



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Transgender Inclusion in Sport
A Legal Analysis**

March 2023

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1.0 Introduction

- 1.1 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).
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- European Convention on Human Rights (ECHR);¹
 - UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR);²
 - UN International Covenant on Civil and Political Rights, Social and Cultural Rights (UN ICCPR);³
 - UN Convention on Elimination of Discrimination against Women (UN CEDAW);⁴
 - UN Convention on the Rights of the Child (UN CRC);⁵ and
 - UN Convention on the Rights of Persons with Disabilities (UN CRPD).⁶
- 1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but are intended to provide further guidance.⁷ The relevant soft law standards in this context include:
- The Yogyakarta Principles, 2006;
 - The Yogyakarta Principles plus 10, 2017;
 - Recommendation CM/Rec(2010)5 of the Council of Europe Committee of Ministers.
- 1.4 This paper provides a human rights analysis of rights relevant to the inclusion of transgender persons participation in sport. It will look at the legal rights of transgender persons under international and domestic frameworks and assess what the law may mean for those seeking to participate in sporting events and for those who organise them.

¹ Ratified by the UK in 1951.

² Ratified by the UK in 1976.

³ Ratified by the UK in 1976.

⁴ Ratified by the UK in 1979.

⁵ Ratified by the UK in 1991.

⁶ Ratified by the UK in 2009.

⁷ This includes resolutions and recommendations of international bodies such as the UN General Assembly or the Council of Europe.

- 1.5 The analysis of the participation of transgender women in sports, both at professional/international and grassroots levels, must be considered in the context of a broader debate about transgender rights.⁸ For example, the access of transgender persons, particularly transgender women, to single-sex spaces such as housing shelters, toilets, prisons and changing rooms.⁹

2.0 International human rights standards

United Nations

- 2.1 The International Covenant on Economic Social and Cultural Rights (ICESCR) sets out in Article 2(2),

the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 2.2 This is also reinforced by Article 3, which protects the “equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”. The UN ICESCR Committee confirms that gender identity falls within the scope of “other status” for the purposes of a prohibited ground of discrimination under Article 2(2) ICESCR. It further recognises that transgender individuals often face serious human rights violations.¹⁰
- 2.3 The ICESCR Committee requires that, in order to give effect to Article 2(2), States should “take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated”, including ensuring participation of those individuals and groups affected in the selection of measures.¹¹ The Committee further recognises that this may require legislation, policies and programmes, and also include temporary special measures.¹²
- 2.4 Article 15(1) ICESCR recognises the right of everyone to take part in cultural life. The ICESCR Committee interprets cultural life as encompassing, ways of life, language, oral and written literature, music and song, non-verbal

⁸ Queen’s University Belfast School of Psychology, Gender Recognition Act (GRA) 2004 Evaluation and Policy Options, August 2022.

⁹ See for example, Equality and Human Rights Commission, ‘Guidance: Separate and single-sex service providers: A guide on the Equality Act sex and gender reassignment exceptions’, April 2022; A/73/152, United Nations Office of the High Commissioner, ‘Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Report on Legal Recognition of Gender Identity and Depathologization’, Session 73, 12 July 2018.

¹⁰ E/C.12/GC/20, ‘UN ICESCR Committee on Economic, Social and Cultural Rights, General comment No. 21 on Non-discrimination in economic, social and cultural rights’, 2 July 2009, at para 32.

¹¹ E/C.12/GC/20, ‘UN ICESCR Committee on Economic, Social and Cultural Rights, General comment No. 21 on Non-discrimination in economic, social and cultural rights’, 2 July 2009, at para 36.

¹² E/C.12/GC/20, ‘UN ICESCR Committee on Economic, Social and Cultural Rights, General comment No. 21 on Non-discrimination in economic, social and cultural rights’, 2 July 2009, at para 38.

communication, religion or belief systems, rites and ceremonies, and sport.¹³ The Committee also sets out that “special attention should be paid to groups that have experienced systemic discrimination...such as women, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, indigenous peoples and persons living in poverty. Temporary special measures might be necessary to achieve substantive equality and remedy current manifestations of previous patterns of exclusion of these groups”.¹⁴

2.5 The International Covenant on Civil and Political Rights (ICCPR) also contains a free-standing non-discrimination clause, which states

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵

2.6 Other status is a wide and open-ended concept, that has been interpreted by the UN Human Rights Committee as including gender identity.¹⁶ The UN Human Rights Committee, while not specifically referencing sport, requires States “to act against discrimination by public and private agencies in all fields”.¹⁷

2.7 The UN Convention on the Rights of the Child (UN CRC) sets out, in Article 31, that

States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities ... and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.¹⁸

2.8 The UN CRC Committee, while not specifically referring to transgender rights, does highlight the importance of sport and of eliminating barriers to participation based on gender. The Committee urges States parties to “take

¹³ E/C.12/GC/21, ‘UN ICESCR Committee General comment No. 21 on the right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)’, December 2009.

¹⁴ E/C.12/GC/25, ‘UN ICESCR Committee General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)’, April 2020, at para 28.

¹⁵ Article 26, International Covenant on Civil and Political Rights.

¹⁶ CCPR/C/119/D/2172/2012, ‘UN Human Rights Committee Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2172/2012’, at paras 7-8.

¹⁷ HRI/GEN/1/Rev.9 (Vol. I), ‘UN Human Rights Committee, General Comment no. 28 on Article 3 (The equality of rights between men and women)’, 29 March 2000, at para 31.

¹⁸ Article 31, UN Convention on the Rights of the Child.

action to challenge gender stereotypes which serve to compound and reinforce patterns of discrimination and inequality of opportunity”.¹⁹

- 2.9 In 2016, the UN Human Rights Council (UN HRC) passed a resolution to appoint an independent expert to find the causes of violence and discrimination against people due to their gender identity and sexual orientation and discuss with governments about how to protect those people.²⁰ This mandate was renewed in 2022.²¹
- 2.10 The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) are also relevant soft law principles. A 2017 update, the Yogyakarta Principles plus 10, included an expansion of the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics.²²
- 2.11 In respect of sport, the Yogyakarta Principles plus 10 recommend that “all individuals can participate in sport in line with the gender with which they identify, subject only to reasonable, proportionate and non-arbitrary requirements” and “without discrimination on the grounds of sexual orientation, gender identity, gender expression or sex characteristics”.²³
- 2.12 The Yogyakarta Principles plus 10 further require States to adopt legislative, policy and other measures, which are in line with international human rights norms and standards, to eliminate bullying and discriminatory behaviour at all levels of sports, on the basis of sexual orientation, gender identity, gender expression and sex characteristics.²⁴
- 2.13 They also encourage sporting organisations to integrate the Yogyakarta Principles, as well as all relevant human rights norms and standards, in their policies and practices. They also make recommendations to sporting organisations to:
- “Take practical steps to create welcoming spaces for participation in sport and physical activity, including installation of appropriate changing rooms, and sensitisation of the sporting community on the implementation of anti-discrimination laws in the sporting context for persons of diverse sexual orientations, gender identities, gender expressions, and sex characteristics”²⁵

¹⁹ CRC/C/GC/17, ‘UN Committee on the Rights of the Child General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)’, 17 April 2013, at para 48.

²⁰ A/HRC/RES/32/2, ‘United Nations Human Rights Council, Protection against violence and discrimination based on sexual orientation and gender identity’, 30 June 2016.

²¹ A/HRC/RES/50/10, ‘United Nations Human Rights Council, Mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, 7 July 2022.

²² The Yogyakarta Principles plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles, 10 November 2017. Available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

²³ Ibid, at 17.

²⁴ Ibid.

²⁵ Ibid, Recommendation R(i).

- “Ensure that all individuals who wish to participate in sport are supported to do so irrespective of sexual orientation, gender identity, gender expression and sex characteristics, and that all individuals are able to participate, without restriction, subject only to reasonable, proportionate and non-arbitrary requirements to participate in line with their self-declared gender”.²⁶

Council of Europe

- 2.14 The European Convention on Human Rights (ECHR) does not expressly mention sport or the rights of transgender persons. However, a number of ECHR rights may be relevant to the rights of athletes in the sporting domain. For example, the right to fair trial (Article 6 ECHR), the right to private and family life (Article 8 ECHR) and the prohibition of discrimination (Article 14 ECHR) have all been considered by the European Court of Human Rights (ECtHR) in the context of transgender inclusion. These rights are set out in turn below.
- 2.15 The right to fair trial, under Article 6(1), applies to the determination of civil rights and obligations, which has a particular meaning before the ECtHR. There must be a dispute over a right which is protected under domestic law and which is genuine and serious.²⁷ In *Mutu and Pechstein v. Switzerland*, the ECtHR considered the application of Article 6(1) in an arbitration dispute before a sporting body and confirmed that it applied to the proceedings before the Court of Arbitration for Sport (CAS) and entitled the applicant to the relevant fair trial safeguards under the ECHR.²⁸ In *Ali Riza and others v. Turkey* the ECtHR also found a violation of Article 6, and confirmed that the specificities of sports arbitration do not justify depriving athletes of Article 6 fair trial guarantees.²⁹ The ECtHR considered that the arbitration proceedings before the Arbitration Committee were compulsory arbitration proceedings and therefore had to afford the safeguards provided for under Article 6(1) ECHR.
- 2.16 Article 8 ECHR protects the right to private and family life, home and correspondence and its scope is interpreted broadly by the ECtHR. Article 8 also secures to individuals a sphere within which they can freely pursue the development and fulfilment of their personality.³⁰ The notion of personal autonomy is an important principle underlying the interpretation of Article 8.³¹
- 2.17 Article 8 contains both negative and positive obligations on the State.³² It is regarded as a qualified right, which may be restricted in particular

²⁶ Ibid, Recommendation R(ii).

²⁷ See for example, *Grzeda v Poland*, Application no. 43572/18, 15 March 2022, at para 257.

²⁸ *Mutu and Pechstein v. Switzerland*, Applications nos. 40575/10 and 67474/1040575/10, 2 October 2018, paras 114-5.

²⁹ *Ali Riza and others v. Turkey*, Application nos. 30226/10 and 4 others, 20 January 2020, at para 180.

³⁰ *A.M.V. v. Finland*, Application no. 53251/13, 23 March 2017, at para 76; *Brüggemann and Scheuten v. Germany*, Application no. 6959/75, Commission decision of 19 May 1976; *National Federation of Sportspersons' Associations and Unions (FNASS) and others v. France*, Application nos. 48151/11 and 77769/13, 18 January 2018, at para 153.

³¹ *Christine Goodwin v. the United Kingdom* [GC], Application no. 28957/95, 11 July 2002, at para 90.

³² *Bărbulescu v. Romania* [GC], Application no. 61496/08, 5 September 2017, at paras 108-112.

circumstances. In considering whether an interference with Article 8 is unlawful, the ECtHR will consider whether it is conducted in accordance with the law, in pursuit of a legitimate aim under Article 8(2), and if it is necessary in a democratic society.

- 2.18 Under the “private life” limb of Article 8, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.³³ Article 8 has been held to be applicable to the question of the legal recognition of the gender identity of transgender persons who have undergone gender reassignment surgery³⁴, the conditions for access to such surgery³⁵, and the legal recognition of the gender identity of transgender people who have not undergone, or do not wish to undergo, gender reassignment treatment.³⁶
- 2.19 In the context of private life, the ECtHR has considered that, where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted.³⁷
- 2.20 The ECtHR considers the concept of “home” as autonomous and interprets it widely. In the case of *National Federation of Sportspersons’ Associations and Unions and Others v. France*, the ECtHR considered whether a requirement upon athletes to provide advance notice of their daily schedule, with a sanction for non-compliance, engaged Article 8. In finding that there was an interference with Article 8(1) although not a violation, the ECtHR expressly did not rule out the possibility that training centres and venues for sports events and competitions, and their annexes such as a hotel room in the case of away events, may be treated as equivalent to “home” within the meaning of Article 8.³⁸
- 2.21 Article 14 ECHR sets out a prohibition on discrimination in the enjoyment of another Convention right. It states, “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The ECtHR has confirmed that the prohibition of discrimination under Article 14, particularly in conjunction with Article 8, covers questions relating to gender identity.³⁹
- 2.22 In determining whether there has been a breach of Article 14, the ECtHR will consider whether there has been a difference in treatment of persons in

³³ L.F. v. the United Kingdom, Application no. 19839/21, 16 June 2022, at para 90.

³⁴ Hämäläinen v. Finland [GC], Application no. 37359/09, 16 July 2014, at para 68.

³⁵ L. v. Lithuania, Application no. 27527/03, 11 September 2007, at paras 56-57; Schlumpf v. Switzerland, Application no. 29002/06, 8 January 2009, at para 107; Y.Y. v. Turkey, Application no. 14793/08, 10 March 2015, at paras 65-66.

³⁶ A.P., Garçon and Nicot v. France, Application nos. 79885/12 and 2 others, 6 April 2017, at paras 95-96.

³⁷ Christine Goodwin v. the United Kingdom [GC], Application no. 28957/95, 11 July 2002, at para 90; Fedotova and Others v. Russia, Application nos. 40792/10 and 2 others, 13 July 2021, at para 47.

³⁸ National Federation of Sportspersons’ Associations and Unions (FNASS) and others v. France, Application nos. 48151/11 and 77769/13, 18 January 2018, at para 158.

³⁹ Identoba and Others v. Georgia, Application no. 73235/12, 12 May 2015, at para 96.

analogous situations and if so, whether this is objectively justified.⁴⁰ Therefore, not all differences in treatment will amount to a violation of the ECHR. Article 14 will also apply in respect of the failure to treat persons differently in relevantly different situations.⁴¹

- 2.23 The right to freedom from discrimination and to have one's gender legally recognised and the legal requirements that must be satisfied to this end, is set out across a number of ECtHR cases.⁴² In *Christine Goodwin v. the United Kingdom*⁴³, the applicant, was a transgender woman who claimed that she faced sexual harassment at work during and following her gender reassignment. She also alleged that the fact that she keeps the same National Insurance number has meant that her employer has been able to discover that she previously worked for them under another name and gender, resulting in embarrassment and humiliation. Relying on Article 14, alongside Articles 8, 12, and 13 ECHR, the applicant complained about her treatment in relation to employment, social security and pensions and her inability to marry. The ECtHR found a violation of Article 8 (right to respect for private and family life) and Article 12 (right to marry and to found a family) but did not find a violation of Article 13 (right to an effective remedy) and also did not make any separate determination under Article 14 (discrimination).
- 2.24 The ECtHR has, however, given a wide margin of appreciation to States in deciding when certain discrimination may be justified in the public interest. In *L.F. v United Kingdom*,⁴⁴ the ECtHR took into account that the arrangement corrected inequalities between the Orthodox Jewish Community and other groups; that only a nominal percentage (one per cent) of local housing in the area was provided by the charity and therefore affected, and that national authorities are to be given a wide margin of appreciation to decide what is socially and economically in the public's interest, and to take measures accordingly.⁴⁵
- 2.25 When considering a State's exercise of its margin of appreciation, the ECtHR has also set out that the justification for discrimination may be narrower depending on the historical treatment of a group being affected.⁴⁶ The ECtHR has stated that, "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State's margin of appreciation is

⁴⁰ See for example, *Molla Sali v. Greece* [GC] 2018, Application no. 20452/14, 19 December 2018, at para 135; *Fabris v. France*, Application no. 16574/08, 7 February 2013, at para 56.

⁴¹ *Thlimmenos v. Greece* [GC], Application no. 34369/97, 6 April 2000, at para 44.

⁴² *Christine Goodwin v. the United Kingdom* [GC], Application no. 28957/95, 11 July 2002; *I. v. the United Kingdom* [GC], Application no. 25680/94, 11 July 2002.; *L. v. Lithuania*, no. 27527/03, 11 September 2007; *Hämäläinen v. Finland* [GC], Application no. 37359/09, 16 July 2014.

⁴³ *Christine Goodwin v. the United Kingdom* [GC], Application no. 28957/95, 11 July 2002.

⁴⁴ *L.F. v. the United Kingdom*, Application no. 19839/21, 16 June 2022.

⁴⁵ *Ibid*, at para 40.

⁴⁶ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, at para 78; *Konstantin Markin v. Russia* [GC], Application no. 30078/06, 22 March 2012, at para 127; *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010, at para 97.

substantially narrower and it must have very weighty reasons for the restrictions in question".⁴⁷

- 2.26 The ECtHR has recognised that, "in the twenty-first century, the right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society could not be regarded as a matter of controversy requiring the further lapse of time to cast clearer light on the issues involved and that the situation in which transgender people lived in some sort of intermediate zone as not quite one gender or the other may no longer be seen as sustainable".⁴⁸
- 2.27 While protecting fairness in sports may be considered a legitimate general interest, in determining whether the State has abided by its obligations under the convention, the ECtHR, particularly with regard to Articles 8⁴⁹ and 14 ECHR, will determine whether a fair balance was struck between the competing interests of the individual and the community as a whole, taking into account the margin of appreciation enjoyed by the State.⁵⁰ The Court will also determine whether those actions by the State that have a discriminatory effect, have an objective and reasonable justification. Therefore, disproportionate and arbitrary measures that deprive persons of participation in sports without reasonable justification may be more difficult to legally sustain.
- 2.28 In addition to the protection of the ECHR, the Council of Europe's Committee of Ministers has adopted a recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.⁵¹ In the context of the right to respect for private and family life, it requires Member States to take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life and to ensure the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.⁵²
- 2.29 The Committee of Ministers also expressly refer to discrimination in the sporting context, highlighting that "homophobia, transphobia and discrimination on grounds of sexual orientation or gender identity in sports are, like racism and other forms of discrimination, unacceptable and should be combated".⁵³ It further confirms that "sport activities and facilities should be open to all without discrimination on grounds of sexual orientation or gender identity".⁵⁴

⁴⁷ *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010, at para 42.

⁴⁸ *Christine Goodwin v. the United Kingdom* [GC], Application no. 28957/95, 11 July 2002, at para 90; *Grant v. the United Kingdom*, Application no. 32570/03, 23 May 2006, at para 40; *L. v. Lithuania*, Application no. 27527/03, 11 September 2007, at para 59.

⁴⁹ *A.D. and Others v. Georgia*, Application no. 57864/17, 1 December 2022.

⁵⁰ *Bărbulescu v. Romania* [GC], Application no. 61496/08, 5 September 2017 at para 112.

⁵¹ 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, 31 March 2010.

⁵² *Ibid*, at 21.

⁵³ *Ibid*, at 39.

⁵⁴ *Ibid*, at 40.

International Sporting Bodies

- 2.30 Sports regulation and adjudication exists at the national and international levels, with the Court of Arbitration for Sport (CAS) acting as a transnational private adjudication body. Rules and decisions issued by these private sporting bodies can have an immense impact on the lives and careers of athletes, particularly at the elite level. However, being private bodies, the democratic processes for forming rules and coming to decisions may not be subject to the same democratic state oversight or human rights law. However, the ECtHR considers that the jurisdiction of the ECHR has been found to apply to CAS proceedings, at least in the context of Article 6 ECHR.⁵⁵
- 2.31 It has been argued that differences in bodily characteristics, training opportunities, nutrition, socioeconomic background, are common and almost intrinsically related to the world of professional sports.⁵⁶ The difficulty for sports regulators is that the science is contested⁵⁷ and people have very different ideas of what is 'fair' in this context.
- 2.32 In October 2020, World Rugby published its Transgender Guidelines based on its own research and literature review.⁵⁸ This indicated that "significant advantages for biological males remain after testosterone reduction"; however, it also recognised that there have been "no direct studies on trans women rugby players".⁵⁹
- 2.33 The World Rugby Guidelines state that "transgender women who transitioned post-puberty and have experienced the biological effects of testosterone during puberty and adolescence cannot currently play women's rugby" due, in part, to the "resultant player welfare risks this creates".⁶⁰ However, transgender men may play men's rugby having provided "confirmation of physical ability" but cannot play women's rugby after the process of sex reassignment has begun, if this reassignment includes supplementation with testosterone.⁶¹
- 2.34 In 2021, the 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

⁵⁵ Mutu and Pechstein v. Switzerland, Applications nos. 40575/10 and 67474/1040575/10, 2 October 2018, Ali Riza and others v. Turkey, Application nos. 30226/10 and 4 others, 20 January 2020.

⁵⁶ Eva Brems, Pieter Cannoot, Mattias Decoster, Claire Poppelwell-Scevak, Sarah Schoentjes and Cathérine Van de Graaf, European Court of Human Rights – Semenya v. Switzerland (Application no. 10934/21), Third Party Intervention by the Human Rights Centre of Ghent University, at para 5.2.1.

⁵⁷ See for example, J Harper, E O'Donnell, B Sorouri Khorashad, 'How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sport participation', *British Journal of Sports Medicine* 2021; 55:865-872; E-Alliance, 'Transgender Women Athletes and Elite Sport: A Scientific Review', November 2022.

⁵⁸ World Rugby, 'Transgender Guidelines' (undated). Available at <https://www.world.rugby/the-game/player-welfare/guidelines/transgender>.

⁵⁹ World Rugby, 'Summary of Transgender biology and performance research', October 2020.

⁶⁰ World Rugby, 'Transgender Guidelines' (undated). Available at <https://www.world.rugby/the-game/player-welfare/guidelines/transgender>.

⁶¹ Ibid.

determining their eligibility rules for high-level competition.⁶² The framework document notes that it consulted with human rights, legal and medical experts.

2.35 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”.⁶³ It further recommends that eligibility criteria are to be implemented in a manner that “does not systematically exclude athletes from competition based upon gender identity, physical appearance and/ or sex variations”.⁶⁴

2.36 The framework identifies “no presumption of advantage”⁶⁵ and that any restrictions from eligibility criteria must be based on 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.”⁶⁶

2.37 In June 2022, the International Swimming Federation (FINA) announced a new policy on eligibility for the men’s and women’s competition categories.⁶⁷ The new policy only permits transgender women athletes who have not experienced male puberty or who transitioned before age 12 to compete in women’s events.⁶⁸ FINA has also proposed an open event category for those athletes who do not meet the criteria for the men’s or women’s categories and has committed to further work in determining the feasibility of establishing such a competition category.⁶⁹

2.38 Other sporting bodies are reviewing their rules and others are likely to follow. For example, the International Federation of Association Football and World Athletics, the international governing body that covers track and field events, have both also announced a review of their gender eligibility policy.⁷⁰

⁶² 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](#)

⁶³ Ibid, Principle 1.1.

⁶⁴ Ibid, Principle 3.1.

⁶⁵ Ibid, Principle 5.1.

⁶⁶ Ibid, Principle 6.1.

⁶⁷ Fédération internationale de Natation, ‘Policy on Eligibility for the Men’s and Women’s Competition Categories’, 19 June 2022. Available at <https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf>

⁶⁸ Ibid, at section F(4)(b).

⁶⁹ Ibid, at section G (6).

⁷⁰ Simon Evans, ‘World Athletics review transgender rules after swimming’s change’, *Reuters*, 20 June 2022.

2.39 From analysing the policies of the international sporting bodies, the focus is on elite competitive sport. As such, their policies place a greater degree of emphasis on fairness, and anything that might confer disproportionate competitive advantage than would be necessary at the grassroots level. However, at both elite and grassroots level, it seems it would be difficult to argue that a participant should be excluded from participating in sport without clear, robust and specific evidence that it is necessary to do so to ensure safety or fairness.

3.0 Domestic legal standards

Relevant NI equality legislation

- 3.1 A significant part of the legal framework protecting transgender rights in NI is found in the form of equality legislation. The Sex Discrimination (Northern Ireland) Order 1976 (SDO) prohibits discrimination on the ground of sex in employment, education, and the provision of housing, goods, facilities, and services. The SDO was amended in 2008⁷¹ to prohibit discrimination on the grounds of gender reassignment in the provision of goods, facilities or services⁷² and again in 2016⁷³ to prohibit indirect discrimination.⁷⁴
- 3.2 Current legal protection from unlawful discrimination under NI equality law only extends to “gender reassignment”, defined as “a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process”.⁷⁵ Therefore, transgender persons are protected against unlawful discrimination on the ground of gender reassignment if they intend to undergo, are undergoing or have undergone gender reassignment.
- 3.3 The Equality Commission NI has recommended that the definition of ‘gender reassignment’ is amended “so as to remove the requirement that a person undergoing gender reassignment must be under medical supervision” and “to give consideration to prohibiting discrimination on the wider ground of ‘gender identity’, rather than the narrower ground of ‘gender reassignment’”.⁷⁶
- 3.4 Article 45(1) SDO permits single sex provision in relation to “any sport, game or other activity of a competitive nature where the physical strength,

⁷¹ Sex Discrimination (Amendment of Legislation) Regulations 2008,

⁷² Articles 4A, 4B and 30(4), Sex Discrimination (Northern Ireland) Order 1976.

⁷³ Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2016.

⁷⁴ This is not a detailed discussion of all relevant legislative provisions pertaining to discrimination, only that which relates to the issue in this paper of transgender inclusion in sport.

⁷⁵ Article 2(2), Sex Discrimination (Northern Ireland) Order 1976.

⁷⁶ Equality Commission Northern Ireland, ‘Gender Equality: Policy Priorities and Recommendations, November 2016, p.53.

stamina or physique of the average woman puts her at a disadvantage to the average man". Article 45(2) permits the exclusion of a transgender woman from a single sex competitive sport "only if the discrimination is necessary to secure- (a) fair competition, or (b) the safety of competitors, at such events".

- 3.5 The SDO does not expressly prohibit a sports body or club from asking prospective participants in a sport a question about their birth sex or gender, if it is needed for the specific purpose of determining whether the exception permitted by Article 45 may be applied to that person. That exception may be applied to transgender persons in the case of certain competitive sports where it is necessary to secure fair competition or the safety of competitors. The law does not compel prospective participants in a sport to answer such questions. However, a sports body or club may set its own policy requiring the provision of such information from individuals if it is done for the purpose of applying the Article 45 exception.

Relevant Great Britain equality legislation

- 3.6 In Britain, discrimination is prohibited by a single equality framework, the Equality Act 2010. This legislation does not apply to NI.
- 3.7 It also confirms "gender reassignment" as a protected characteristic.⁷⁷ A person can claim the protection of this characteristic, "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".⁷⁸ The statutory guidance to the Act confirms 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".⁷⁹ It further confirms that the individual does not have to "undergo medical treatment in order to be protected".⁸⁰
- 3.8 Section 195 of the Equality Act 2010 sets out an exception to the participation of a transgender person as a competitor in a gender-affected activity. The Equality Act would not be contravened by excluding a transgender person from a relevant gender-affected activity if it is necessary to do so to secure "(a) fair competition or (b) the safety of competitors".⁸¹ A gender-affected activity is defined as 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".⁸²

⁷⁷ Section 4, Equality Act 2010.

⁷⁸ Section 7(1), Equality Act 2010.

⁷⁹ Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice' (EHRC, 2011) at para 2.19.

⁸⁰ Ibid, at para 2.20.

⁸¹ Section 195(2), Equality Act 2010.

⁸² Section 195(3), Equality Act 2010.

- 3.9 Julie Curtiss, a transgender rugby player, recently issued legal action against the Rugby Football Union (RFU), claiming discrimination under section 7 of the Equality Act 2010. The challenge will consider if her exclusion from the female category of contact rugby can be justified. The RFU, in July 2022, updated its policy which excludes transgender women from participating in contact rugby.⁸³

Gender Recognition

- 3.10 The Gender Recognition Act 2004 (GRA) applies across the UK and grants full legal recognition for transgender persons who have been issued with a full Gender Recognition Certificate (GRC), subject to some exceptions.⁸⁴ The UK gender recognition process does not require applicants to be post-operative. However, applicants need to demonstrate that they have been diagnosed with gender dysphoria, have lived as their new gender for two years, and intend to continue doing so.⁸⁵ The process is recognised through application to the Gender Recognition Panel.⁸⁶
- 3.11 The GRA makes provision specifically for gender-affected sport. A sport is a gender-affected sport if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport. The GRA allows sporting bodies to restrict the participation of persons whose gender has become the acquired gender under the Act, if this is necessary to secure fair competition or safety.⁸⁷ This section was repealed for England, Scotland and Wales by the Equality Act 2010.⁸⁸
- 3.12 The GRA also ensures that a transgender person has a right to confidentiality over their transgender status or gender history. The Act enables a person to change their gender legally by obtaining a Gender Recognition Certificate (GRC), which leads to the issue of a new birth certificate.⁸⁹
- 3.13 Once someone has a GRC, it is an offence in almost all circumstances to disclose their gender history to others without their consent, if you have obtained the information in an official capacity.⁹⁰ The Act sets out that "official capacity" includes in connection with the functions of a local or public authority or of a voluntary organisation, as an employer or otherwise in connection with, the conduct of business or the supply of professional services.⁹¹ In football for example, those in an "official capacity" could include club or league officials such as the manager, coach or league organiser. A person does not need a GRC to play football in an over-18 men's

⁸³ Rugby Football Union, 'RFU Council votes in favour of change to gender participation policy', 29 July 2022.

⁸⁴ Section 9(3), Gender Recognition Act 2004.

⁸⁵ Section 3, Gender Recognition Act 2004.

⁸⁶ Section 1, Gender Recognition Act 2004.

⁸⁷ Section 19, Gender Recognition Act 2004.

⁸⁸ Schedule 27, Part 1, Equality Act 2010.

⁸⁹ Section 10, Gender Recognition Act 2004.

⁹⁰ Section 22, Gender Recognition Act 2004.

⁹¹ Section 22, Gender Recognition Act 2004.

or women's team and a person without a GRC should be treated exactly the same as one with a GRC and confidentiality should be respected.

- 3.14 Whilst the GRA has been welcomed as an official mechanism by which transgender persons can gain recognition within the UK, it has nevertheless received criticism for being inadequate.⁹² In June 2020, a report published by the European Commission ranked the procedure established in the Gender Recognition Act 2004 as amongst the worst in Europe with alleged "intrusive medical requirements", meaning it now lags behind international human rights standards.⁹³
- 3.15 The self-declaration model is an alternative means of obtaining recognition, placing the responsibility with the individual rather than a medical process. This model was introduced to Ireland with the enactment of the Gender Recognition Act 2015.⁹⁴
- 3.16 In September 2020, the UK Government published the results of a public consultation into reform of the Gender Recognition Act 2004 which had been launched in 2018, which included consideration of continuing with the medical approach.⁹⁵ This showed majority support for wide-ranging changes; however, the UK Government's plans to "modernise" the process, involves digitisation and a reduction in the application fee, but no commitment to change the current requirement for a medical diagnosis.⁹⁶
- 3.17 Following consultations, the Scottish Government has introduced legislation which would simplify the process for application for a GRC, including a statutory declaration rather than providing medical reports.⁹⁷ The UK Government has issued an order under section 35 of the Scotland Act 1998, in order to prevent the legislation from proceeding to Royal Assent.⁹⁸
- 3.18 In 2021, a judicial review in the NI High Court sought to challenge the medical requirements set out in the GRA. Here the court found that having to prove to be suffering or to have suffered from a "disorder" in order to secure a gender recognition certificate was unlawful under Article 8 ECHR as unnecessary and unjustified. However, the Court upheld, in principle, the general requirement for a diagnosis of "gender dysphoria" set out in a specialist medical report under sections 2(1)(a) and 3(1) of the GRA.⁹⁹

National sporting bodies

⁹² Bex Stinson, 'We need urgent reform of the GRA', Stonewall, 21 July 2017.

⁹³ European Commission, 'Legal gender recognition in the EU: the journeys of trans people towards full equality', June 2020.

⁹⁴ Oireachtas, Gender Recognition Act 2015.

⁹⁵ House of Commons Library, 'Gender Recognition Act reform: Consultation and outcome', 17 February 2022.

⁹⁶ Government Equalities Office, 'Press Release: Government responds to Gender Recognition Act consultation', 22 September 2020.

⁹⁷ Gender Recognition Reform (Scotland) Bill.

⁹⁸ Office of the Secretary of State for Scotland, 'Press Release: Gender Recognition Reform (Scotland) Bill: statement from Alister Jack', 16 January 2023.

⁹⁹ JR111 Application for Judicial Review [2021] NIQB 48.

- 3.19 National Governing Bodies (NGBs) are responsible for the regulation of participants in events in their sport and for providing fair and safe competition. They are also responsible for determining the competition framework for their sport including whether single sex and/or mixed-sex competitions are sanctioned.
- 3.20 NGBs are required to comply with the relevant domestic legal framework potentially also alongside an international, sporting regulatory framework for international competition. UK or all-Ireland wide NGBs that operate in NI, will have two different legal frameworks to ensure compliance with. While the text of Article 45(2) SDO and s.195 Equality Act 2010 are substantially the same; the statutory guidance for the latter confirms that it is not a medicalised process, as it is in NI.
- 3.21 NGBs in NI should treat a transgender person, who has been issued with a full Gender Recognition certificate, as belonging to the sex in which they present (as opposed to the biological sex they were assigned) unless this might give the transgender person an unfair advantage or would be a risk to the safety of competitors which might occur in some close contact sports.¹⁰⁰
- 3.22 NGBs in NI should not restrict the participation of a transgender person in competitive sport unless this is strictly necessary to uphold fair or safe competition, otherwise they may be in breach of the GRA in the case of those persons issued with a full GRC. It may also amount to unlawful gender reassignment discrimination in the case of a transgender person who intends to undergo, is undergoing or has undergone gender reassignment, as defined in the SDO (or Equality Act).
- 3.23 The Sports Councils' Equality Group (SCEG), made up of representatives from each of the UK's sports councils (UK Sport, Sport England, Sport Wales, sport Scotland and Sport NI) published its Guidance for Transgender Inclusion in Domestic Sport in 2021.¹⁰¹ In its guiding principles, the guidance recognises the commitment to the "inclusion of transgender people in sport and physical activity" but makes no reference to domestic or international human rights frameworks. However, it also distinguishes between male and female categories, taking account of whether the sport is gender-affected. It further promotes three categories: prioritising transgender inclusion; female and open categories; or universal admissions.¹⁰²
- 3.24 An Equality Impact Assessment (EQIA) accompanying the guidance acknowledged that persons can be negatively impacted by exclusion from sport, and the guidance confirms that individual sports are free to make their own decisions about transgender inclusion.¹⁰³ It states that it may have a

¹⁰⁰ Section 19, Gender Recognition Act 2004.

¹⁰¹ Sports Councils' Equality Group, 'Guidance for Transgender Inclusion in Domestic Sport', September 2021.

¹⁰² Sports Councils' Equality Group, 'Guidance for Transgender Inclusion in Domestic Sport', September 2021, at 12.

¹⁰³ Sports Councils' Equality Group, 'Equality impact assessment on Guidance for Transgender Inclusion in Domestic Sport', September 2021.

positive impact on transgender people as it could lead to “more opportunities to participate and compete in their sport”.¹⁰⁴ However, the EQIA also highlights the negative impact on transgender women, as the guidance may allow NGBs to exclude them from some competitions, as the Guidance states that inclusion cannot be balanced in gender-affected sport.¹⁰⁵

- 3.25 Some examples of recent changes by NGBs in relation to their policies on the participation of transgender athletes are set out below:
- 3.26 In April 2022, British Cycling suspended its new policy on Transgender and Non-binary participation due to the differences between its policy and eligibility rules of its international body, Union Cyclist Internationale (UCI).¹⁰⁶ A full review is taking place, which is due to complete in Spring 2023.¹⁰⁷ While this review is ongoing British Cycling will not process Race Licences for new transgender or non-binary participants.¹⁰⁸
- 3.27 In August 2022, the Irish Rugby Football Union (IRFU) updated its Gender Participation Policy which prevents transgender women from participating in the female category for contact rugby, limiting it to those whose sex was “recorded as female at birth”.¹⁰⁹ Transgender men must go through a risk assessment “to ensure the playing environment/level is appropriate and the potential risks are understood”.¹¹⁰
- 3.28 In August 2022, the World Boxing Council (WBC) issued guidelines in relations to the participation of transgender athletes in professional combat sports. The WBC advocates for equally skilled and matched competitors and highlights concerns about an unfair advantage of a transgender woman over cisgender woman, or a cisgender male over a transgender male. It has concluded that, at the present level of scientific knowledge, that “allowing transgender athletes to compete raises serious health and safety concerns”.¹¹¹ The WBC has created a committee to consider the possibility of having a transgender league.¹¹²
- 3.29 In February 2023, Scottish Rugby has updated its Gender Participation Policy, which limits participation to those whose sex was recorded as female at birth.¹¹³ This brings it into line with the other Rugby governing bodies in the UK and Ireland.¹¹⁴

¹⁰⁴ Sports Councils’ Equality Group, ‘Equality impact assessment on Guidance for Transgender Inclusion in Domestic Sport’, September 2021, at 4.

¹⁰⁵ Sports Councils’ Equality Group, ‘Equality impact assessment on Guidance for Transgender Inclusion in Domestic Sport’, September 2021 at 5,7.

¹⁰⁶ British Cycling, ‘British Cycling Statement: Transgender and Non-Binary Participation Policy’, 8 April 2022.

¹⁰⁷ British Cycling, ‘An Update on our Transgender and Non-Binary Participation Policy’, 17 November 2022.

¹⁰⁸ British Cycling, ‘British Cycling Transgender and Non-Binary Participation Policy Guidance’, 17 November 2022.

¹⁰⁹ Irish Rugby Football Union, ‘IRFU – Gender Participation Policy (2022-2023)’, 10 August 2022.

¹¹⁰ Ibid.

¹¹¹ World Boxing Council, ‘World Boxing Council Statement: Guidelines Regarding Transgender Athletes participation in professional Combat Sports’, 15 August 2022.

¹¹² M Sulaimán, ‘Round 12: A promising 2013’, 3 January 2023.

¹¹³ Scottish Rugby, ‘Gender Participation Policy’, February 2023.

¹¹⁴ Scottish Rugby, ‘Statement: Gender Participation Policy’, 25 January 2023.

Also, in February 2023, UK Athletics (UKA) issued a position statement on the issue of transgender inclusion, following its response to the World Athletics consultation on changes to its Transgender Regulations.¹¹⁵ UKA states that efforts should be made to “fairly and safely include transgender women in an ‘open category’”.¹¹⁶

4.0 Intersex persons and sex verification

- 4.1 The issue of the participation of intersex persons in sport is a separate debate that may well deserve an analysis of its own. It is, however, worth noting legal developments in this area, insofar as it is relevant to the consideration of transgender participation in sport.
- 4.2 The UN Office of the High Commissioner for Human Rights (UN OHCHR) has recognised that intersex people often share common concerns with transgender individuals “due to shared experiences of harm arising from dominant sex and gender norms”.¹¹⁷ However, the framework of sexual orientation and gender identity does not fully represent the human rights concerns in this area, illustrated by the inclusion of ‘sex characteristics’ in the updated Yogyakarta Principles plus 10.¹¹⁸ According to the UN OHCHR, current and historic policies have resulted in intersex people, that is those born with sex characteristics that do not fit with typical binary sex categorisation,¹¹⁹ experiencing human rights violations. Women who have, or are perceived to have, intersex traits are often subjected to stigmatisation, abuse and discrimination, and unprotected due to the absence of legislation protecting against discrimination.¹²⁰ Women athletes have been subjected to humiliation or indeed exclusion from participation in their sport due to their sex characteristics.¹²¹¹²²
- 4.3 Regarding the issues that intersex people face, the UN High Commissioner for Human Rights has stated:

All human beings are born equal in dignity and rights. Those foundational, bedrock principles of universality and equality mean that all of us, without exception, and regardless of our sex characteristics, are equally entitled to the protections of

¹¹⁵ UK Athletics, ‘Trans Position Statement2’, 3 February 2023. Available at: http://www.uka.org.uk/wp-content/uploads/2023/02/UKA-Trans-Position-Statement_FINAL-03.02.23.pdf.

¹¹⁶ Ibid, at para 6.

¹¹⁷ UN Office of the High Commissioner for Human Rights, ‘Background Note on Human Rights Violations against Intersex people’, at 5. Available at: <https://www.ohchr.org/sites/default/files/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>.

¹¹⁸ Ibid, at 6.

¹¹⁹ UN Office of the High Commissioner for Human Rights, ‘Free & Equal Campaign Fact Sheet: Intersex’ (OHCHR, 2015). Available at: <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>

¹²⁰ UN Office of the High Commissioner for Human Rights, ‘Background Note on Human Rights Violations against Intersex people’, at 30.

¹²¹ See also, A/HRC/32/33, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, 4 April 2016, at para 55-57.

¹²² A/HRC/29/23, UN High Commissioner for Human Rights, ‘Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity’, 4 May 2015, at para 42.

international human rights law. Unfortunately, the myth that all human beings belong to one of two distinct and separate sexes is deep-rooted, and it contributes to the stigma, and even taboo, attached to being intersex. This is linked to ... very serious human rights violations ... They include ... infanticides of intersex babies; and widespread and life-long discrimination, including in education, employment, health, sports [and] accessing public services.¹²³

- 4.4 Invasive procedures such as chromosomal or sex testing have frequently been conducted on athletes to avoid the apparent threat of 'sex fraud' (participating under an assumed gender to obtain a competitive advantage).¹²⁴ In the past, women athletes have undergone chromosomal testing, only to discover that they do not possess the two X chromosomes usual to females.¹²⁵
- 4.5 Some international and national sporting federations have introduced policies banning women with testosterone levels exceeding a certain threshold from participating in competitive sport.¹²⁶ However, it has also been argued that there is insufficient clinical evidence¹²⁷ to establish that those women are afforded a "substantial performance advantage" warranting exclusion.¹²⁸ It has been reported that these policies have led to women athletes being discriminated against and forced or coerced into "treatment" for hyperandrogenism. Some athletes have undergone gonadectomy and partial clitoridectomy without health issues that would warrant those procedures.¹²⁹
- 4.6 The UN HRC has adopted a resolution on the rights of intersex persons that "expresses concerns about existing discriminatory regulations, rules and practices that require some women and girl athletes to medically reduce their blood testosterone levels by undergoing unnecessary, humiliating and harmful medical procedures or hormone therapy in order to participate in women's events in competitive sports".¹³⁰ The resolution also requested OHCHR to prepare a report on the intersections between race and gender discrimination in sports.¹³¹ It recognises the multiple and intersecting forms

¹²³ Opening remarks by Zeid Ra'ad Al Hussein, High Commissioner for Human Rights High Commissioner for Human Rights at the Expert meeting on ending human rights violations against intersex persons, 16 September 2015, Geneva, Available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E.

¹²⁴ Human Rights Watch, "'They're Chasing Us Away from Sport' - Human Rights Violations in Sex Testing of Elite Women Athletes Report", 4 December 2020.

¹²⁵ A. de la Chapelle, 'The use and misuse of sex chromatin screening for "gender verification" of female athletes', JAMA. 1986, 256.

¹²⁶ International Association of Athletics Federations, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)', Version 1.1, 23 April 2018.

¹²⁷ Stéphane Bermon, Pierre Yves Garnier, Angelica Lindén Hirschberg, Neil Robinson, Sylvain Giraud, Raul Nicoli, Norbert Baume, Martial Saugy, Patrick Fénichel, Stephen J. Bruce, Serum Androgen Levels in Elite Female Athletes, The Journal of Clinical Endocrinology & Metabolism, Volume 99, Issue 11, 1 November 2014, Pages 4328–4335.

¹²⁸ Inside the Games, 'Human Rights Watch join calls for IAAF to scrap new female classification rule', 26 July 2018.

¹²⁹ Intersex Human Rights Australia, 'Women athletes forced to undergo clitorectomies to compete', 28 April 2014. Available at: <https://oii.org.au/25610/women-athletes-forced-clitorectomies/>.

¹³⁰ A/HRC/RES/40/5, 'UN Human Rights Council, Session 40, Resolution 40/5: Elimination of discrimination against women and girls in sport', 4 April 2019.

¹³¹ A/HRC/44/26, 'UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Intersection of race and gender discrimination in sport', 15 June 2020.

of discrimination that women and girls face in sports settings, because of their race and sex, and the right to bodily integrity and autonomy.¹³²

- 4.7 In April 2016, the UN Special Rapporteur on health, Dainius Pūras, criticised current and historic sex verification policies, recommending that:

Sporting organisations must implement policies in accordance with human rights norms and refrain from introducing policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible, and harmful medical procedures in order to participate as women in competitive sport. States should also adopt legislation incorporating international human rights standards to protect the rights of intersex persons at all levels of sport, given that they frequently report bullying and discriminatory behaviour, and should take steps to protect the health rights of intersex women in their jurisdiction from interference by third parties.¹³³

- 4.8 The Yogyakarta Principles plus 10 also recognise the right of everyone, including children, to bodily and mental integrity, autonomy and self-determination.¹³⁴ This requires States to ensure that legislation protects against forced or coercive modifications to sex characteristics¹³⁵ In respect of children, that modifications are consented to by the child in a manner consistent with their evolving capacity and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.¹³⁶
- 4.9 Sport's institutional structure is such that all Olympic-eligible sports must at least abide by IOC policy.¹³⁷ In this case, athletes wishing to compete in the Olympics may only do so in either the male or female categories. This eligibility criteria may then filter down into grassroots sports.
- 4.10 In 2015, the Court of Arbitration for Sport (CAS) issued a landmark decision concerning intersex female runner Dutee Chand. The decision was the first of its kind and marked an important stage in the development of law related to intersex rights. Chand won two gold medals at Asian Junior Athletics Championships in 200 metres and 4 × 400 metre relays. In the 200m event she bettered her previous timing to 23.74 seconds hoping to qualify for the Commonwealth Games, but Chand was dropped from the 2014 Commonwealth Games contingent after the Athletic Federation of India stated that hyperandrogenism made her ineligible to compete as a female

¹³² A/HRC/40/L.10/Rev.1, 'UN Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', March 2019.

¹³³ A/HRC/32/33, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', 4 April 2016, at para 57.

¹³⁴ The Yogyakarta Principles plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles, 10 November 2017, Principle 32.

¹³⁵ Ibid, Principle 32B.

¹³⁶ Ibid, Principle 32D.

¹³⁷ International Olympic Committee, 'Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations', 16 November 2021.

athlete.¹³⁸ Following the Commonwealth Games, she was also dropped from the Indian contingent for the 2014 Asian Games. There was no suggestion that Chand was involved in cheating or doping, and the decision was widely criticised by intersex advocates.

- 4.11 Chand appealed to CAS. Following the decision in her favour¹³⁹, the International Association of Athletics Federations (IAAF) policy on hyperandrogenism was suspended. The ruling found that there was a lack of evidence that testosterone increased female athletic performance and notified the IAAF that it had two years to provide the evidence. This effectively removed the suspension of Chand from competition, clearing her to race again.
- 4.12 In 2019, the UN HRC passed a South African-led resolution on eliminating discrimination against women and girls in sport that criticised the IAAF. It called on all countries to ensure sports organisations “refrain from developing and enforcing policies and practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women’s events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy”.¹⁴⁰
- 4.13 Another high-profile case is that of Caster Semenya. Semenya is a South African middle-distance runner and winner of two Olympic gold medals and three world championships. In June 2018, Semenya announced that she would legally challenge the IAAF rules. She claimed that such hormonal medication, which she had taken from 2010 to 2015, had made her feel constantly sick and caused her abdominal pain.¹⁴¹ Semenya filed a request for arbitration before CAS against regulations made by the IAAF in 2018,¹⁴² which required her to undergo hormonal treatment in order to compete in the Women’s category.
- 4.14 The CAS rejected her challenge¹⁴³ and Semenya subsequently filed a civil action with the Swiss Federal Court arguing discrimination on the grounds of sex and sex characteristics against female athletes. The Swiss Federal Court rejected Semenya’s appeal against the decision of the CAS and thereby upheld the legality of the so-called ‘testosterone rules’.¹⁴⁴

¹³⁸ Matt Slater, ‘Sport & gender: A history of bad science & ‘biological racism’, *BBC Sport*, 28 July 2015.

¹³⁹ CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF).

¹⁴⁰ A/HRC/40/L.10/Rev.1, ‘Resolution 40/5 The Elimination of Discrimination Against Women and Girls in Sport’, 20 March 2019.

¹⁴¹ Sean Ingle, ‘Caster Semenya accuses IAAF of using her as a “guinea pig experiment”’, *The Guardian*, 18 June 2019.

¹⁴² International Association of Athletics Federations, ‘Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)’, Version 1.1, 23 April 2018.

¹⁴³ CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations & CAS 2018/O/5798 Athletics South Africa v. International Association of Athletics Federations.

¹⁴⁴ Tribunal Federal Judgment of 25 August 2020 (4A_248/2019, 4A_398/2019)

- 4.15 Semenya has now made an application to the ECtHR, arguing that Switzerland has failed in its obligations to protect her against the violation of her rights under Articles 3, 6, 8, 13, and 14 ECHR.¹⁴⁵
- 4.16 The ECtHR is being invited to determine that States have a positive obligation under Article 8 ECHR to ensure the effective protection of the bodily integrity of female professional athletes with a variation of sex characteristics. Should the ECtHR do so, it could have an effect on the justiciability in public law of rules on sporting participation made by private sporting bodies. The ECtHR has previously held that, “while the essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities, it may also impose on the State certain positive obligations to ensure effective respect for the rights protected by Article 8”¹⁴⁶ even in the horizontal relation between two private parties.¹⁴⁷
- 4.17 A decision by the ECtHR is awaited but it could be illustrative in the development of the human rights jurisprudence on the issue of participation in sport for transgender persons.
- 4.18 In parallel to issues around transgender participation, blanket approaches to this complicated issue may struggle to be considered reasonable and proportionate and may continue to face legal challenge. Intersex persons also highlight the particular the problem of only using birth sex as the basis for gender determination and exclusion, particularly as the process for legal gender recognition and transition in the UK may not proceed until post-puberty.¹⁴⁸

5.0 Conclusions

- 5.1 Having regard to the human rights and equality standards at international, regional and domestic level, it is evident that the right to participate in sport on an equal basis and without discrimination is protected. Any restrictions upon participation must be compatible with human rights safeguards.
- 5.2 The Yogyakarta Principles recommend that “all individuals can participate in sport in line with the gender with which they identify, subject only to reasonable, proportionate and non-arbitrary requirements” and “without discrimination on the grounds of sexual orientation, gender identity, gender expression or sex characteristics”.¹⁴⁹ The Principles therefore begin from the position of participation and inclusion for transgender persons and that any restrictions that are put in place should be necessary, reasonable, proportionate and non-arbitrary.

¹⁴⁵ Semenya v. Switzerland, Application no. 10934/21.

¹⁴⁶ Bărbulescu v. Romania, Application. no. 61496/08, 5 September 2017, at para 108.

¹⁴⁷ Evans v. the United Kingdom, Application no. 6339/05, 10 April 2007, at para 75.

¹⁴⁸ Section 1(1), Gender Recognition Act 2004.

¹⁴⁹ The Yogyakarta Principles plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles, 10 November 2017, at 17.

- 5.3 At a regional level, jurisprudence from the ECtHR has established that Article 6 ECHR applies to what may have previously been considered private sporting arbitration proceedings¹⁵⁰ and confirmed that the specificities of sports arbitration do not justify depriving athletes of their fair trial guarantees.¹⁵¹
- 5.4 The ECtHR has also established that Article 8 ECHR rights are to be interpreted broadly and expressly did not rule out the possibility that training centres and venues for sports events and competitions may be treated as equivalent to “home” within the meaning of Article 8.¹⁵²
- 5.5 Regarding the protections of Article 14 ECHR, against non-discrimination without objective and reasonable justification, the ECtHR has found that while protecting fairness in sports may be considered a legitimate general interest and will determine whether a fair balance was struck between the competing interests of individuals and the community.¹⁵³ Therefore, disproportionate and arbitrary measures that deprive persons of participation in sports without reasonable justification may be in breach of the ECHR. Also, if an attempted restriction on rights applies to a particularly vulnerable group in society who have suffered a history of systemic discrimination, such as transgender persons, it may also make it harder to justify any discrimination or exclusion.¹⁵⁴
- 5.6 The domestic equality legal framework in NI also provides a right of protection for transgender persons from discrimination on the grounds of gender reassignment.¹⁵⁵ The law does not currently protect against discrimination on the grounds of ‘gender identity’ or ‘sex characteristics’. In respect of sport, the law provides an exemption which permits the exclusion of transgender women from a single sex competitive sport only where necessary to secure fair competition, or the safety of competitors.¹⁵⁶
- 5.7 Policies produced by sporting organisations should reflect international human rights standards and should not arbitrarily exclude transgender persons from participation. Safeguards to protect athlete’s rights should also protect against requirements for irrelevant clinical data or unnecessary medical procedures as a precondition to full participation. Organisations should also take practical steps to create welcoming spaces for participation in sport and physical activity for transgender persons, including the installation of appropriate changing rooms, education and sensitisation of sporting communities, and the enforcement of anti-discrimination laws in the sporting context.

¹⁵⁰ *Mutu and Pechstein v. Switzerland*, Applications nos. 40575/10 and 67474/10, 40575/10, 2 October 2018, at paras 114-115.

¹⁵¹ *Ali Riza and others v. Turkey*, Application nos. 30226/10 and 4 others, 20 January 2020, at para 180.

¹⁵² *National Federation of Sportspersons’ Associations and Unions (FNASS) and others v. France*, Application nos. 48151/11 and 77769/13, 18 January 2018, at para 158.

¹⁵³ *Bărbulescu v. Romania* [GC], Application no. 61496/08, 5 September 2017 at para 112.

¹⁵⁴ *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010, at para 42.

¹⁵⁵ *Sex Discrimination (Northern Ireland) Order 1976*.

¹⁵⁶ *Article 45(2), Sex Discrimination (Northern Ireland) Order 1976*.

- 5.8 With regard to intersex athletes and sports participants, it is clear that the direction of travel in human rights law and jurisprudence is moving away from policies and practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women's events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy.¹⁵⁷

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¹⁵⁷ A/HRC/40/L.10/Rev.1, 'Resolution 40/5 The Elimination of Discrimination Against Women and Girls in Sport', 20 March 2019.