Sex Matters is a human rights organisation campaigning for clarity about sex in law, policy and language | sex-matters.org | info@sex-matters.org

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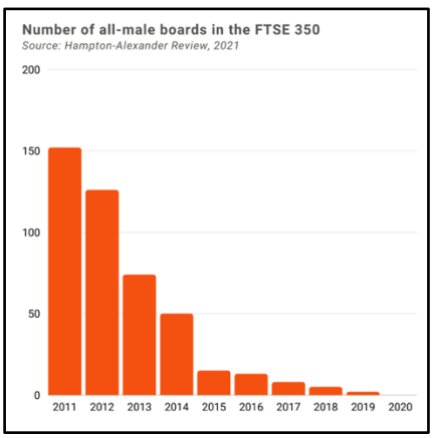
Getting it right

Diversity and inclusion on company boards and executive committees

A briefing by Sex Matters and Legal Feminist

The Financial Conduct Authority's proposal on monitoring *Diversity and inclusion on company boards and executive committees* (FCA CP 21/24) was well intentioned. It aims to extend the practice of reporting female leadership of corporations pioneered voluntarily under the Hampton-Alexander Review to a wider group of listed companies, and to make it mandatory.



Regrettably, the proposal is flawed in proposing to abandon straightforward monitoring based on sex and require all listed companies to report by reference to the highly controversial concept of "gender identity".

This proposal affects not only financial firms, but all listed businesses. The FCA plans to issue final proposals in early 2022. The formal consultation has closed, but it is not too late to raise your concerns directly with the FCA.

This paper provides a summary of the practical and legal problems with the proposal and offers an alternative that would be simple and in line with existing legislation, and would build on the voluntary good practice established by the Hampton-Alexander Review.

> *"In the past decade, we have cheered the years in which more than 100 women newly took up their seats on FTSE 350 boards, the moment all-male boards reduced from 152 to zero, and the year-on-year decline of the 'One & Done' boards."*
> *Denise Wilson, Chief Executive Hampton-Alexander Review, 2021*

The FCA proposal

The FCA proposes to require all listed companies to report annually against a target of 40% of board members being self-identified "women" and to publish data on the gender identity of their boards, executive management and the "big four": Chief Executive Officer, Chief Financial Officer, Chair and Senior Independent Director. In each case, individuals would be categorised based on gender identity as either "man", "woman" or "non-binary".

This is a significant change, moving away from reporting straightforwardly on sex, which is in line with common law, the Equality Act, the Companies Act 2006 and UK GDPR. The FCA is taking a position on gender self-identity which has been rejected by government and which goes beyond the law.

The legal context

In the UK being a woman or a man is defined as a sex, both in common law and under the Equality Act (the word gender is sometimes used instead, but as a synonym for sex, not to mean "gender identity"). The definition of sex in UK law was set out in Corbett v Corbett [1971] and recently confirmed in Forstater v CGD Europe [2021] IRLR 706, and means biological sex. The Equality Act 2010 defines man and woman under the protected characteristic of sex and states that "man" and "woman" mean respectively a male or female of any age. Information on a person's sex is not considered "sensitive" or "special category" information and is routinely collected for payroll purposes.

Under the Gender Recognition Act 2004, people are able to change their legally recorded sex by obtaining a "Gender Recognition Certificate" (GRC) following a diagnosis of "gender dysphoria". Around 5,000 people have done this since the GRA became law. Other countries also have means by which people can change the sex on their birth certificate.

Section 414C(8) Companies Act 2006 already requires UK-incorporated listed companies to report on the composition of their boards by sex. A person with a GRC would report under their "acquired" sex.

Self-declared gender identity is not a legal characteristic, as the Supreme Court recently found in Elan-Cane, R (on the application of) v Secretary of State for the Home Department [2021] UKSC 56:
"There is no judgment of the European Court of Human Rights which establishes a positive obligation to recognise a gender category other than male or female."

The risks

The proposal not to follow the legal definition and instead abandon sex for "gender identity" would:

- **cause issues under data protection legislation and create more work and data risk for business**. Gender identity is "special category" data for the purposes of UK GDPR. Specific conditions of sensitivity and confidentiality apply when collecting such data. Companies cannot simply reclassify someone's sex as their "gender identity".
- **create problems of information privacy when companies report**. Given that listed company boards range in size from as few as three directors to generally no more than 15, individuals will be easily identifiable. This is a particular concern in respect of gender identity, and even more so if rules are extended to cover sexual orientation and socio-economic background.
- **undermine trust in reporting.** Aggregating sex and self-identified gender is inconsistent with best practice recommended by the Office for Statistics Regulation and followed by the Office for National Statistics (ONS). Data will not be capable of comparison and analysis by reference to ONS and other data, or historic data on board directors.
- **make it impossible to track progress on female representation on boards.** Under the current proposals, in a small board of four directors, the presence of (say) one male director who identifies as trans or non-binary would change the composition of the board, without there actually being any female directors. Progress on all-male boards and "one-and-done" boards (with only one female director) would be misrepresented, as companies would no longer report clear information on the number of male and female directors.
- **abandon the progress made by the Hampton-Alexander Review.** Progress has been achieved through clear metrics and recognition of the business case for diversity in leadership. Companies have worked hard to create inclusive cultures, remove barriers and attract and retain female talent, including recognising the impact of maternity and child-rearing on the careers of mothers. The FCA's proposal suggests that this material difference between men's and women's lives is irrelevant. It also suggests that differences in risk-taking behaviour observed by previous studies are not material.
- **contribute towards a hostile environment for those who believe sex matters.** Asking directors to declare a "gender identity" is a demand to comply with a belief system that they may not share. The categorisation may also spill over to other staff, shaping corporate approaches to diversity more broadly. Many women view the idea of gender identity as sexist. It is increasingly recognised that employees (particularly women) face bullying and harassment for expressing the "gender-critical" view that sex matters.
- **create reputational risks for businesses**. By requiring companies to report on gender identity rather than sex the FCA is exposing them to controversy and outrage, for example by declaring that they don't have an all-male board, when it is quite clear that they do. Companies would be forced into seemingly taking a position in a controversial public debate, when they themselves are likely to want to stay neutral.

A workable alternative

The FCA risks undermining its credibility as an enforcer of rules on conflicts of interest by promoting gender ideology and going beyond the law. It failed to disclose in the consultation that not only is it a Stonewall Diversity Champion but also that one of its most senior executives is the Chair of the Board of Trustees of Stonewall. Stonewall is a lobbying group that campaigns for self-identification of gender to become law.

There is a simple solution. The FCA regulations should require monitoring of sex (as recorded on a person's birth certificate). This would be consistent with section 414C(8) of the Companies Act. This provision already does half of the work that the FCA's proposed rules purport to do in relation to women on listed company boards. A simpler proposal would be to:

- require all Issuers to report under section 414C(8) as though they were "quoted companies" under the Companies Act definition.
- set targets for a percentage of board members to be women, determined on the basis of sex as in the Companies Act.

This would:

- maintain coherence in legal and administrative systems around the recording of sex, working within the existing legal framework, including the Gender Recognition Act
- avoid confusion and complication in reporting by building on existing mandatory reporting requirements
- avoid data protection breaches and protect the confidentiality of individual board members by not requiring issuers to collect and publish special category data
- enable a trans person who has obtained a Gender Recognition Certificate to still be included in targets and data reporting under her or his "acquired" sex
- ensure that the regulatory initiative largely benefits the group it is aimed at – women
- ensure the initiative does genuinely achieve greater diversity, so enhancing the conditions for diversity of thought and avoiding group-think
- enable the capture and analysis of data on a disaggregated basis consistent with other leading data organisations such as the ONS
- not discriminate against people who do not believe in gender identity ideology.

This proposal is simple and works within the existing legal system. In particular, in balancing the rights of trans people with those of others (particularly women), it uses the framework that already exists in law and has been through careful scrutiny to achieve a reasonable degree of fairness and coherence.