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20 October 2021

BY EMAIL ONLY

Submission to the Financial Conduct Authority consultation: Diversity and inclusion on company boards and executive committees

For Women Scotland formed in 2018 to campaign for women's rights and we are particularly concerned about the redefinition of 'woman' in law and policy. We are currently appealing a judgement in a judicial review¹ of the Scottish Government's decision to redefine 'woman' for the purposes of the Gender Representation on Public Boards Act 2018.

Our response to this consultation focuses on the changes proposed, as outlined in para 1.14 of the consultation paper CP21/24:

- *At least 40% of the board are women (including individuals self-identifying as women)*
- *At least one of the senior board positions (Chair, CEO, SID or CFO) is held by a woman (including individuals self-identifying as a woman)*

We welcome the initiative to redress the historical underrepresentation of women on company boards. However, by including "individuals self-identifying as women" in the definition of "woman" we believe this aim is ultimately undermined, both by the fact that the proposal is not compliant with the Equality Act 2010, and also because it may not lead to increased representation for women. It may actually be detrimental for women as it allows boards to consist of 60% men and 40% men who self-identify as women, that is, 100% males, and the fact that there could be zero women board members would be concealed in the data.

Sections 158 and 159 of the Equality Act² describe the positive action measures that may be taken regarding recruitment and promotion and, importantly, specify that these must be for persons who **share** a protected characteristic and who suffer a disadvantage connected to the characteristic. The relevant protected characteristics here are "sex" and "gender"

¹ <https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/>

² <https://www.legislation.gov.uk/ukpga/2010/15/part/11/chapter/2>

reassignment”. These are distinct and separate protected characteristics and have the following definitions:

Sex³

In relation to the protected characteristic of sex—

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.*

where “man” means a male of any age and “woman” means a female of any age.⁴

Gender reassignment⁵

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*
- (3) In relation to the protected characteristic of gender reassignment—*
 - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;*
 - (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.*

Self-identification of sex is not law in Scotland and is a topic of much heated public debate following the recent Government proposals to introduce it by amending the Gender Recognition Act. Currently, a man does not become a woman (for some purposes) in law until a Gender Recognition Certificate is obtained, and the protected characteristic of gender reassignment offers protection to those who are proposing/undergoing/have undergone physiological changes; it does not cover self-identification.

The Equality and Human Rights Commission has confirmed that having the protected characteristic of gender reassignment does not change a person’s sex for the purposes of the Equality Act⁶ and further specifies that “A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes”.⁷

³ <https://www.legislation.gov.uk/ukpga/2010/15/section/11>

⁴ <https://www.legislation.gov.uk/ukpga/2010/15/section/212>

⁵ <https://www.legislation.gov.uk/ukpga/2010/15/section/7>

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<https://forwomen.scot/wp-content/uploads/2021/08/Engender-Understanding-the-Equality-Act-Transcript-06Nov2020.pdf> (page 22)

⁷

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

By redefining woman in the manner proposed, the FCA is including persons who may self-identify as women, but who the Equality Act would characterise as male. It also **excludes** persons who would be characterised as female, ie. those women who self-identify as men.

By permitting some males, but not others, access to positive measures the FCA would leave itself vulnerable to legal action for sex discrimination. As well as doing little to advance equality between the sexes, it does not serve persons who have the protected characteristic of gender reassignment well, particularly those women who identify as men. It is not possible to identify out of all the reasons why women have historically been discriminated against, and it may well be that these women (as classified by the Equality Act) still find their employment and promotion prospects detrimentally affected by pregnancy and childbirth. There are other reasons resulting in under-representation of trans people on company boards, and it may be appropriate for positive action measures for the protected characteristic of gender reassignment to be taken to address them. These are different challenges to be addressed however, and are not resolved simply by merging some sections of the separate protected characteristics together.

The Scottish Government was only able to avoid its responsibilities under s158 and 159 by excluding them entirely from the provisions of the Gender Representation on Public Boards Act 2018,⁸ arguing that an exception clause on public boards in the Scotland Act allowed it to do so. This, amongst other legal arguments, will be challenged at the hearing in the Court of Session on 03 November 2021. It is clear, however, that no other organisation has the same scope to potentially dis-apply sections of the Equality Act and the FCA is bound to adhere to the Act in full.

Finally, we note that the FCA achieved 59th place in last year's Stonewall top 100 employers.⁹ As we are sure you are aware, the influence of Stonewall has been prominent in the media lately and their lobbying to replace sex with self-identified sex (or gender identity) in multiple organisations, generally with little or no scrutiny, is increasingly being questioned. Stonewall was recently found to have misrepresented the law to the University of Essex,¹⁰ and it may well be the case that an organisation following Stonewall's advice to "get ahead of the law" can be more accurately described as breaking the law.

⁸ <https://www.legislation.gov.uk/asp/2018/4/section/11>

⁹ https://www.stonewall.org.uk/system/files/2020_top_100_report.pdf

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<https://www.essex.ac.uk/-/media/documents/review/events-review-report-university-of-essex-september-2021.pdf>