

Female Sports Participation, Gender Identity and the British 2010 Equality Act.

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Abstract

The inclusion of girls and women in sport at all levels depends on single sex categories for most sports from puberty onwards, because of the biological differences between the sexes. Most sport is, by definition, competitive; involving invasion games, teams, leagues, races, competitions and sometimes rankings, from foundation to excellence. Girls and women are underrepresented, particularly in traditional sport, as recognised by the UK Sports Councils and most governing bodies of sport.

This paper uses feminist philosophy: Lister on androcentric citizenship, and Fraser on justice as balance, framing, recognition, representation and redistribution. It investigates the impact on the inclusion of girls and women, of eligibility policies adopting ‘self-identification of gender’ guidelines for the inclusion of transgender people in sport, at participation rather than elite levels.

It explores fairness and equality as incorporated in law in the 2010 Equality Act in Britain, and contributes to ‘equality evidence’ available to the UK Sports Councils and GBS. These bodies are charged with developing fair and inclusive evidence-based eligibility criteria, in sports participation settings, for both girls and women, and transgender people.

Introduction

Academic work attempting to reconcile fair and safe inclusion of both female and transgender participants in sport ranges between two distinct theoretical positions, underlying ontological assumptions and conceptual architecture. The biological sciences, quantitative social sciences, and materialist feminism overwhelmingly regard human sexual dimorphism as settled scientific reality, with associated performance-related consequences for females and males in sport (Bermon et al 2019; Burt, 2020; Devine, 2021; Harper et al 2021; Handelsman Hirschberg and Bermon 2018; Hilton and Lundberg 2021; Knox Anderson and Heather 2019; Lowrey, 2021; Murray and Blackburn, 2019; Stock, 2021; Suissa and Sullivan, 2021; Thibault et al, 2010). In contrast, the humanities and qualitative social sciences drawing heavily on postmodern and queer theory, often favour gender identity theory. This conceptualises individual innate gender identities and either rejects human sexual dimorphism, or overwrites it with individual gender identity as the more important sociocultural-political demographic in relation to justice and equality, even in sport (Anderson and Travers, 2017; Canadian Centre for Ethics in Sport, n.d.; Jones et al, 2017; Teetzel, 2014).

This paper adopts a materialist feminist position maintaining both females and transgender people face discrimination, females on the basis of biological sex, and transgender people on the basis of transsexual or transgender status. Justice for both demographic categories necessitates an empathy with the differing oppressions, discriminations and exclusions they experience in heteronormative androcentric societies, and an even-handed exploration of the fairest and safest way to include both in sport. This is congruent with British equality legislation enshrined in the 2010 Equality Act (hereafter EA) (HM Government, 2010), in which females are protected from discrimination on the basis of ‘sex’, and transgender people on the basis of ‘gender reassignment’. The Act includes a dedicated sport section recognising

the biological differences between the two sexes. Notwithstanding the EA, well-intentioned efforts of governing bodies of sport (GBS) to recognise and include transgender people are often on the basis of ‘gender identity’, rather than sex, at participation levels (LTA, 2019). However, Murray and Blackburn (2019, 262) argue policy development privileging gender identity may result in ‘losing sight of women’s rights’.

This applied paper explores the impact of gender identity eligibility criteria on fair and safe inclusion of females in sports participation in Britain. It outlines fairness and equality as incorporated in law in the 2010 EA, and contributes to ‘equality evidence’ available to Sports Councils and GBS charged with developing fair and inclusive evidence-based eligibility criteria, in sports participation settings for female and transgender people.

Theoretical framework

Feminist political philosophers have long argued that political space is dominated by the male citizen and his interests, and that females are excluded from decision making in political and policy arenas affecting their interests (Fraser 2008; Lister 2003). Fraser’s justice requires the interrogation of the normalised meta-political framing of political and policy space, and associated inextricably linked framing of recognition, representation and redistribution, in order to balance fairly, and impartially, differing and contested inclusion claims. Her ‘all affected’ principle states, ‘all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it’ (2008, 24). Fraser argues the three necessary components of justice are increasingly disaggregated with, in neoliberal capitalist societies, individual identity recognition prioritised at the expense of collective political representation and economic redistribution. This engenders co-opted, depoliticised, marginalised feminism, more easily accommodated by political systems which, and policy actors whom, remain largely androcentric.

Lister argues androcentric citizenship includes females (at best), as subjects not agents, of political and policy decisions. They may have status as community members, but not ‘practice’ or ‘voice’ as political participants and decision makers. She explains that ‘behind the cloak of gender-neutrality ... there lurks in much of the literature a definitely male citizen, and it is his interests and concerns that have traditionally dictated the agenda’ (2003, 4). Lister’s citizenship reconciles civic republicanism and liberal rights, creating a plural citizenship of ‘*differentiated* universalism’ (authors italics) given that ‘to the extent that (a) universalist principle in fact embodies masculine particularist interests, women will remain excluded or will be included only on male terms’ (199).

In the interests of justice then, government agencies should ensure democratic framing at meta-political levels so ‘all affected’ are included in consultations, commissioning, policy development and implementation. This would avoid the meta-political mis-framing of ‘subjects of justice’ and ensuing gerrymandering of political space excluding females.

Framing may sometimes appear representative, via inclusion of individual female actors and top down technical ‘consultation’ with organisations partially devolved from government but heavily funded by them. However, Devine (2016, 1208) argues that in sport policy ‘formal sport citizenship rights and Lister’s ‘status’ are accorded to all and presented as gender neutral, but often do not recognise, or recognise but ignore, the sexual division of play and the voice of women and girls.’ Further, upholding equality is frequently out-sourced to arm’s length government agencies and civil society in Britain. This can engender asymmetrical policy development which contravenes Fraser’s ‘all-affected’ principle. Accordingly, the 2013 UK Transgender Guidelines for GBS, Domestic and International sport were developed by an external Consultant in discussion with *five* transgender advocacy groups, but *none* representing female interests (Sports Council Equality Group, 2013a, 2013b, 2013c).¹ To avoid consultation *by* the androcentric state and establishment, *of* the androcentric state and

establishment, the recognition and representation of females should involve empirical evidence and meaningful bottom-up consultation with female participants, as well as representation of grass roots female groups, in policy arenas which affect their interests.

Sex, Gender and Gender Identity: Ontological confusions conflation and irreconcilable differences

Biological science and materialist feminism

Biological scientists and materialist feminists overwhelmingly understand human sexual dimorphism, that is, ‘anatomical divergence beyond the reproductive system, leading to adult body types that are measurably different between sexes’ (Hilton and Lundberg, 2021 201), as well-established unremarkable scientific reality. The Endocrine Society elucidates, ‘sex is dichotomous’ and ‘females have ovaries and make larger female gametes (eggs), whereas males have testes and make smaller male gametes (sperm)’ (Bhargava et al, 2021 2-3). This equips females with the foundational biological capacities of gestation, pregnancy and childbirth essential to species survival. Accordingly, the Sex and Gender Equity in Research (SAGER) guidelines explain, ‘sex refers to a set of biological attributes in humans and animals’ and ‘sex is usually categorized as female or male’ (Heidari et al., 2016 1). Binary sex in humans is immutable, unproblematically classified as either female or male in 99.98% of people, with phenotypic variation within each sex category (Bhargava et al, 2021; Lee et al, 2016; García-Acero et al, 2020; Sax 2002). Consequently, the UK’s Office for National Statistics (ONS) (2019a) and World Health Organisation (2020) define sex as the biological state of being female or male.

People with disorders/differences/variations of sexual development (DSDs/VSDs) are sometimes termed ‘intersex’. These conditions do not negate but rather support the sex binary, given they are disorders/differences of either female or male sexual development,

rather than additional sexes or somehow not fully female or male people (Bhargava et al, 2021 3). Most DSDs are sex specific and most people with DSDs, despite atypical sex development, are unproblematically classified as female or male. The diagnosis and sex classification of the remaining 0.02% continues to improve, with prenatal diagnosis far more frequent, particularly in rich countries. Indeed, in many cases this is essential for medical reasons (Lee et al, 2016). Transgender and DSD populations have minimal overlap and the vast majority of transgender people undergo typical sex development as female or male, with no DSD (Carmichael et al 2021; García-Acero et al, 2020; Kreukels et al, 2018).

‘Gender’ is a contested concept with at least three, irreconcilable, underlying ontological assumptions. For biological essentialists, females are biologically determined as feminine and males as masculine with contingent social roles. Consequently ‘sex’ and ‘gender’ are interchangeable or collapsed, since gender is tethered to sex and a feminine male or masculine female, is ontologically incoherent.

Conversely, the social sciences, psychology and materialist feminism, have long rejected a biologically essentialised understanding of gender, instead conceptualising it as historically and socioculturally constructed femininity and masculinity, as distinct from immutable biological sex (Burt, 2020; Devine, 2021; Haines Deaux and Lofaro 2016; Fine, 2017; Suissa and Sullivan 2021). This distinction is widespread. The Endocrine Society explains ‘sex and gender should not be used interchangeably’ (Bhargava et al, 2021 2) and the SAGER Guidelines (Heidari et al., 2016 1) that ‘gender refers to the socially constructed roles, behaviours and identities of female, male and gender-diverse people’ recommending ‘careful use of the words sex and gender in order to avoid confusing both terms’ (4).

For materialist feminists, gender is the hierarchical mechanism by which androcentric patriarchal societies construct males as masculine/superior/rational, and females as

feminine/subordinate/emotional, thereby damaging the personhood and flourishing of both sexes. Consequently, gender stereotypes, but not human sexual dimorphism, are rejected. This does not negate a material embodied understanding of gender (Channon and Jennings, 2014; Torres et al, 2020; Young, 1980) as part of ‘becoming’ and written-in-the-body, since arguing otherwise reprises substance dualism. Rather, this inscription is engendered by being-female-in-the-androcentric-world and becoming-woman-in-the-androcentric-world, given that bodies are dynamic systems existing within sociocultural-political contexts (Fine, 2017). Accordingly, Young’s ‘throwing-like-a-girl’ (1980) captures both the innate morphology, anatomy, physiology and biomechanics of females (Hilton and Lundberg, 2021), *and also at the same time*, the sociocultural-historical embodiment of gender. This occurs by way of the *interaction* of this underlying biology with being-female-in-the-androcentric-world and becoming-woman-in-the-androcentric-world. For example, gendered sociocultural-historical pressures in sports emphasizing excessive leanness, linked to the ‘female athlete triad’ (disordered eating, amenorrhea and osteoporosis), and relatively common in dancers gymnasts and runners, is embodied by way of anatomy (bone mineral density deficits), physiology (up-regulation of cortisol, down-regulation of oestrogen, menstrual dysfunction) and biomechanics (fracture from minimal trauma) (American College of Sports Medicine, 2007). Gender is written-in-the-body *and also at the same time* this is a female body not a blank slate, with sex-differentiated morphology as a consequence of reproductive biology. Understanding the phenomenon of throwing-like-a-girl, or indeed throwing-like-a-woman, necessitates the recognition that males have ‘longer arms than females, which allows greater torque production from the arm lever when, for example, throwing a ball, punching or pushing’, (Hilton and Lundberg, 2021 203) ‘disproportionately greater strength in their upper compared to lower body’ and multiple anatomical and biomechanical throwing-related male advantages (Lombardo and Deaner, 2018). Accordingly, the material embodied throwing-

like-a-girl/woman, is engendered by the sub-ordinate status of females within androcentric societies and can be de- and re-constructed over time and place. At the same time, throwing-like-a-girl/woman is inextricably related to female morphology as a consequence of reproductive biology. In a just world, throwing-like-a-girl/woman would be equally recognised valued and celebrated rather than denigrated as secondary, inferior, or even disappeared within the normalised hegemonic, androcentric, throwing-like-a-man of sport. Female morphology, reproductive biology and performance-related consequences in sport would be afforded equal recognition, so that the personhood of females, with distinctly female bodies, *albeit and at the same time* incorporating increasingly residual embodied gendered social scripts, are ‘seen’.

Gender identity theory: gender and sex

More recently, gender identity theory emanates from postmodern and queer theory. It conceptualises unverifiable, innate, non-binary gender identities, unrelated to biological sex and understood as a spectrum rather than binary, but often identified by way of feminine or masculine gender stereotypes. In contrast with materialist feminism, these stereotypes are uncoupled from biological sex (Anderson and Travers, 2017; Burt, 2020; Canadian Centre for Ethics in Sport, n.d.; Devine, 2021; Lowrey, 2021; Stonewall; Suissa and Sullivan, 2021). Accordingly, the American Psychiatric Association (APA) diagnostic criteria for gender dysphoria in children rely on stereotypical feminine or masculine clothing, toys, games, activities and gender roles (APA, 2013 452). Consequently, gender identity theory reverses/collapses sex and gender, deconstructing not *feminine* and *masculine* but *female* and *male*. Gender identity becomes essentialised and innate, just as sex is socially constructed and considered coercively ‘assigned at birth’, and gender identities overwrite biological sex as *the* socioculturally-politically salient demographic. ‘Cisgender’ people are conceptualised as

having a gender identity which aligns with sex, and considered privileged in comparison with transgender people, whose gender identity does not. Gender identity theory posits sex as a spectrum, and so for transgender people a binary sex has been incorrectly or coercively ‘assigned at birth’. This creates a cisgender/transgender hierarchy in which ‘cisgender’ people are dominant and oppress sub-ordinate transgender people by way of their ‘cis-privilege’. Nonetheless, some advocates of this view still assert the idea that sex is a spectrum.

For critics, gender identity theory encompasses a number of conceptually problematic, empirically under-researched and un-verified, deconstructions, connotations, negations and reversals (Burt, 2020; Devine, 2021; Lowrey, 2021; Stock; Suissa and Sullivan, 2021). These include first, conflation of biological sex with sociocultural-historical gender. Second, the conflation and re-inscription of feminine with female and masculine with male for ‘cisgender’ people. In this it echoes biological essentialists. Third, the negation of the conception of an oppressive socioculturally constructed structural/relational *sex hierarchy*, and its replacement with the conception of liberating unverifiable individual internal gender identities. This underpins the negation of the conception of an oppressive socioculturally constructed masculine (dominant)/feminine (subordinate) *gender hierarchy* and its replacement with the conception of an oppressive cis (dominant)/trans (subordinate) *gender identity hierarchy*. In this way, gender identity theory collapses or reverses sex and gender, or even negates dimorphic sex entirely. Out with dimorphic sex goes the standard feminist structural/relational political analysis of female oppression as based on reproductive biology, produced and maintained via hierarchical gender stereotypes. In a final conceptual reversal and reconstruction, females can be positioned as dominant and may oppress transgender males by virtue of ‘cis-privilege’.

This theoretical architecture leans heavily on the conflation of transgender people, most of whom undergo typical sex development, with people with DSDs most of whom are not transgender and unproblematically categorised as female and male. This facilitates the deconstruction of human sexual dimorphism and reconstruction of sex-as-a-spectrum. Conversely, DSD support organisations emphasize the difference between DSDs and transgender identity. In 2008 the Intersex Society of North America explained,

‘these two groups should not be and cannot be thought of as one. The truth is that the vast majority of people with intersex conditions identify as male or female rather than transgender or transsexual. Thus, where all people who identify as transgender or transsexual experience problems with their gender identity, only a small portion of intersex people experience these problems’.

Similarly, dsdfamilies (n.d.) elucidates,

‘DSD refers to a physical situation that begins before birth in which the reproductive/genital system does not develop as expected for a typical boy or girl. Transgender describes the situation when someone identifies themselves as (feels that they are) a gender not suggested by their bodily sex. Very rarely, children or young adults with a DSD may feel that they are not the sex they have been told they are’.

This understanding, led the ONS to abandon its 2019 Census guidance for people with DSDs which conflated ‘intersex’ with gender identity, because ‘we are asking the person to provide their sex attributes in a gender question and, as such, are conflating concepts’ (ONS, 2021).

Gender identity theorists of sport then, deconstruct not gender, but sex. Gender becomes essentialised and innate and, by conflating people with DSDs and transgender people, sex is conceptualised as socially constructed along a spectrum or disappeared altogether.

Accordingly, Anderson and Travers (2017 2-5) claim, notwithstanding the overwhelming

evidence from the biological sciences, that ‘queer/feminist science studies have revealed that sex is not naturally restricted to only two categories’, refer to ‘dualistic thinking about sex’ and pejoratively regard sport ‘a largely unexamined bastion of sex segregation in Western cultures’. In doing so, they conflate oppressive sociocultural-historical discrimination excluding females from sport (based on gender stereotypes) (Fine, 2017), with material morphological sex differences which arise as a consequence of reproductive biology (based on biological sex). Sometimes, they even conflate single sex sport (based on biological reality) with racial segregation (based on ‘scientific’ racism) (Anderson and Travers, 2017). This scaffolds the deconstruction of performance-related category differentials between the sexes, and in its place, the reconstruction of individual performance differentials along a single mixed sex performance spectrum. It can then be argued that ‘athletics should be gender neutral, a human activity and not a pumped-up, artificial rendition of men’s strength and woman’s weakness’ (McDonagh and Pappano, 2009, 3). Single sex categories are reframed as ‘coercive sex segregation’ (McDonagh and Pappano, 6) oppressive and patriarchal, rather than essential for justice as fair and safe female inclusion, and replaced with ‘gender-neutral’ (mixed sex) sport categories. Finally, gender identity theorists of sport often cite historically/contemporary exploitative and oppressive sex testing of DSD athletes when arguing for inclusion of transwomen in female categories. (Anderson and Travers, 2017; McDonagh and Pappano, 2008). However, transgender athletes are not subject to eligibility criteria for DSD athletes, but instead comply with transgender inclusion criteria, permitting substances otherwise prohibited, via therapeutic use exemptions (WADA, 2017).

Further, the conceptual term ‘cisgender’ is ontologically problematic for materialist feminists and others who self-recognise as female (and male) based on sex, rather than feminine (or masculine) perceived as oppressive gender stereotypes. The struggle for justice for females has involved deconstructing historically contextualised sociocultural and hierarchical gender

stereotypes associated with biological sex, with the ultimate aim of eliminating gender stereotypes altogether. To the extent that ‘cisgender’ for females means identification with feminine, it is understandable many find this concept itself oppressive, coercively assigning them an essentialised hierarchical gender stereotype (Burt, 2020; Devine, 2021; Lowrey, 2021; Stock, 2021; Suissa and Sullivan, 2021). Accordingly, the 2021 Census for England and Wales recognised gender identity may not be meaningful for the wider population, and framed the new and broadly welcomed gender identity question as voluntary (in contrast with the mandatory binary sex question) (ONS, 2019b).

For gender identity theorists, instead of recognising and celebrating female morphology and the associated anatomical, physiological and biomechanical realities of throwing-like-a-girl/woman, running-like-a-girl/woman and so on, *whilst at the same time* recognising the importance for sociocultural-political justice and equality for females (and males) of deconstructing embodied sociocultural-political constructions of feminine (and masculine), the only way for females to achieve equal recognition as persons and escape the pejorative throwing-like-a-girl, is to ‘compete up’. That is, to compete within supposedly liberating gender neutral (mixed sex) normalised, androcentric competition categories, which celebrate hegemonic masculinity in patriarchal societies. McDonagh and Pappano even argue, ‘the assumption that females cannot play with males is flawed because it assumes that females are a disabled class’ (2008 p.147). Critics of gender identity theory regard this as a sex-blind regressive version of ‘justice as equal treatment’ in an androcentric world, rather than equal recognition. This re-naturalises the universal ideal sportsman, denying or misrecognising female morphology and reproductive biology, and in a final reversal, disappearing females instead of dismantling patriarchy. This may benefit a vanishingly small number of females within sports lacking depth and breadth in female categories, but at the same time achieve the

collective demotion or disappearance of females as a sex, all the way down a gender-neutral (mixed-sex) performance hierarchy in most contemporary sport forms.

Gender identity theory then, appears ontologically irreconcilable with the over-arching consensus of the biological and social sciences, and therefore with materialist feminism. However, adherents to a range of disciplines and theoretical perspectives will surely agree that both females and transgender people should be fairly and safely included in sports participation.

Fairness and Inclusion

Sex sport and performance

Hilton and Lundberg (2021) explain that testosterone-driven male puberty ‘underpins sporting advantages that are so large no female could reasonably hope to succeed without sex segregation in most sporting competitions’. Thibault et al, (2010) clarify, ‘A stabilization of the gender gap in world records is observed after 1983’, world records for the sexes now progress in parallel and conclude ‘the gap may be set’. World Athletics ‘Toplist’ data for 2019 (Table 1) show Fraser-Pryce was the fastest female over 100m, 2160 males ran faster (IAAF, n.d.) and indeed 10 000 males have faster personal bests (Hilton and Lundberg 2021). Sex-related differentials track through all elite athletics events. Therefore, biological scientists and materialist feminists recognise that without females categories female athletes would disappear from most elite sport.

Table 1: IAAF Rankings 2019

Event	Rank 1 Female	Athlete	Country	Rank 1 Male	Name	Country	Nos. males faster than Rank 1 female

100m	10.71	Shelly-Ann Fraser-Pryce	Jamaica	9.76	Christian Coleman	USA	>2160 =99
200m	21.74	Shaunae Miller-Uibo	Bahamas	19.50	Noah Lyles	USA	>2618 =52
400m	48.14	Salwa Eid Naser	Brunei	43.45	Michael Norman	USA	>1835 =19
800m	1.54.98	Caster Semenya*	South Africa	1.41.89	Nijel Amos	Botswana	>4015 =13
1500	3.51.95	Sifan Hassan	Netherlands (born Ethiopia)	3.28.77	Timothy Cheruiyot	Kenya	>1893 =1
5k	14.44	Sifan Hassan	Netherlands (born Ethiopia)	13.22	Robert Keter	Kenya	>251 =5
10 000m	30.17.62	Sifan Hassan	Netherlands (born Ethiopia)	26.48.36	Joshua Cheptegei	Uganda	>1384
10k	29.57	Sheila Chepkirui Kiprotich	Kenya	26:38	Joshua Cheptegei	Uganda	>864 =18
Half Marathon	1.05.28	Brigid Kosgei	Kenya	58:01	Geoffrey Kamworor	Kenya	>1126 =12
Marathon	2.14.04	Brigid Kosgei	Kenya	2:01:41	Kenenisa Bekele	Ethiopia	>586 =2

*Semenya is an athlete with a DSD who is no longer eligible for the female 800m category under revised IAAF eligibility criteria unless she reduces plasma testosterone to <5 nmols/l.

Male-advantage ranges from 8-12% in running events (Handelsman et al, 2018) to 50% in some strength and power sports (Hilton and Lundberg, 2021), and females have ‘31% lower LBM (lean body mass), 36% lower hand-grip strength and 35% lower knee extension strength’ than males (Harper et al, 2021). When reviewing the legacy effects of male puberty following hormonal and/or surgical transition, Hilton and Lundberg conclude ‘the muscular

advantage enjoyed by transgender women is only minimally reduced when testosterone is suppressed' (2021, 199). Harper (a transwoman) et al agree that 'These findings suggest that strength may be well preserved in transwomen during the first 3 years of hormone therapy' (2021, 1).

Alignment or tension

Most work assumes the importance of fairness or at least 'tolerable unfairness' (a supposed 'balancing' of inclusion and fairness) at elite levels (Devine, 2019; Gooren and Bunck 2004; Knox Anderson and Heather 2019), and that inclusion of transgender athletes must involve male advantage elimination or mitigation. Consequently, self-identification involving no medical modification, is widely considered neither fair nor inclusive of females in elite sport, except by a minority of academics and sports bodies. This includes the Canadian Centre for Ethics in Sport (CCES) whose guidance is written by sports administrators and one medic, with no apparent input from biologists, physiologists or ethicists (n.d.). However, there is little work on the impact of self-identification on female categories at participation levels, and why fairness and safety at non-elite levels might be considered less important for female inclusion.

Justice and fairness as either merit or equality, are the defining principles of political philosophy. Some scholars prioritise *fairness* (Howe 2020; Sailors 2020), however the 'thinner' concept, *inclusion* (Pike, 2020), is sometimes conceptualised as in tension with fairness, but usually addressed unilaterally as transgender rather than female inclusion (Gleaves and Lehrbach 2016). Historically inclusion aimed to 'move up' those lower down a given performance hierarchy, such as including children with special educational needs in mainstream education involving provision of additional resources, or including students from state schools in elite universities by admitting with lower exam grades. However, fairness

also involves critiquing meritocratic claims made for hierarchies. For example, IQ scores historically disproportionately benefitted white middle class students. Notwithstanding the category error of conceptualising one universal, ostensibly meritocratic, sport performance hierarchy, arguing for ‘moving down’ those ‘higher up’ (due to puberty-related male advantage), into a category designed for inclusion of those ‘lower down’ departs from these more usual inclusion claims. For instance, wheelchair marathon times are faster than marathon times. Consequently, a fairness-inclusion alignment discourse necessitates dedicated wheelchair categories rather than a ‘moving down’ into the meritocratically inferior marathon, in a universal marathon performance hierarchy.

Feminist political philosophers unsurprisingly adopt a fairness-inclusion alignment discourse. They argue that fairness leading to inclusion necessitates the recognition of females as embodied moral agents, and a reframing of sociocultural-political space to achieve a just settlement (Devine, 2021). Along these lines, Howe (2020, 496) argues that achieving female recognition should ‘neither eliminate sport as a fairness-regulated system for developing individual excellence in bodily movement nor ...prevent women’s achievement of sporting excellence, with the regard that belongs to them.’ Similarly, Sailors (2020, 425) observes ‘faced with the difficulty of establishing a way to protect the women’s category in sport, one alarmingly common strategy is to concede that trans and intersex athletes may have an advantage, then assert that it does not matter.’ In contrast, those prioritising inclusion and recognition, generally mean for transgender athletes and/or athletes with DSDs, rather than female athletes. Gleaves and Lehrman (2016, 323) even contend that ‘inclusion of transgender and intersex athletes must move beyond the idea of fairness’. Similarly, Anderson and Loland (2015, 244) claim ‘treatment of these athletes (a transwoman and an athlete with a DSD) violates commonly recognized ideals in sport of mutual respect and

inclusion’, but concede that mutual recognition and solidarity necessitate just and fair eligibility criteria, possibly requiring category reformulation.

Work in the humanities consists of primarily small qualitative studies with transgender people (Jones et al 2017) and the discussion of their inclusion and human rights. The latter usually centres elite sport and transsexual athletes, who are often conflated with transgender people and/or people with DSDs. It neglects almost entirely female inclusion and human rights (Anderson and Loland 2015; Bianchi 2017; Teetzel, 2014).

Category and policy (re)formulation

The framing of the policy space for the inclusion of transwomen is usually assumed to be female categories. The ‘subjects of justice’ are often identified as primarily/only transgender people, whilst the recognition and representation claims of females are deemed secondary at most. This transgresses Fraser’s ‘all-affected’ principle and Lister’s ‘practice’ or ‘voice’, since females are self-evidently subjects of justice in relation to their own female categories. For this reason, recognition, inextricably linked to representation, necessitates female political representation in policy deliberations regarding transgender inclusion in female categories, together with meaningful consultation of female participants and athletes (Devine 2021).

Further, this may already constitute a metapolitical mis-framing, given inclusion of transwomen does not necessarily mean in female categories. It may be, in the interests of justice fairness and female inclusion, eligibility for categories at all levels should rightly be on the basis of biological sex (World Rugby, 2020), rather than serum testosterone, legal sex or non-binary gender identities. If so, subjects of justice would include males and policy deliberations should consider the inclusion of all biological males in male or open categories.

UK Sports Councils and GBS are charged with framing legally contextualised, inclusive, fair and safe policies which regulate participation for everyone, given that female rights as a sex are recognised widely in law (UN 1979; H.M. Government 2010). In practice, policy deliberations have centred transgender, not female, inclusion (SCEG, 2013a, 2013b, 2013c)¹ and wider policy deliberations have centred elite sport. Some authors propose category reformulation to explore whether replacing single sex categories with: (a) ‘all-inclusive’ (mixed sex) categories (Gleaves and Lehrbach 2016); (b) protected female categories and open categories (Edwards, Davies and Forbes 2015; Martínková 2020; Pike 2020); (c) categories centring individual physiological variables downstream of sex and puberty such as weight height or circulating testosterone, or algorithms based on combinations of these (Anderson and Loland 2015; Knox, Anderson and Heather 2019; Teetzel 2014); (d) additional transgender categories; or (e) a combination of approaches depending on performance parameters of different sports (Sailors 2020), might address inclusion and fairness for all participants.

However, elite sport sits at the pinnacle of participation and performance pathways, in which all participants, including future elite athletes, play and develop. Sport England (hereafter SE) notes ‘half of the people who regularly get active in a typical year do so through traditional sport’ (SE, 2019 26). Nevertheless, many GBS argue that whereas transgender eligibility into female categories in elite sport must involve male advantage mitigation as a minimum, in contrast, this is not important in participation settings (LTA, 2019).

Framing, Recognition and Balance: Equality Law in Britain

1. The protected characteristics of ‘sex’ and ‘gender reassignment’

In Britain, sport policy must comply with the EA and address fairness, safety, equality and discrimination in relation to nine categories with ‘protected characteristics’ (hereafter PCs),

one of which is 'sex' and another 'gender reassignment'. Female inclusion is upheld via the PC of 'sex'. Section 195 of the Act enshrines the right to single sex categories and to legal discrimination against males in 'gender affected' activities, 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'. The Act clearly means sex affected activities (and is poorly drafted in this respect). In 'gender-affected' sports a female at percentile 50 in any female performance hierarchy (participation performance or excellence), will be disadvantaged if matched with a male at percentile 50 in the equivalent male hierarchy. Consequently, if this male and others transition and move into the female category, they move a significant distance up this female performance hierarchy (a different distance in different sports), by virtue of their puberty-related male advantages, and all females below them in the category are disadvantaged and move down. This remains true even if they have made some form of medical transition. Averages capture all values in a set and consequently represent the whole category not just the middle. They identify statistically significantly performance differences between the sexes for the purposes of most sports, in which for any matched percentile in the distinct female and male performance hierarchies, females are disadvantaged as compared with males. Accordingly, Section 195 applies to categories rather than individuals, and consequently GBS can (and perhaps *must*) lawfully discriminate against all males in 'gender affected' sports on a category basis, regardless of individual performance, 'if it is necessary to do so to secure in relation to the activity (a) fair competition, or (b) the safety of competitors' (EA Section 195 and Gender Recognition Act [GRA] Section 19) in relation to the PC of sex.

Further, Sports Councils and GBS have a Public Sector Equality Duty (PSED) to ensure policies and practices do not indirectly discriminate against females, and must take

‘objectively justified’ (Equality and Human Rights Commission [EHRC] 2021) measures to advance equality between the sexes. For Sports Councils investing public money in GBS, this PSED cannot be delegated, and consequently investment criteria must adhere to the law (EHRC, 2021 26). ‘Objectively justified’ involves inclusion as empirically evidenced balance. It echoes ‘tolerable unfairness’ and entails lawful discrimination against one group with a PC in order to uphold inclusion of another, which unless objectively justified would be illegal. Crucially, the objectively justified policy of female inclusion via female categories in ‘gender affected’ sports is already enshrined in law in Section 195. Both Sports Councils in their investment decisions, and GBS in their eligibility criteria, should not attempt to override this law by returning to first principles in this regard².

A ‘transsexual person has the PC of gender reassignment’ if ‘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’ (Section 7). This has been interpreted widely to include not just transsexual people but also those *identifying* as transgender, without a diagnosis of gender dysphoria, who have undertaken no medical transition (Collin et al, 2016). For Stonewall, a UK transgender interest organisation, trans is ‘An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.’ including (but not limited to) people describing themselves as,

‘transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois’ (Stonewall (2020a) .

However, the PC of ‘gender reassignment’, does not change legal sex without a Gender Recognition Certificate (GRC). The EHRC (2018) advises ‘a trans woman who does not hold

a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female’.

Without a GRC transwoman are biologically and legally male. The GRA Section 2 (HM Government 2004) regulates the process by which transsexual people can change legal sex, requiring a gender dysphoria diagnosis, and therefore interacts with the EA’s PC of ‘sex’.

However, because biological sex is immutable, they may, or even *must*, still be excluded from single sex sport in ‘gender affected’ sports. Interestingly, some transsexual people resist incorporation into the larger transgender category, arguing ‘We are already seeing our right to define as “transsexual” being challenged by transgender activists who seek to remove this distinction.’ (The Guardian, 2018).

Notwithstanding the law, some GBS use self-identification eligibility criteria for sports participation (LTA 2019). This may reflect poor legal advice from special interest groups regarding Section 195. This echoes the influential Reindorf Report (2020) which observes, of the University of Essex’s transgender policy, that ‘the policy states the law as Stonewall would prefer it to be, rather than the law as it is. To that extent the policy is misleading’ (p.73). This may reflect anticipated legal changes to introduce self-identification, which have not materialised. Murray and Blackburn (2019) and Sullivan (2021) have termed this ‘policy capture’, with Murray and Blackburn arguing that ‘the unregulated roll-out of gender self-identification...has happened with inadequate scrutiny and without due process’ and ‘decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population’. They conclude this has ‘undermined the rights and interests of women (264-265).’

Finally, Barrister Naomi Cunningham asks ‘Will it ever be unlawful *not to exclude* trans women from women’s sport?’, and outlines ‘two distinct ways in which sporting clubs or

bodies may lay themselves open to claims if they permit male-bodied people to compete in women's events'. The first is negligence 'in contact sports (and potentially others, like cycling, where there is a risk of accidental contact)', and the second, indirect discrimination where,

'Opening participation in sex-segregated sports to trans men and trans women (whether on the basis of self-identification, or limited to those with a GRC) will put women at a striking disadvantage compared to men... if trans women are allowed to compete in women's sports, natal women are bound to lose out on team places, prize money, sponsorship, medals, and – perhaps most importantly – participation' (Cunningham, 2020).

2. Public Sector Equality Duty

Under the PSED, Sports Councils and GBS with sports council investment are legally bound to give due regard to addressing discrimination against females, advancing equality of opportunity and fostering good relations between the sexes. This includes removing or minimising disadvantages experienced by females and taking steps to meet needs that are different from needs of people who do not share their PC. They must encourage females to participate in public life (including 'sporting...activities' [38]) in which participation is disproportionately low.

The EHRC (2021, 25) explains 'due regard is fulfilled *before and at the time* a particular policy that will or might affect people with PCs is under consideration' (author's italics). Consequently, Sports Councils and GBS must consider the effect of self-identification into female categories on girls and women at the time such policies (investment and eligibility decisions) are under consideration, not retrospectively. Further, 'Where a policy, practice or

decision is considered to be unlawful the body subject to the duty will need to change it to avoid being liable for discrimination or other prohibited conduct under the Act' (30).

3. Balancing Inclusion Claims: Equality evidence

Inclusion claims from different groups with PCs need to be balanced carefully. The EHRC frames 'subjects of justice' widely, explaining 'a relevant body will need to have sufficient evidence of the impact its policies and practices are having, or are likely to have, on people with different PCs. Such information is termed 'equality evidence' (EHRC 2021 48).

Accordingly, Sports Councils and GBS should provide sufficient 'equality evidence' to show due consideration of the impact of self-identification into female categories on those with the PC of 'sex'. It must balance the inclusion claims of groups with different PCs and ensure compliance with Section 195, before enacting such policies.

Sports Councils and GBS should consider: 'What information, if any, does it already routinely collect which could help it understand the impact ...? Is that information disaggregated by different PCs? If not, can it be? Does that information give it a sufficient understanding of the particular disadvantages, different needs and/or disproportionately low participation experienced by people who share particular PCs?' also 'Would it be useful to engage with the people particularly affected by a decision or policy? (53). Some but not all appropriate equality evidence is available.

a. The sexual division of play

Historically, SE has collected sex disaggregated data for a range of sports (SE 2020) documenting significant differences in the proportions of females and males participating (Table 2). This is especially marked for traditional sports, played in single sex categories at all levels, where the pool of males is significantly larger than that of females, and competition is integral to the activity. In team sports 77% of participants are male and

33% female. Football, cricket, rugby union and golf participants are 90%, 89%, 84%, and 84% male; and 10%, 11%, 16%, 16% female, respectively.

Table 2: The sex gap in sports where competition is integral to participation: May 2018/19.

Sport	% M	% F	Male (numbers)	Female (numbers)
Team Sports	77	23	2 457 600	724 800
Football	90	10	1 842 500	212 800
Cricket	89	11	259 800	32 100
Rugby Union	84	16	187 700	36 600
Golf	84	16	819 100	159 800
Basketball	79	21	221 500	58 000
Rugby League	68	32	42 600	20 400
Track and Field Athletics	65	35	137 400	73 500
Tennis	61	39	459 400	295 300

b. Estimating the transgender population

Collin et al (2016) found the prevalence of transsexual people who have a diagnosis and have made some form of medical transition was just under 0.01%, whereas 0.35-0.87% of people self-identify as transgender. They explain that for ‘prevalence of surgical or hormonal gender affirmation therapy or transgender-related diagnoses, the prevalence estimates generally ranged between 1 and 30 per 100,000 individuals’, whereas ‘self-

reported transgender identity was orders of magnitude higher ranging from 100 to 700 per 100,000 or 0.1%-0.7%'. Estimated adult transgender prevalence is twice as high for transwomen as compared with transmen, and numbers reporting transgender identity are rising.

In the UK around 5 000 transsexual people have a GRC (Government Equalities Office [GEO], 2018) and have therefore changed legal sex. Although the GRA requires a gender dysphoria diagnosis but not medical transition as a condition for awarding a GRC, we can cautiously assume most people with a GRC have medically transitioned in some way.²

Conversely, the GEO explains 'No robust data on the UK trans(gender) population exists. We tentatively estimate there are approximately 200,000-500,000 trans people in the UK'. Stonewall estimates 1% of the population fall under the 'transgender umbrella', and 'around 1 per cent of the population might identify as trans, ... That would mean about 600,000 trans people in Britain' (Stonewall 2020b). Therefore, using self-identification in place of GRC eligibility criteria, would entail a 100-fold increase in numbers eligible for female categories. Further, UK sex-disaggregated data shows 73% of people awarded a GRC from 2005-2019, were biological males, compared to 27% who were biological females (Ministry of Justice, 2021). Using GEO and Stonewall estimates, transsexual people with a medical diagnosis and GRC comprise 0.75 - 2.5% of the much larger transgender population, the large majority of whom self-identify and have made no medical transition.

c. Impact of self-identification on single sex categories

Because of the much larger pool of males in most traditional sports and team games, self-identification eligibility criteria appear to have a significant and disproportionate impact on the percentage and numbers of transwomen eligible for female categories (Table 3).

For all competitive team sports, the percentage of transgender (biologically male)

participants in females categories would range from 1% (7 373) to 4.4% (32 932), whereas the percentage of transgender (biologically female) participants in male categories ranges from 0.1 (2 174) to 0.2 (4 784). For example, the percentage of transwomen footballers in female categories would range from 2.5% (5 528) to 10.5% (24 690), whereas the percentage of transmen footballers in male categories would be 0.03% (638) to 0.1% (1 404).

Table 3: The impact of ‘self-identification’ on single sex sport categories in sports where competition is integral to participation: May 2018/2019

Sport	Transwomen as % of Female Categories¹	Numbers of Transwomen in Female Categories¹	Transmen as % of Male Categories¹	Numbers of Transmen in Male Categories¹
Team Sports	1.0-4.4	7 373 - 32 932	0.1 - 0.2	2 174 - 4 784
Football	2.5 - 10.5	5 528 - 24 690	0.03 - 0.1	638 - 1 404
Cricket	2.4 - 9.8	779 - 3 481	0.04 - 0.1	96 - 212
Rugby Union	1.5 - 6.5	563 - 2 515	0.1 - 0.1	110 - 242
Golf	1.5 - 6.5	2 457 - 10 976	0.1 - 0.1	479 - 1 055
Basketball	1.1 - 4.9	665 - 2 968	0.1 - 0.2	174 - 383
Rugby League	0.6 - 2.7	128 - 571	0.1 - 0.3	61 - 135

Track and Field Athletics	0.6 - 2.5	412 - 1 841	0.2 - 0.4	221 - 485
Tennis	0.5 - 2.1	1 378 - 6 156	0.2 - 0.4	886 - 1 949

¹Lower estimate uses the lower GEO 0.3% transgender estimate and assumes equal numbers of transwomen and transmen. Higher estimate uses Stonewalls 1% transgender estimate and the Collin et al prevalence of 67% transwomen and 33% transmen equating to a prevalence of 1.34% for transwomen and 0.66% for transmen.

Discussion

It is both morally and legally right that Sports Councils and GBS introduce evidence-based investment and eligibility policy to ensure participation of females and transgender people in sport at all levels. In the interests of justice, balancing, framing, mapping and agenda-setting, according to Fraser’s ‘all-affected’ principle, and Lister’s ‘differentiated universalism’, are essential for sport policy regulating eligibility into female categories. The EA recognises nine groups with PCs and *all* have legitimate justice and inclusion claims in law. In sport, both demographic groups with PCs of ‘sex’ and ‘gender reassignment’ are recognised as ‘affected’ and are therefore ‘subjects of justice’.

Equality evidence revisited

In Britain the population of transwomen with GRCs is extremely small. Accordingly, notwithstanding the fairness and safety of including people who have gone through male puberty in female categories, and the legality of not invoking Section 195 for ‘gender affected’ sports, the impact of including 5000 probably mostly medically transitioned² transsexual people in legal rather than biological sex categories might be considered a ‘tolerable unfairness’. However, it appears self-identification eligibility criteria would

increase, possibly 100-fold in some sports, people who are biologically and legally male, mostly without medical transition, in female categories.

Transwomen who self-identify without medical transition have three significant advantages in female categories in ‘gender affected’ sports. Firstly, the well documented puberty-related biological male advantage, resulting in the 10-50% performance gap between the sexes as discussed. Secondly, because of the sexual division of play, engendering disproportionately large numbers transitioning from the male pool into a much smaller female pool, particularly in traditional competitive sports. Thirdly, because most adult transgender people are biological males. The combined effect of these three advantages, would enable significant numbers of transgender participants to move relative performance upwards, displacing significant numbers of females downwards, in female categories at all levels. Further, there is possibly a fourth legacy advantage of embodied masculinity as discussed by Torres et al (2020). Finally, there are related effects on safety differentials in many sports, notably, contact sports (Pike, 2020).

Category reformulation revisited

Advocates of category reformulation (a) (above) propose a sex-blind universal androcentric sport citizenship centring male excellence, comparing female performance, and finding it wanting. Gleaves and Lehrbach (2016, 316) explain this ‘mixed gender’ approach thus,

‘women who earn the chance to compete as elite athletes against other elite athletes on merit will be respected for their talents in a way that women competing within a protected class will not. Women who lack sufficient talent will have equal standing with their male counterparts who also fall short and with whom they can enjoy watching the elite athletes from the sideline.’

Females without the ‘talent’ of being born male, are considered secondary, and perhaps just not good enough to compete in elite sport. This category error misrecognises the biological reality of female morphology, so that embodied female excellences celebrating fast, high and strong females are not valued in their own right, but in comparison with males or with respect to ‘gendered narratives’.

Solution (c) is also problematic, given serum testosterone is not the only or definitive male advantage, but a proxy for global advantage as a result of multiple puberty-related biological variables, in most sports. Reformulation centring individual biological variables downstream of sex and puberty would necessitate multiple categories, still unfair, since for example, weight categories (Anderson and Loland 2015) leave myriad puberty-related male advantages, including strength, power, and lean body mass, intact. Weight for weight, males have significant performance advantages (Hilton and Lundberg 2021), which necessitate the existence of weight categories within, rather than instead of, sex categories. A possible way forward here may be the algorithm solution (Knox Anderson and Heather 2019), dependant on the highly problematic task of developing fair and inclusive algorithms, incorporating multiple relevant variables downstream from puberty (for example: muscle mass, connective tissue, body composition, heart and lung size, haemoglobin concentration, skeletal structure, upper to lower limb strength, lever length and so on [Hilton and Lundberg 2021]), probably resulting in single sex categories anyway. Effectively therefore, we are left with retaining single sex categories, or exploring (b) and (d) for ‘gender affected’ sports, and adopting (e) for all sports.

Female categories and gender identity revisited

Self-identification at participation levels reprises category (a), a sex-blind androcentric sport citizenship, displacing females to Gleaves’s and Lehrman’s ‘sideline’, or at least to lower

positions in a performance hierarchy than the recognition of their female sex merits. This compromises the legal provision for fair and safe female inclusion in ‘gender affected’ sports at all levels as required by the EA. It is difficult to conclude this ‘balances’ inclusion claims to achieve fairness, or even ‘tolerable unfairness’. It may also result in female self-exclusion, or parental exclusion of female children for safety or fairness reasons. Further, it could result in excessive training by girls and women in futile attempts to close an unrecognised sex-related performance gap, with resultant negative health outcomes including an increase in eating disorders and female athlete triad prevalence, with attendant serious ethical issues. It also mis-recognises transsexual people, many of whom acknowledge biological sex and, like Caitlyn Jenner, consider it unfair and unsafe for transwomen to participate in female categories (BBC, 2 May 2021). Further, it damages mutual recognition, given it recognises transgender people by gender identity but not girls and women by biological sex. Indeed, it mis-recognises many females by assigning them an unwanted, ontologically incoherent (to them), feminine ‘gender identity’. Policy initiatives regarded as unfair are unlikely to lead to good relations between different demographic groups as required by the PSED.

It is widely recognised that females are significantly underrepresented in traditional competitive sports. Sports Councils and GBS should, in the interests of justice and law, address discrimination against them. Recognising the embodied reality of biological sex, by way of female categories, is enshrined in the EA Section 195, which upholds fair and safe inclusion on a category not individual basis. This recognition exemplifies Lister’s differentiated universal citizenship, in sport. Equivalent empirical evidence for trans participation is not collected, but qualitative reports indicate they may also be underrepresented (Jones, 2017). If so, policies to increase trans participation would also constitute a ‘legitimate aim’.

Justice requires that competing inclusion rights of demographic groups with different PCs must be carefully considered via the principles of fairness, safety and proportionality as outlined in the EA. The test of lawfulness for inclusion policies that lawfully discriminate against another group with a PC, is that they are a 'proportionate means of meeting a legitimate aim' and in sport that they comply with Section 195. The fairness and safety for females of including self-identified, rather than medically transitioned, transgender participants who are biologically and legally male, in female categories in 'gender affected' sports, are the same as for all biological males. If Collins et al and Stonewall are correct regarding transgender prevalence, then relatively large numbers of mostly self-identifying non medically transitioned transwomen, will understandably want to participate in sport. However, self-identification eligibility criteria would disproportionately affect the proportionate and lawful means of achieving the legitimate aim of including females in sports participation, via legally protected female categories in 'gender affected' sports. Eligibility criteria based on gender identity, rather than biological sex in these sports do not therefore appear justified, balanced, or even possibly legal in Britain. Further, many females do not identify as feminine, but recognise themselves as biologically female. They may therefore be excluded from categories based on feminine gender identities, rather than female biological sex. Consequently, self-identification eligibility policies at participation levels may constitute an 'intolerable injustice', which indirectly and unlawfully discriminate against female participation in 'gender affected' sports.

Alternative policies for transgender inclusion should therefore be revisited. Retaining dedicated female categories, and replacing male with open categories (b) may be the fairest way to balance inclusion claims. This enables individual females to 'move up' into open categories if they so wish, and is maximally inclusive of transwomen given a large majority have undergone no male advantage mitigation via medical transition. Alternatively,

additional categories (d) could be introduced for transgender people. Either of these would be proportionate means of achieving the legitimate aims of fair and safe sports participation for both female and transgender participants. A combination of category solutions (e) aligns with the EA, given that in sports that are not ‘gender affected’ female categories upholding fairness and safety may not be necessary. However, in sports where females are underrepresented this may still be a proportionate means of achieving the legitimate aim of increasing female participation.

Finally, justice and the law entail framing and balancing inclusion claims even-handedly, recognising all ‘subjects of justice’ in relation to sports participation. Therefore, Sports Councils and GBS should distinguish between biological sex, legal sex, and gender identity when collecting sports participation data. Recognition of both female (PC of sex) *and* transgender people (PC of gender reassignment) requires disaggregated, robust, data collection and equality evidence. Relying on conflated ‘gender’ data including a third ‘other’ option for sex questions (SE, 2020), and only qualitative and anecdotal narratives of individual transgender people’s lives, should be avoided. This would enable evidence-based analysis of the impact of self-identification eligibility criteria on female inclusion, as required by equality law in Britain. This is of central importance for the investment and eligibility policy deliberations of Sports Councils and GBS.

Note

1. As this paper was finalised, the Sports Council Equality Group (SCEG) published updated Guidance for Transgender Inclusion in Domestic Sport in the UK (SCEG, 2021). This Guidance is much improved as compared with earlier 2013 ‘transsexual inclusion’ documentation (SCEG, 2013a and b). It adheres to both Fraser’s ‘all affected’ and Lister’s ‘differentiated universalism’ principles and is therefore the

result of a robust process. This included wide-ranging consultation with groups representing all stakeholder interests, interviews with both female and transgender participants, and a thorough assessment of the science and law in this area. Moving forward, Sports Councils will want to ensure compliance with both the law and this updated Guidance regarding their investment decisions and the grant-aiding of public money to GBS and other organisations.

2. Original intentions of gender reassignment legislation resulting in the GRA (2004) assumed a three-stage transition process where stage 2 involves hormones and stage 3 surgery for most transsexual people and refers to physical transition throughout (Home Office, 2000, 28). Further, UK Government GRC guidelines (2021) state ‘If you have not had any treatment or surgery yet, you must send a report that includes details of any planned treatment or surgery’ and GIRES (2014) explains ‘If you have not had any surgery then the report must explain clearly as to the reason why. This could be because you are currently still waiting for surgery on a waiting list, or you aren’t medically able to or for any other reasons, but an explanation has to be included as to why this is so.’

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