

Women's sport & the law

What is fair & what is legal when it comes to trans inclusion in elite women's sports? **Naomi Cunningham & Fiona McAnena** weigh up the law & the latest guidance

For as long as there has been organised sport, where women have been permitted to participate at all, men and women have competed in separate categories. The reason is obvious: the enormous athletic advantage conferred by male puberty. Last month World Athletics announced that no athlete who had gone through male puberty would be allowed to compete in women's world ranking competitions. UK Athletics has just followed suit.

What does the law say?

When sex discrimination was made unlawful in the UK by the Sex Discrimination Act 1975 (SDA 1975), an extensive scheme of exceptions was included to deal with the many situations in which direct sex discrimination is justified and necessary. Sport was one of them: s 44, SDA 1975 simply excluded 'any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man' from the scope of the general prohibitions on sex discrimination.

Amendment of SDA 1975 in 1999 to address discrimination because of gender reassignment had no effect on the sport exception, because having the protected characteristic of gender reassignment did not change a person's sex.

In 2004, the Gender Recognition Act 2004 (GRA 2004) deemed those granted a gender recognition certificate (GRC) to have changed sex for legal purposes, but s 19 made it explicit that men who became legally female in this way could be excluded from women's sporting events.

When the Equality Act 2010 (EqA 2010) replaced SDA 1975 (and the other discrimination legislation) six years later, s 19, GRA 2004 was repealed and replaced with s 195, EqA 2010, to the same effect. Section 195 reads:

'Sport

- (1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.
- (2) A person does not contravene section 29, 33, 34 or 35, so far as

relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity—

- (a) fair competition, or
- (b) the safety of competitors.

- (3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.'

The international & UK approaches

In the past 20 years, sports governing bodies have moved far from this basic principle.

In 2003, the International Olympic Committee (IOC) adopted a policy allowing transsexual males to compete in women's sport. Human rights arguments were then used to question the requirement of full gonadectomy and legal recognition in one's new sex, and by 2015, the IOC agreed that 12 months' testosterone suppression, to a level remaining far above female levels, was sufficient to permit a trans-identifying male to compete in women's sport. This was the basis on which three adult males featured in women's teams (for New Zealand, Canada and the USA) in the Tokyo Olympics.

The law in the UK has not changed, but most UK sport governing bodies (NGBs) have followed their international federations and allowed trans-identifying males into women's categories either on the basis of self-identification or with a short period of testosterone suppression. In effect, many women's competitions at both elite and club levels are now mixed-sex, with eligibility to compete on gender identity in place of sex.

The sex exceptions are on their face permissive, not compulsory, so the NGBs argue that their stance is not unlawful. But a policy of 'trans inclusion' is a provision, criterion or practice that puts women at a particular disadvantage compared to men, and is therefore unlawful indirect sex discrimination unless it can be shown to be a proportionate means of achieving

a legitimate aim. Since trans inclusion will make competition unfair (and in some cases also unsafe) for all the female participants for the sake of accommodating a small number of male competitors, justification will be difficult.

New guidance

In 2021, the UK Sports Council Equality Group (SCEG) published new guidance pointing out that: 'Competitive fairness cannot be reconciled with self-identification into the female category in gender-affected sport. This principle is in keeping with the provisions of the Equality Act.' The guidance was explicit that it was lawful to ask people their sex, although they don't have to answer. Since then, many NGBs have reviewed their policies. Once they have worked through the evidence and realised there is no fair way to allow trans-identifying males into women's categories, fear of being sued by GRC-holders who are legally female is usually the last hurdle.

Announcing its decision on 31 March to adopt World Athletics' policy, UK Athletics said it 'has also received the required assurances from relevant bodies that the sporting exemption in the Equality Act 2010 applies to the Gender Recognition Act 2004'. UK Athletics' previous legal advice had been that the 'sporting exemption' at s 195, EqA 2010 did not affect what was described as 'a duty in s 9(1), GRA 2004 to treat those trans women with a [GRC] as female for all purposes'. Whoever had advised them appears to have mistaken the repeal of s 19 with the consolidation of discrimination law into EqA 2010 as a reflection of a decision to abolish the exception rather than simply to move it to its new home in EqA 2010.

The true position is clear. Almost all sports may be lawfully segregated by sex, and the exclusion from women's events of all males—including those who have a GRC deeming them to be women for legal purposes—is permitted by s 195(1) and s 195(2), EqA 2010.

Sporting bodies may be right that there is a risk of legal claims brought by males who identify as women and want to be allowed to compete in women's events. But there is also a risk of indirect discrimination claims brought by women whose fair competition is wrecked by the inclusion of trans-identifying males in their events. Since the former claims will be based on a misunderstanding of the law, and the latter will have both fairness and the law on their side, the advice for sporting bodies is simple: 'Do right and fear no-one.' **NLJ**

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