

**Gendered
Intelligence**

**Transgender and
Non-Binary
Inclusion in Sport:
A Summary Legal
Analysis**

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1.0 Introduction

This legal analysis (Analysis) aims to provide the reader with an understanding of the main legal provisions in England, Wales and Scotland that are relevant to transgender (trans) participation in sport with a broad focus on human rights and equality law.

This Analysis will not provide firm answers, or determine eligibility for competition. Instead, it aims to help competitors and organisations approach decisions with the objective of lawful inclusion.

Please note this Analysis does not constitute formal, legal advice.

2.0 Some principles to be guided by

- 2.1 Navigating the law can be tricky and overwhelming. We believe however that the Equality Act 2010 provides decision makers with the tool they need to allow each and every sport to be inclusive of trans people.
- 2.2 It can be helpful to develop some core principles that can guide you in your decision-making processes, as you navigate this area of law and policy.

Some may include:

- Sports should not arbitrarily exclude transgender people from participating
- Sport should be a welcoming place for all
- Policies and practices should respect bodily autonomy and integrity
- We shall respect individual circumstance and consider each case on its own facts

3.0 Domestic legal framework

The Equality Act 2010¹

- 3.1 There is no general law for sport in England, Wales and Scotland.
- 3.2 Discrimination in sport is covered by the Equality Act 2010 (EA10), which prohibits both direct and indirect discrimination on the basis of a number of “protected characteristics”, subject to exceptions.
- 3.3 Section 195 of the EA10 (“**s195**”) is the relevant section which deals specifically with sport and transgender (transsexual)² inclusion, which states:

(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.** (Our emphasis)*

What amounts to the protected characteristic of ‘gender reassignment’ under the EA10?

- 3.4 Broadly, this is the protected characteristic that protects someone who satisfies or is perceived to satisfy the following definition under section 7 of the EA10 (“**s7**”):

“(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a

¹ The Equality Act 2010 does not apply to Northern Ireland.

² ‘Transsexual’ is now seen as an outdated term by some. We use it here when quoting the specific text of the law. Outside that use, Analysis will use the more commonly used community terms of transgender / trans. This does not affect the analysis of the law which is based on the specific definition of the protected characteristic of gender reassignment, and relevant case law.

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.”

3.5 When considering transgender inclusion/exclusion in sport, it is the protected characteristic of 'gender reassignment' that is engaged when considering whether a transgender individual has been lawfully discriminated against as a result of their transgender status.³

3.6 The first question to consider therefore is whether one has the gender reassignment protected characteristic under s7. The statutory guidance to the EA10 states that 'gender reassignment' is a "...*personal process (that is, moving away from one's birth sex to the preferred gender), rather than a medical process*".⁴ It further confirms that the individual does not have to "undergo medical treatment in order to be protected".⁵

3.7 Some points to note when considering if someone has the protected characteristic, include (but are not limited to):

- One need not have undertaken any actual steps towards the process of gender reassignment (often called 'transitioning'). One only needs to be "proposing to undergo";
- Transitioning may consist of non-surgical changes to presentation, such as change of pronoun or name;
- There is no requirement to be under medical supervision to have the protected characteristic;
- One does not need to have "completed" transition to have the protected characteristic;

³ This guide does not consider how a transgender person's protected characteristic of 'sex' applies to a trans person being included/excluded from participating in sport. This is because a trans person's sex for the purposes of the EA10, even if congruent with their affirmed gender, does not remove their status as a trans individual and the protections they have as someone with the gender reassignment protected characteristic

⁴ Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice' (EHRC, 2011) at para 2.19

⁵ Ibid, at para 2.20

- There is no age requirement: all ages can have the protected characteristic under s7, including children and young people (see from paragraph 3.18 below);
- One does not require a Gender Recognition Certificate (“**GRC**”) (see 3.39-3.42) to have the protected characteristic under s7.

3.8 The definition of gender reassignment was recently interpreted in the case of *(AA) v NHS England* [2023] EWHC 43 (Admin). The below emphasised elements (emphasised by us) offer a helpful authority on how to interpret s7:

*“... There are three important aspects of the definition in s.7(1) of the 2010 Act. First, it refers to “a process... for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”. The underlined words make clear **that the process will not necessarily be a medical one. It may involve changing non-physiological aspects of sex, such as one’s name and/or how one dresses, or wears one’s hair, or speaks, or acts.***

*Second, the reference to “a process (or any part of a process)” reflects the fact that **trans people will give effect to their gender identity in a variety of ways.** Some will embark on a process which they intend will include hormone treatment and surgery, or other forms of medical intervention – as well as changing some of the non-physiological aspects of gender. But **some may decide, on reflection, that they only wish to make some of these changes. The words in parenthesis make clear that this does not matter: they are still protected by the 2010 Act.***

*Third, the reference to those who are “proposing to undergo”, as well as those who are undergoing or have undergone, this process (or part of it) shows that **Parliament intended the protection to start before the process (or any part of it) has started. All that is required is that they propose to undergo at least a part of such a process. The word “proposing” connotes a conscious decision, which can properly be described as settled, to adopt some aspect of the identity of a gender different from that assigned at birth. A passing whim will not do, but nor is an intention required that the change should be permanent...***⁶

⁶ See paragraphs 129 to 131

Applying section 195 EA10

3.9 The EA10 Explanatory Note describes the effect of s195 to be the following:

*"This section allows separate sporting competitions to continue to be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other. **It also makes it lawful to restrict participation of transsexual people in such competitions if this is necessary to uphold fair or safe competition, but not otherwise.**"*⁷ (Our emphasis)

3.10 S195 provides a mechanism that can allow a decision maker to lawfully exclude someone with the protected characteristic of 'gender reassignment'.

3.11 Exclusion is lawful only when it is necessary to ensure fair competition and/or the safety of competitors within the context of the specific sport or game in which participation is being considered.

3.12 At the time of publication, there is a lack of case law that considers how this provision will be applied. There is therefore some uncertainty on the application of this provision. However, broadly, the following should be considered.

Gender-affected activity

3.13 S195 subsection 3 (s195(3)) states:

"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."

3.14 It is not unlawful for a sport to separate competitions into male/female should the sport be one that is 'gender affected' i.e. if it satisfies the above definition.

⁷ See paragraph 614: [Equality Act 2010 - Explanatory Notes \(legislation.gov.uk\)](https://www.legislation.gov.uk)

3.15 The EA10 does not itself categorise/list sports that are 'gender-affected' and so it will come down to the interpretation of the decision-maker.

3.16 It would be sensible to make a note of the decision made in this regard, with reasons.

3.17 One example the EA10 Explanatory Note provides includes:

"It would be lawful to have men and women, though not necessarily younger boys and girls, compete in separate 100 metre races."

Children/young people

3.18 Considering the above example, the age of an individual is clearly an important consideration when applying s195.

3.19 Further, subsection 195(4) of EA10 states:

"In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors."

3.20 Decision-makers should be aware that children can also have the protected characteristic under s7 and are susceptible to being unlawfully excluded from participation. Authority for this position can be found within the judgment of Chamberlain J in the case of *(AA) v NHS England* when he stated:

"... there is no reason of principle why a child could not satisfy the definition in s. 7, provided that they have taken a settled decision to adopt some aspect of the identity of the other gender... Determining whether any particular child has the protected characteristic of gender reassignment will involve a case specific factual assessment."

3.21 The special provision under subsection 195(4) suggests that there was an intention to acknowledge the impact puberty may have on performance. However, under the EA10, an individual having commenced puberty, or having an established puberty does not automatically result in exclusion being lawful.

3.22 Instead, it is best practice to consider the particular facts of a case, noting that excluding young people from sport can have a significant

negative impact on a young person's social, mental and physical health. The test of 'necessity' to exclude is likely to be a relatively high test, especially if a young person is participating in recreational sport.

3.23 Schools should conduct appropriate risk assessments when deciding whether and how to integrate trans pupils into sports; this is part of the duty of care to assess risk for all pupils with regard to their diverse circumstances and the risks they might pose / be subject to.

Can a trans person be lawfully excluded from the category aligned with their gender identity?

3.24 Sports can lawfully create separate categories for male and female competition (s195(1) EA10).

3.25 By s195(2), a decision maker can lawfully discriminate against a person with the protected characteristic of 'gender reassignment' only if it is necessary in order to ensure:

- Fair competition; and/or
- The safety of competitors.

3.26 Applying these criteria can attract controversy, especially in relation to trans women who want to participate in female competition. However, excluding a trans woman in an attempt to avoid controversy, or as a result of prejudicial attitudes only, are not lawful justifications in themselves.

3.27 Decision makers would be well-advised to apply an informed and fair criterion (based on the particular nature of the subject sport) to an individual's own, specific circumstance.

3.28 Remember, the decision maker does not *have* to exclude a trans person, it *may* do so under the limitations of the statutory exceptions.

3.29 A decision to include or exclude may both be subject to a request for reasons. This is because if a decision-making body discriminates against a transgender person, they must justify that the discrimination is necessary and proportionate and in compliance with the provisions under the EA10, especially in cases where exceptions might apply, such as s195.

3.30 The application of s195 is that of a 'balancing' exercise. For instance, where arguments on safety and/or fairness are considered strong, this has to be balanced against the discriminatory impact of excluding a trans person.

- 3.31 Decision-makers would be well advised to document their decision, with reasons to ensure that if asked, they can explain how they have reached the decision they have.

Applying the criteria of 'safety'

- 3.32 Simply put, if by including a trans person it can be shown that a disproportionate risk of harm exists as a result, a decision-maker may be able to lawfully exclude them.
- 3.33 Decision-makers may find it helpful to consider and record their responses to the following questions to assist them in applying the EA10 provisions:
- a. What level are participants competing at?
 - b. How old are the participants?
 - c. Is it a contact/collision sport?
 - d. What risks are inherent within the sport you are considering?
 - e. What evidence do you have of any possible risk the transgender individual poses to cisgender participants, or the cisgender participants pose to the transgender participant? Are these risks because the individual is transgender?
 - f. Are the risks posed by or to the transgender individual disproportionate considering the risks identified at (d) above? If you think they are, how so?
 - g. What other options are there aside from exclusion?
 - h. Have you engaged with the trans individual to obtain their views?
 - i. Have you noted your decision-making process and reasons for ultimate decision?
- 3.34 When applicable, it is likely to be more difficult for a decision-maker to justifiably exclude a trans person on the basis of safety in relation to a non-contact sport. However, it might be arguably necessary to, for example, exclude a trans person from a collision/contact sport, if their performance / attributes differed from that of others in their playing context in a way that introduced a disproportionate risk. Decision-makers should be ready to illustrate that such a risk would not reasonably be introduced by any cisgender participant. Women are diverse in many ways and s195 is therefore not straight forward to apply. Any decision should be considered with due care, recorded with reasons and discussed with the subject individual to ensure all options are exhausted and a collaborative decision reached.
- 3.35 One participant taking issue with there being a transgender participant is not lawful justification in itself to exclude a trans participant from participating, though their concerns should be considered as part of the risk assessment process.

Applying the criteria of 'fair competition'

- 3.36 Simply put, if including a trans woman would undermine fair competition because they would have an unfair advantage compared with cisgender participants, then their exclusion may be lawfully justified.
- 3.38 Decision-makers may find it helpful to consider and record their responses to the following questions to assist them in applying the EA10 provisions:
- a. What 'level' are participants competing at?
 - b. How old are the participants?
 - c. What forms of advantage, including unfair advantage, can be found within the sport?
 - d. What evidence do you have of any advantage the transgender individual possesses? Is this advantage because the individual is transgender?
 - f. If concluded as being applicable, is the advantage possessed by the transgender individual disproportionate, considering those identified at (c) above? If you think it is, how so?
 - e. Is the transgender individual's performance beyond the realm of possibility for the category of gender they are participating in?
 - g. What other options are there aside from exclusion?
 - h. Have you engaged with the trans individual to obtain their views?
 - i. Have you noted your decision-making process and reasons for ultimate decision?

The impact of legal gender recognition

- 3.39 Legal gender recognition is governed by the Gender Recognition Act 2004. Successful application for gender recognition under the Act is confirmed by issue of a Gender Recognition Certificate (GRC).
- 3.40 A participant does not require a GRC to be protected by the EA10.
- 3.41 A participant who does have a GRC is not precluded from being excluded under s195 EA10 i.e. someone having a GRC does not mean they have to be automatically included in the category that aligns with their "acquired gender" under their GRC.

3.42 However, in a decision-making process it is a factor that may be taken into account as part of the balancing exercise.⁸ Whether or not an individual has a GRC is also relevant to identifying a comparator when considering whether treatment is discriminatory, since a person with a GRC will have the legal sex corresponding with their “acquired gender”.

Blanket policies

3.43 Blanket policies refer to policies that introduce a uniform approach for all those with a protected characteristic, without consideration of a person’s individual circumstance.

3.44 Sporting bodies should consider whether such an approach is proportionate and supported by cogent evidence of necessity.

3.45 Blanket approaches to decisions around exclusion may struggle to be justified under s195 as necessary and proportionate to ensure fair competition or the safety of competitors because there is not a clear, uncontested evidence base for such approaches.

3.46 If such a policy cannot be justified under s195, then:

3.46.1 A trans person with a GRC should be able to participate in the category corresponding with their “acquired gender” and any attempt to exclude them would amount to direct discrimination on the basis of their gender reassignment protected characteristic;

3.46.2 For a trans person without a GRC, such a policy would be likely to amount to indirect discrimination on the basis of their gender reassignment protected characteristic which requires justification under section 19(2) of the EA2010 as a proportionate means of achieving a legitimate aim. If the policy is not necessary for fair competition or safety, justification under section 19(2) is likely to be difficult.

3.47 As such, a case-by-case analysis is considered to be the most risk averse approach.

⁸ It should be noted that section 22 Gender Recognition Act 2004 provides that in certain circumstances it will be a *criminal offence* for a person to disclose information about a person’s gender history if they have a GRC

Those who identify outside of the binary

- 3.48 So long as an individual satisfies the definition of s7, someone with a non-traditional gender identity (such as non-binary/agender/gender fluid etc) may possess the protected characteristic.
- 3.49 There is no clear case law on how decision makers should approach inclusion of those who have a gender identity outside of the binary.
- 3.50 If protected, s195 would need to be applied as for a trans-binary individual. Considering the individual's factual circumstance will be important and any exclusion would have to be justified.

Human Rights Act 1998

- 3.51 Although this decision-making process is governed by the EA10 (and any related claim would typically be expected to be brought under the EA10), it should be noted that convention rights (as incorporated into domestic law by the Human Rights Act 1998 ("HRA")) may also be engaged and included in any challenge brought against a decision.
- 3.52 Such convention rights could include Article 8 (Right to respect for private and family life) and Article 14 (Prohibition of discrimination).

4.0 An international view

- 4.1 There are some notable international references that can offer the decision maker further assistance.
- 4.2 For instance, in 2021, the International Olympic Committee (IOC) published its Framework on fairness, inclusion and non-discrimination on the basis of gender identity and sex variations (IOC Framework), which replaced its 2015 consensus statement, and is to be taken into account by international and other sports organisations in determining their eligibility rules for high-level competition.⁹ The IOC Framework notes that it consulted with human rights, legal and medical experts.

⁹ International Olympic Committee, 'IOC Framework on Fairness, Inclusion and Non-discrimination on the basis of Gender Identity and Sex Variations' November 2021. Available at: [IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf](#)

- 4.3 The IOC Framework promotes inclusion as a key principle, highlighting that *"Everyone, regardless of their gender identity, expression and/or sex variations should be able to participate in sport safely and without prejudice"*.¹⁰
- 4.4 It further recommends that *"Eligibility criteria should be established and implemented fairly and in a manner that does not systematically exclude athletes from competition based upon gender identity, physical appearance and/ or sex variations"*.¹¹
- 4.5 The framework states *"No athlete should be precluded from competing or excluded from competition on the exclusive ground of an unverified, alleged or perceived unfair competitive advantage due to their sex variations, physical appearance and/or transgender status."*¹² and that any restrictions arising from eligibility criteria should be based on robust and peer reviewed research that:
- a) *"demonstrates a consistent, unfair, disproportionate competitive advantage in performance and/ or an unpreventable risk to the physical safety of other athletes;*
 - b) *is largely based on data collected from a demographic group that is consistent in gender and athletic engagement with the group that the eligibility criteria aim to regulate; and*
 - c) *demonstrates that such disproportionate competitive advantage and/or unpreventable risk exists for the specific sport, discipline and event that the eligibility criteria aim to regulate."*¹³
- 4.6 In issuing the IOC Framework, the IOC recognised that it *"...must be in the remit of each sport and its governing body to determine how an athlete may be at a disproportionate advantage against their peers, taking into consideration the nature of each sport."*
- 4.7 The IOC does not define eligibility criteria for every sport, discipline or event. Instead, it offers a framework to develop respective criteria that are applicable to their sport. It recognises that it is in the interest of everyone to ensure there is no unfair and disproportionate advantage however it states that the principles contained in the IOC Framework *"...aim to ensure that competition ... is fair and safe and that athletes are not excluded solely on the basis of their transgender identity or sex variations."*
- 4.8 There are other resources related to international human rights law that are relevant and authoritative.

¹⁰ Ibid, Principle 1.1

¹¹ Ibid, Principle 3.1

¹² Ibid, Principle 5.1

¹³ Ibid, Principle 6.1

4.9 Some further resources you may wish to explore include:

- a. [Yogyakarta Principles plus 10 – Yogyakartaprinciples.org](https://yogyakartaprinciples.org)
- b. [Gender identity and expression \(coe.int\)](https://www.coe.int/t/e/sports/2024/03/240324_gi_sport_en.pdf)- Council of Europe document which makes recommendations for sport specifically (Chapter 2, 2.8), written in March 2024
- c. A [paper](#) (October 2023) on the protection of human rights in sport without discrimination based on SOGIESC by a group of UN Special Procedures mandate holders found that the categoric exclusion of trans and intersex women from women’s sports is a prima facie violation of human rights obligations under the principle of non-discrimination and of the right to privacy. The actual policy position in relation to that can be found [here](#).
- d. [Recommendation CM/Rec\(2010\)5](#) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity; see section IX.
- e. [Recommendation CM/Rec\(2021\)5](#) of the Committee of Ministers to member States on the Revised European Sports Charter.
- f. [United Nations General Assembly: Protection against violence and discrimination based on sexual orientation and gender identity](#) (section III, D in particular) July 2021.
- g. [LBTI women in sport: violence, discrimination, and lived experiences | ILGA-Europe](#) March 2021.
- h. [The Fight for a Level Playing Field- ending discrimination against women in the world of sport](#), Council of Europe, September 2022, particularly section 4, point 24.

5.0 Intersex inclusion

- 5.1 Although this is an Analysis focusing on transgender participation in sport, decision makers should be conscious of the fact that policies that impact trans people can often also impact intersex people and vice versa.
- 5.2 Intersex people can sometimes be misunderstood to be trans, which should never be assumed.
- 5.3 A recent case dealing with this issue concerns the athlete, Mokgadi Caster Semenya. Ms Semenya argued that a decision by World Athletics to enact eligibility requirements for female classification unfairly

discriminated against athletes on the basis of sex and/or gender because they only apply to female athletes that had certain physiological traits. This was the start of a bigger legal case which ended up as an appeal in the European Court of Human Rights (*Semenya v Switzerland*), where the ECHR found that she had been discriminated against, but did not overrule the eligibility requirements themselves. The ECHR decision can be found [here](#).

5.4 [The IOC framework](#) also covers this area of thought.

6.0 Other considerations

6.1 Other areas of the Equality Act 2010 are potentially relevant when considering the issues that might arise when considering transgender people's participation in sport. For instance, how to apply provisions related to single sex services under paragraph 27 of Schedule 3 of the EA10. This area of the EA10 is separate to that considered within this guidance.

6.2 When dealing with these kinds of decisions you will more than likely have to process personal data, which would include information about an individual's transgender status or history. Decision makers should seek advice on how to ensure compliance with their data protection duties.

7.0 Thanks

We are grateful to the Northern Ireland Human Rights Commission (NIHRC)¹⁴ for allowing us to consider and re-use content found in their original document [Transgender Inclusion in Sport: A Legal Analysis, March 2023](#).

The NIHRC Analysis should be considered when considering the position relevant to the jurisdiction of Northern Ireland.

This Analysis has been prepared by Gendered Intelligence with the assistance of Russell-Cooke LLP.

¹⁴ The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI)

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