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Guidance for Transgender Inclusion in Domestic Sport

INTRODUCTION TO LEGAL CONSIDERATIONS



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Guidance for Transgender Inclusion in Domestic Sport - Introduction to Legal Issues

INTRODUCTION

This guidance has been produced by Harper Macleod LLP working in conjunction with the The UK Home Nations Sports Councils and is a summary of Harper MacLeod LLP's key legal considerations at the time of writing. It is offered as written guidance, to further supplement the support offered to sports, in addition to training delivered by Harper Macleod LLP as to the legal considerations underpinning Guidance for Transgender Inclusion in Domestic Sport published by The UK Home Nations Sports Councils in September 2021. This is a summary of key legal considerations at the time of writing. This guidance is not offered as standalone guidance as the context of the content is key; it must only be considered further to the training session attended by delegates; it is offered as an aide to assist sports in consideration of the published Guidance for Transgender Inclusion in Domestic Sport and decisions to be made by sports further to that Guidance. The content is confidential and is not for distribution or publication within individual sports.

GENDER RECOGNITION ACT 2004

GENERAL POSITION AND LIMITING PROVISION

At present the Gender Recognition Act 2004 regulates and underpins the method to obtain a gender recognition certificate. This was originally where the “sport exception” was located (as further explained below). It is primary legislation, covering Great Britain and Northern Ireland.

The first 8 sections of the GRA sets out a framework in connection with obtaining a gender recognition certificate (GRC). Section 9 explains the outcomes of obtaining a GRC. Sub-section 1 of section 9 explains that:-

“Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).”

Sub-section 3 then limits this general position. Sub-section 3 explains that the general provision is subject to any provision made by the GRA or any other act or subordinate legislation.

Thus, it is not the case that a person with a GRC must forever and always, for all purposes, be treated in law as their acquired gender.

ORIGINAL SPORTING EXCEPTION

Previously under the GRA, section 19 provided an exception for “gender affected” sport. Section 19’s explanatory note explained that section 19 allowed a body responsible for regulating participation in sport to prohibit or restrict participation of a person, who is recognised in the acquired gender and is seeking to compete in the acquired gender, if that is necessary for (a) fair competition or (b) the safety of other competitors.

Section 19 has been repealed and replaced by section 195 of the Equality Act 2010. The language in Section 195 is very similar to GRA s19 and the explanatory note. We will look at s195 in more detail below.

EQUALITY ACT 2010 (EA)

STRUCTURE OF PROTECTION

The EA operates around “**protected characteristics**” and of which, most are applicable to all of us, providing the basis to require equal treatment and non-discrimination, based on those protected characteristics and prohibited reasons.

Some protected characteristics are more defined categories. Gender reassignment is a category that is potentially available and applicable to only a group of people.

Key for our purposes is the approach of the EA to “gender reassignment” and “transsexual person”. A person is a “transsexual person” if they have the protected characteristic of gender reassignment are 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.

There is legal protection under the EA if a person is wrongly treated without justification due to their sex. There is also legal protection if you are a transsexual person and are wrongly treated due to gender reassignment and there is no applicable exception.

Thus legal protection under the EA is potentially available under a much wider set of circumstances than a person holding a gender recognition certificate.

S195 EXCEPTION

Section 195 contains an exception in law for single-sex sport where there is “gender-affected activity”. Separately, where there is “gender-affected activity” transgender participation can be restricted, as further explained below.

Under sub-section (3) of section 195, “gender-affected activity” is a sport, game or other activity of a competitive nature (e.g. not a leisure pursuit) and 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 (within the sport).

Thus, for the exception to apply, there is a need to consider average persons; not individuals. This is not the average of the person who participates in the sport but on average generally, between the sexes. A sport that is heavily reliant on size and strength, such as rugby, is a good example of “gender-affected activity”.

It is also permissible to consider the age and stage of development of children when determining participation (per s194 sub-section (4)).

Key to the exception operating is (i) fair competition or (ii) safety. Section 195(2) provides that the EA is not contravened if you do something, in relation to the participation of transsexual persons, if it is necessary to secure (i) fair competition or (ii) safety of competitors.

If your sport is not gender-affected and is open to all, there is no applicable need to exclude and the exception under s195 does not apply.

If your sport has open categories, all can compete and no distinction is made between male, female and transsexual.

SAFETY AND FAIRNESS

Whilst transgender participation is a very important issue in all of sport, the legislation stipulates that in gender-affected activity, safety and/or fairness is paramount.

This principle applies in the same way that natal males do not typically participate with natal females in gender-affected activity.

Each NGB and SGB should use the framework provided (under **Guidance for Transgender Inclusion in Domestic Sport**) to define the priorities for their sport, and whether the current format of their sport will provide a focus on either inclusion or fairness (and safety where relevant).

PERMIT PARTICIPATION?

Where the circumstances exist to apply the exception, if the sport was to instead adopt a more permissive approach and allow participation in a gender-affected activity, that may itself have risk, particularly in relation to safety. Decision-makers in sport who make the rules and who organise and/or influence participation need to be very careful. If the sporting exception is available and is not applied, then risks of legal issues arising from safety and/or fairness issues must be considered and appreciated. These issues could easily include personal injury claims, access to participation disputes, claims of indirect discrimination and separately, difficulty in demonstrating compliance with European and/or international federation member requirements.

SUMMARY OF LEGISLATION

The focus of the legislation is not only on creating equality, but it also focuses ultimately on safety and fairness, in a way that is manageable and practical.

The legislation directs governing bodies to assess key questions:-

- 01. Is the sport organised around single-sex participation? Or is the sport truly mixed?**
- 02. Looking at the averages between the sexes, is the sport gender-affected?**
- 03. If so, do issues of safety and/or fairness arise?**

These are questions for governing bodies to answer based on all that they know of their sport, applying the framework within **Guidance for Transgender Inclusion in Domestic Sport**.

ISSUES TO CONSIDER, FURTHER THOUGHTS AND PRACTICAL POINTS

CASCADE YOUR OWN GUIDANCE THROUGHOUT YOUR SPORT

Clubs, organisations and associations may need support to understand the legal position and the steps they should take in practice. Whilst independent legal advice should be sought, the legal questions posed are not necessarily for clubs (etc) within domestic sport to answer.

A key issue may be around asking participants for information as to whether they are eligible to participate in any given form of the sport. This is permissible. Declarations as to birth state are possible, as there is no absolute prohibition on the same.

Care should be taken to manage information gathered in a way that is consistent with your GDPR obligations and which recognises the special sensitive nature of the data for transsexual persons.

MITIGATE THE IMPACT OF EXCLUSION

If your sport applies the exception available, a key measure to focus on is to provide an opportunity to participate in an “open form” of the sport. This will not only help promote inclusion but help manage risk.

CONSIDER ASSOCIATED ISSUES - FACILITIES

The question of what facilities (for example, commonly (but not exclusively) changing facilities) need to be provided and who can access those facilities is a separate (but related) issue and deliberately not included within **Guidance for Transgender Inclusion in Domestic Sport**. The issues are more complex and tend to be fact and circumstance specific.

This issue is typically one for event organisers, tournaments, clubs and those making rules for league or competition participation. There is no single answer capable of being applied to all circumstances.

Whether facilities are owned, leased or merely accessed; size, scale and resource, including financial; frequency of use; and potentially other beliefs; may all be relevant and require to be considered.

The Equality and Human Rights Commission publishes guidance from time to time on single-sex spaces which should be considered.

Try to be pragmatic and solutions driven. If facilities are limited, can they be used at different times, in a respectful way by all?

CONCERNS, INTERNAL COMPLAINTS AND DISPUTES

If concerns are raised about participation or restriction on participation, steps should be taken to engage and discuss the concerns in detail. If the sport has made decisions consistently with **Guidance for Transgender Inclusion in Domestic Sport** (and this guidance and having taken independent legal advice) then the issue is not likely to be a clash of beliefs (women’s sport participation rights and trans-participation rights) and may instead concern issues that need to be properly discussed to attempt to encourage understanding. This may in addition, assist in understanding properly if barriers can be removed or if alternative opportunities to participate can be identified.

If this dialogue cannot resolve the concerns raised, governing bodies should make available an opportunity for a complainant to engage the governing bodies complaints procedures.

HUMAN RIGHTS

The Human Rights Act 1998 (HRA) is the primary legislation within the UK in respect of human rights. It has three main effects including that public bodies must observe human rights; the courts can be asked to intervene if there is a breach; and new laws must be compatible with human rights.

The HRA doesn't have direct effect on private sports organisations. However, it remains relevant and complicated issues can arise in relation to different issues including the use of public funds, grant awards, disputes and information handling.

Very often, “*human rights*” are cited by people in support of arguments, including, for example, respect for private life (article 8). This can tend to be presented as if the “human right” is an absolute and automatically outweighs all other rights or interests. Such a position is not correct and is often unhelpful. Almost all human rights are not “absolute”. Most expressed human rights are, in law, either limited, or qualified, in some respect.

Where a person wishes to participate in a sport, but refuses to disclose information as to their eligibility to participate (where they are otherwise obliged to), then they are not meeting the terms of participation and argument about human rights and privacy is unlikely to be correct.

LANGUAGE, CULTURE AND ASSOCIATED ISSUES

It is recognised that there are many different areas of sport in which transgender participation may prompt questions and require keen consideration of whether change is required.

Language, terminology, publications and presentation of opportunities are all aspects of sport that may be relevant to consider. The **Guidance for Transgender Inclusion in Domestic Sport** published by the UK Home Nations Sports Councils in September 2021 should be considered for further assistance.

DATE OF PUBLICATION; DISCLAIMER

This guidance has been produced to be accurate as of May 2024. Although every effort has been taken to provide an accurate, short-form, summary of the key legal issues as they present at the date of production, readers may wish to (i) check that this is the latest version published of this note; and (ii) take their own independent legal advice on any issue connected with this guidance. The note is generalised guidance on legal issues as opposed to specific legal advice provided to the reader in question. Copyright in this document is retained by Harper Macleod LLP. As confidential material distributed as an aide to a closed distribution list to assist the recipient in consideration of the Guidance for Transgender Inclusion in Domestic Sport, it is not for publication or general circulation within sports or onward transmission to third parties.

