human rights organisation campaigning for clarity about sex in law, policy and language

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Introduction

The Financial Conduct Authority is consulting on a proposal to change listing rules to require companies to disclose publicly in their annual financial report whether they meet specific board diversity targets relating to “gender” and ethnicity on a “comply or explain” basis. This response concerns the listing rules in relation to “gender”.¹

- The proposal is that at least 40% of the board should be women (**including those self-identifying as women**).
- At least one of the senior board positions (Chair, Chief Executive Officer (CEO), Senior Independent Director (SID) or Chief Financial Officer (CFO)) should be a woman (**including those self-identifying as a woman**).

The proposed format for reporting is shown here.

It also includes “non-binary” and “prefer not to say”.

The proposed approach is not to monitor sex, but instead assesses “gender”, a category that is not defined in law.

It does not give any justification or reasoning for this.

Gender

Men (including those self-identifying as men)

Women (including those self-identifying as women)

Non-binary

Not specified/prefer not to say

We argue that this approach should be rejected in favour of collecting data on sex with the options “male”, “female” and “prefer not to say” (which is adequate to accommodate the privacy of those with a transgender identity). The FCA might justify asking for either legal or biological sex and should publish its Equality Impact Assessment.

¹ This response answers Q5: Do you agree with proposed targets on gender and ethnic diversity representation at board-level of companies? Should we consider any additional or different targets? Q6: Do you agree with the format and extent of numerical data reporting proposed in the tables in Annex 2? If not, please explain any changes you would suggest or where further clarity is needed.

Sex in UK law

Sex is a physiological attribute about a person which is determined at conception and observed at (or before) birth. There are two sexes: male and female (which correspond to the categories man and woman).

Sex is a fact of life that has been acknowledged, recorded and used in law long before it was formally defined. This reflects the fact that sexual reproduction, the generation of offspring by fusion of genetic material from two different individuals, one male and one female, is foundational: it evolved over a billion years ago, long before humans, words or laws.

Being a woman or a man is defined as a sex, both in common law and under the Equality Act. Women in particular face structural sex discrimination. For this reason there has been an Equal Pay Act since 1970, and a Sex Discrimination Act since 1975. These were incorporated into the Equality Act 2010.

The Equality Act 2010 defines man and woman under the protected characteristic sex:

S11. a): "In relation to the protected characteristic of sex... a reference to a person who has a particular protected characteristic is a reference to a man or to a woman".

S.212. "Man" and "woman" mean respectively a "male" or "female" of any age.

Under the Gender Recognition Act 2004, people are able to change their legally recorded sex by obtaining a "Gender Recognition Certificate" (GRC). The certificate is awarded on the basis of a medical diagnosis of gender dysphoria (but not necessarily any physical changes or surgery), a change of other paperwork such as bills over two years and a statutory declaration. Only around 5,000 people have accessed this legal change since the GRA became law. It is estimated that there may be 500,000 people who identify as transgender.

"Gender" is often used as a polite synonym for sex (such as in the term "gender pay gap"). However, this creates confusion, since there are many different meanings of gender. As the EHRC states:

The term is often used interchangeably with "sex", partly in recognition that much of the inequality between women and men

is driven by underlying social and power structures rather than by biological sex. Although the Equality Act protects people from discrimination because of their sex, other UK legislation (such as the regulations requiring employers to publish their gender pay gap) refers to gender. This may cause confusion in some circumstances. To avoid any ambiguity, we are reviewing our use of language across our website and publications to ensure clarity and consistency. However, it is important to note that any mistaken or structural use of the term gender does not affect how the law works in practice.²

The FCA's proposal divides people into three self-identified categories unrelated to sex, which it calls "men", "women" and "non-binary". This use of "gender" is not simply a synonym for sex or a mistaken use of gender for sex, but a completely different concept aligned with the idea of gender identity, and not the material reality of sex.³

This regulation is therefore not fit for its stated purpose of promoting greater diversity on boards as it does not consider sex. It forces companies to instead collect data on the undefined term "gender".

Recommendation 1: Monitor binary sex

The FCA should amend the regulation to be clear that it concerns the balance between the two sexes on boards, and it should provide a reporting format which records straightforwardly whether directors are male or female.

This is in line with:

- **the definition of sex in UK law as established in** *Corbett v Corbett* [1971] P 83, followed by *R v Tan* [1983] QB 1053 and *Bellinger v Bellinger* [2003] 2 AC 467). Its effect was considered by the House of Lords in *Chief Constable of West Yorkshire Police v A (No.2)* [2005] 1 AC 5, and recently confirmed in *Forstater v CGD Europe* [2021] IRLR 706

² <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

³ The voluntary FTSE Women Leaders scheme only asks about "men" and "women" using the term gender and not defining whether it means sex: <https://ftsewomenleaders.com/faqs/>

- **data collected by the ONS in the census**, and guidance on the census produced by the ONS (following the successful legal challenge by FairPlay for Women, after the ONS proposed that sex be considered a self-identified characteristic)⁴
- **guidance recently produced by the Office for Statistics Regulation’s Inclusive Data Taskforce**, which states that “regularly collected (and also legally protected in England, Wales and Scotland) characteristics such as sex, ethnic group and disability status should continue to be comprehensively and appropriately recorded”⁵
- **the Equality Act 2010** where sex is a protected characteristic (this was clarified by the Equality and Human Rights Commission in a helpful statement in 2018)⁶, which would bring the measure in line with the FCA’s responsibility under the Public Sector Equality Duty to consider impacts on people with different protected characteristics
- **information already collected by companies for the purpose of tax and payroll for HMRC**, which is based on legal sex as recorded on a person’s birth certificate
- **reporting under the Companies Act 2006**, which requires companies to include in their strategic report a breakdown showing “the number of persons of each sex who were directors of the company, the number of persons of each sex who were senior managers and the number of persons of each sex who were employees”
- **the Data Protection Act**, which establishes that information on the sex of employees and others is not considered “special category information”, whereas data on gender identity, such as whether someone considers themselves to be non-binary or transsexual, is special category sensitive data.

“Non-binary” identity should not be collected in place of sex

In 2018 the UK government launched a consultation on potential changes to the Gender Recognition Act, including whether it should change to a system of self-identification, and whether non-binary identities should be recognised in law. In 2020, having considered the responses, the government announced that it had decided *not* to make these changes to the legal basis of sex.

⁴ https://docs.google.com/document/d/1_DaGtT4HOd5u910-3RmKftxzE0GqSoX6/edit?usp=sharing&ouid=117677916329443485624&rtpof=true&sd=true

⁵ <https://uksa.statisticsauthority.gov.uk/the-authority-board/committees/inclusive-data-taskforce/inclusive-data-taskforce-report-leaving-no-one-behind-how-can-we-be-more-inclusive-in-our-data/>

⁶ <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

The proposed approach by the FCA of including a “non-binary” category is therefore not based on any law.

In a recent case before the Supreme Court, Christie Elan Cane argued that as a self-identified “non-binary” person they should be allowed to have “X” rather than “F” on their passport, and that as passports are issued under royal prerogative this change could be made even though there is no legal recognition of “non-binary” as a category.

The government argued against this, saying that sex in English law is based on the male-female distinction and that there are real, proper and serious questions involved in allowing an X on a passport. Sir James Eadie QC, representing the government, argued:

“The decision to focus on passports is a forensic attempt to avoid the question. The attraction of trying to confine it to X on the passport is a way to avoid the questions about what is involved in recognition of non-binary identities.”

“If a change is made it should be made coherently, and it should be done across the board. We need to consider the consequences and the ramifications of the logic. This X in the passport is not an isolated issue. The state can take the view that they need to take the time to consider. They can take the view that they do not need to take a sole measure considered in isolation.”⁷

Similarly, introducing “non binary” into corporate governance rules evades consideration of the implications of a major social shift. And since these reporting requirements are designed to encourage changes in corporate diversity and inclusion practices the categories and thinking would be cascaded into equality monitoring and diversity and inclusion programmes across corporations, and likely into other areas.

There is no sign that there has been any serious consideration of the impacts of replacing the male/female distinction with male/female/non-binary in the FCA regulations.

Follow the precautionary principle

The response given above is that the FCA *can* and *should* stick with collecting data on binary sex. This is the simple and obvious approach. Sex is an existing measure; it is

⁷ <https://twitter.com/SexMattersOrg/status/1414879773256560656>

inclusive; it is data that is already routinely collected (and is not considered sensitive in relation to GDPR); and it is consistent with other measures.

The proposal states:

“We will judge the success of this measure in two ways: (a) We would hope to see data from in-scope companies that is complete, comparable and meaningful. If not, we may review the parameters of our reporting requirements over time. (b) The feedback we receive from investors and other stakeholders about whether they are finding the data useful and how it may be made more useful. We expect to see interested parties using the data in their own policy analysis and research.”

The precautionary principle suggests starting from a point of clarity and known usefulness, rather than replacing it with a novel set of categories at the outset.

There is no legal imperative to not collect data on sex, and no case has been made for its replacement in the proposal.

Replacing binary sex with three-way self-identified gender risks a reputational backlash and a legal challenge.

Recommendation 2: publish your equality impact assessment

Consider the options

While sex is the obvious and simple thing to monitor, the Scottish Government’s Public Boards Act (2018) takes a “self identification” approach to women on boards. A recent judicial review considered the legality of this. The judgment (which is being appealed) found that while there was no legal imperative for the Scottish Government to adopt the novel definition of “womanhood”, there was nothing illegal in it deciding to incentivise representation of two different groups together, females and males with the protected characteristic of gender reassignment.

The judgment concluded that the Scottish Government was not constrained to using the definition of woman in the Equality Act 2010 for the Public Boards Act 2018, nor did it need to use the same definition of woman for public boards as it does in relation to

other situations such as changing rooms, counselling, sports, prisons or the registration of parents as mother or father.

It said that while the public sector equality duty should be applied using the Equality Act definitions, “this statutory duty does not compel a particular outcome”.⁸

Thus if the principles applied in that case apply, the FCA could choose to define its own categories, but must consider the impact of its choice using the Equality Act definitions.⁹ And just as the Scottish judgment suggests it may consider the self-identified gender option, it may also consider the biological sex option (as well as the legal sex option).

A recent review of evidence undertaken by the **Sports Council Equality Group (SCEG)**, which is composed of members of the five major sports councils within the United Kingdom, demonstrated the approach to considering options.¹⁰ In relation to fairness and safety in sport, it considered three options and concluded that biological sex categories are “the most useful and functional division relative to sporting performance” and that competitive fairness cannot be reconciled with self-ID by gender identity.

Similarly three options can be identified in relation to corporate boards:

- **Option A:** monitor biological sex
- **Option B:** monitor “legal sex” (biological sex as modified by a gender recognition certificate)
- **Option C:** monitor a novel composite category (self-identified womanhood) which excludes female people who identify as non-binary or as men and includes male people who identify as women.

Thus the FCA needs to determine (and make the case for) its policy choice based on stated objectives. Is the aim to overcome sex discrimination and increase the representation of female people at the highest levels of corporate governance, or is to increase the representation of people who self-identify as women on unspecified criteria and may in fact have benefited from all the advantages of being men?

⁸ <https://drive.google.com/file/d/1117aUsKBxmko2G0laya6bFCzEEwLRhN9/view?usp=sharing>

⁹ <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/>

¹⁰ <https://sex-matters.org/posts/updates/sports-guidance/>

What evidence is it responding to? In the Scottish government case, the government produced no evidence that men living in a female “gender identity” experience comparable career disadvantages to natal women.

Publish your reasoning

The FCA should publish its Equality Impact Assessment and ensure that it reflects the protected characteristic of sex in the Equality Act, as well as other relevant protected characteristics such as gender reassignment and belief.

If the Equality Impact Assessment uses “self identified gender” as a stand-in for sex in its underlying consideration of impact, it risks a successful challenge to compliance with the Public Sector Equality Duty (PSED).

As the measure will not be limited just to women on boards, but is likely to cascade down through diversity and inclusion monitoring and advancement programmes, the impacts of the different options should be considered at every level of business when undertaking the equality impact assessment.

This table uses the Equality Act definition of woman as a female person of any age.

	Protected characteristic sex	Protected characteristic gender reassignment	Protected characteristic belief
Option A: Monitor biological sex	Beneficial to women (as defined by the Equality Act) as their representation is clearly monitored and incentivised	May be detrimental to men with protected characteristic of gender reassignment (“transwomen”) who do not wish to acknowledge their sex	May be detrimental to people who believe in gender identity who do not wish to acknowledge their sex.
Option B: Monitor legal sex	Some undermining of benefit to women, through reduction in focus on the material conditions for female people, but relatively limited, as only around 5,000 people have gender recognition certificates	Potential benefit to men who have legally changed their sex to female. Potentially detrimental to men with protected characteristic of gender reassignment who have not legally changed their sex (NB the majority of transgender people have not changed legal sex)	
Option C: Monitor self-defined gender	Detriment to women as the protected characteristic of sex is no longer monitored. Detriment to women as increases sexist notions that womanhood equates to femininity, and ignores disadvantages suffered by women because of their sex.	Benefit to men with the protected characteristic of gender reassignment.	Detriment to women who do not believe in gender identity as they may self-exclude from monitoring, or feel under pressure to deny their belief.

As with sports there is a clear trade-off between choosing a category system (sex) that benefits women, and one that benefits men who identify as women (self-identification).

Justify a decision to monitor either legal or biological sex

The result of such an Equality Impact Assessment might in this case, as with the census, be to justify a policy of monitoring legal sex rather than biological sex – on the basis of administrative expediency and limited detrimental impact on women as a group.

Compared with sport, medicine or incarceration there is greater tolerance for a definition which departs from biological sex in this case, and it is legal sex which is already recorded by HMRC and in payroll records.

However, the option of monitoring biological sex should not be dismissed out of hand, since addressing the under-representation of female directors (and women at all stages of advancement) is actually the objective of the measure. Given the small numbers of people involved on boards, and particularly as executives, a male executive transitioning could drastically improve a company's score, without any female executives benefiting. Furthermore the approach taken is likely to have knock on effects such as on "gender pay gap" reporting and equality monitoring.

There is a "prefer not to say" option which avoids males who identify as women having to highlight their sex in relation to a measure which is not intended to address the situation of transsexual males but of women in the workplace.

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