

SEX MATTERS REBUTS FAULTY LEGAL ADVICE PROVIDED TO UK ATHLETICS CONCERNING FEMALE-ONLY SPORTS

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3rd February 2023: Human-rights organisation Sex Matters responds to a call from UK Athletics for the government to amend the Equality Act in order to guarantee the legality of female-only sports. While Sex Matters agrees with UKA that female-only sports are essential to provide safe and fair competition for women, **our analysis is that no legal change is required.** Female-only competition is already lawful under the Equality Act, and “transwomen” – men who identify as women – can already be excluded either on grounds of sex (if they do not hold a gender-recognition certificate) or provisions in the Equality Act that expressly permit the exclusion of transsexual people, even those with a gender-recognition certificate, where necessary for fair competition and/or the safety of competitors.

Our analysis agrees with that of British Triathlon, which has updated its transgender guidance to make clear that entry to the female category is restricted to athletes who are female at birth, and thus excludes men who have “acquired” the female sex in law through the provisions of the Gender Recognition Act.

Sport and the Equality Act: our legal analysis

In competitive events, women and men generally compete in their own sex class, in the same way as they compete in the appropriate class for their age, weight and so on. So if a man wants to compete in a women’s event, normally he will just be told “No”.

Not being allowed to do something you want to do because of your sex is sex discrimination, which the Equality Act 2010 prohibits in various contexts. So how come it’s lawful to have separate men’s and women’s events at all?

The answer is in the “General Exceptions” part of the Equality Act. Section 195 is headed “Sport”, and it applies to “gender-affected activities”.

Section 195(3) explains what that expression means: if 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, it’s a gender-affected activity. It’s obvious that that covers the great majority of competitive sports. Exceptions will be sports where the differences between competitors are all about skill, built on a base level of athleticism that either sex

can attain. Equestrian events are the obvious example, and sure enough they tend not to be segregated by sex. Section 195(1) makes it lawful to discriminate on grounds of sex in relation to participation in a gender-affected activity.

So what about men who identify as women? Is it lawful to exclude them?

In the case of female-identifying men who don't have a GRC, the answer is simple: yes. They are men, and they don't have the benefit of a law deeming them to be female for any purpose, so they can be excluded on sex grounds under section 195(1). (It's sometimes said that a "blanket rule" excluding all men might have to be separately justified as being a proportionate means of achieving a legitimate aim if it discriminates *indirectly* against trans people, but that's nonsense: a blanket rule excluding all men is what section 195 expressly permits. Its adverse impact on old men, disabled men, men who think they are women etc does not have to be separately justified.)

It's slightly more complicated in the case of a man with a GRC declaring him to be female. If he has a GRC, he can't simply be told "No, you're a man" because the law deems him to be a woman. But section 195(2) says it's lawful to exclude a transsexual on grounds of gender reassignment if that's necessary to secure either fair competition or the safety of competitors. The athletic advantages conferred by male puberty don't go away if you suppress testosterone in adulthood [Hilton and Lundberg 2021]. So in practice, it will almost always be necessary to exclude men with GRCs declaring them to be women if the competition is to be fair; and in contact sports especially, it will very often be necessary for the safety of competitors as well.

A GRC doesn't confer a right to be treated as female for all purposes: it deems some men to be women (and vice versa). If a man is deemed female because he has a GRC, excluding him can't be sex discrimination any more - so it's not sanctioned under s.195(1). Instead, he's excluded because he's only "female" by virtue of a GRC - so by reason of his gender reassignment. That's the situation that s.195(2) provides for.

On the face of things, section 195 merely makes it *lawful* to run women-only competitions excluding all men, whatever paperwork they may hold – but not compulsory. But if a sporting body chooses not to make use of those exceptions, it may well find itself on the wrong end of a negligence claim if a woman is injured because a man has been allowed to compete, or indirect discrimination claims because a "trans inclusion" policy adversely affects competition for women, but not men.

Naomi Cunningham, discrimination barrister and Chair of Sex Matters, said: "Female-only sports are not only essential to ensure fairness and safety for women, but also entirely legal.

The Equality Act provides several exceptions to the general prohibition on sex discrimination, one of which is for competitive sport. The legal routes for excluding men with and without a gender-recognition certificate stating their sex as female differ, but the end result is likely to be the same.

“We agree with UK Athletics that women deserve safe and fair sports on the same basis as men, but disagree that current law makes this impossible. What is crystal-clear is that the law on sex and gender recognition is overall a mess. We are calling on the government to simplify the Equality Act with an amendment clarifying that the protected characteristic of ‘sex’ refers to biology, not identity. Only then will women’s legal rights be secure in practice.”

Notes for editors:

About Sex Matters

Sex Matters is a human-rights organisation co-founded in 2021 by Maya Forstater, who is its director, to campaign for sex-based rights. It lobbies for clarity on sex in law and institutions; publishes research, guidance and analysis; supports and mobilises people to speak up; and holds organisations accountable.

More on our petition clarify the Equality Act:

<https://sex-matters.org/take-action/make-the-equality-act-clear/>

More from Naomi Cunningham on single-sex sports and the Equality Act:

<https://www.legalfeminist.org.uk/2020/07/07/sex-gender-and-fair-competition-in-sport/>

British Triathlon’s transgender policy:

<https://www.britishtriathlon.org/britain/documents/about/edi/transgender-policy-effective-from-01-jan-2023.pdf>

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