

Background Document

Unlawful Discrimination and the Inclusion of Trans and Gender Diverse Students and Staff in Sport and Recreation

Introduction

The University is committed to being safe, inclusive and equitable. As such, its Inclusion of Trans and Gender Diverse Students and Staff in Sport and Recreation Guidelines promote participation in sport and recreation without discrimination based on their gender identity.

The Guidelines have considered matters such as the Minority Stress Model, which describes how stigma affects minority groups,¹ such as trans and gender diverse people, and has significantly negative health impacts on marginalised communities.² This is because minorities experience constant stress from being in a hostile environment in which their behaviour, values, appearance, and actions are different from the dominant majority. For trans and gender diverse people, this means that transphobia, stigma (including self-stigma), isolation, and secrecy are likely to cause chronic stress.³

Findings from an inquiry by the New Zealand Human Rights Commission and overseas research also confirm the high levels of discrimination and marginalisation experienced by trans and gender diverse people.⁴ This restricts their access to and enjoyment of sport and recreation.⁵

The University recognises the joys and benefits that participation in sport and recreation can provide, and the value of ensuring these activities are fair, safe and open to everyone. More detailed information, on the legal and scientific issues associated with discrimination, and trans students and staff participation in sports and recreation, is set out below.

What is unlawful discrimination?

Discrimination occurs when a person is treated unfairly or less favourably than another person in the same or similar circumstances. Discrimination is unlawful when it occurs in an area of public life, is based on a prohibited ground of discrimination and there is no relevant exception, as set out in the [Human Rights Act 1993](#) (HRA).

¹ VR Brooks, *The theory of minority stress*. V.R. Brooks (Ed.), 1981.

MA Lexington, *Minority stress and lesbian women*. Lexington Books, Meyer, IH, 2003.

LD Garnets, 'Minority stress and mental health in gay men', in DC Kimmel (eds.), *Psychological perspectives on lesbian, gay and bisexual experiences*. New York, Columbia University Press, 2nd edition, pp. 699–731.

² ML Hendricks, RJ Testa, 'A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the Minority Stress Model' *Professional Psychology: Research and Practice*, v43, 2012, pp 460–467. Retrieved from <http://doi.org/10.1037/a0029597>.

³ Health Policy Project, Asia Pacific Transgender Network, and UNDP, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*, 2015, pp 19.

⁴ M Couch, M Pitts, H Mulcare, S Croy, A Mitchell, S Patel, *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*. Melbourne, Australia: Australian Research Centre in Sex, Health & Society, 2007. Retrieved from: <http://apo.org.au/node/3849>.

JM Grant, LA Mottet, J Tanis, J Harrison, JL Herman, M Keisling, *Injustice at every turn: A report of the national transgender discrimination survey*. Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011. Retrieved from: https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566cbf2c57eb8de92a5392e6/1449967404768/ntds_full.pdf.

Human Rights Commission, *To Be Who I Am / Kia noho au ki tōku anō ao. Report of the Inquiry into discrimination experienced by Transgender People / He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira*, 2008.

⁵ Human Rights Commission, 2008.

Discrimination can be direct discrimination or indirect discrimination, and unlawful even if there is no intention to discriminate. Direct discrimination occurs when a person or group is treated differently because of one of the prohibited grounds of discrimination in the HRA, and experiences some form of disadvantage. Indirect discrimination occurs when an apparently neutral practice has a disproportionately negative act on a particular group.

Unlawful discrimination against a trans or gender diverse person because of their gender identity is prohibited under the ground of sex in the HRA. This includes discrimination against someone because of the assumption that they are trans or gender diverse.⁶ Frequently, such assumptions are based on a trans or gender diverse person's gender expression.

While gender identity and gender expression are not specified in the HRA:

- the Human Rights Commission accepts such discrimination complaints under the prohibited ground of 'sex' discrimination in section 21 of the HRA
- a 2006 legal opinion by the Deputy Solicitor-General concluded 'sex' discrimination under the HRA encompasses discrimination based on a person's gender identity.⁷ There is no New Zealand case law on this issue, however the Deputy Solicitor-General's position has subsequently been affirmed in legal commentary.⁸

Freedom from discrimination is also set out in section 19 of the [New Zealand Bill of Rights Act 1990](#) (NZBORA) and refers back to the prohibited grounds of discrimination in section 21 of the HRA.

Similarly, the prohibited grounds of discrimination in the HRA are referred to in the employment discrimination provisions in section 105 of the [Employment Relations Act 2000](#).⁹

The University must not unlawfully discriminate against trans and gender diverse players, coaches, referees, and staff when exercising any of its powers. This includes, for example, when the University:

- develops and enforces policies
- provides sporting or recreation facilities and services or
- recruits, sets terms and conditions of employment or terminates someone's employment.

The Human Right Act 1993 and unlawful discrimination

There are two different tests for unlawful discrimination, depending on whether the actions fall under Part 1A or Part 2 of the HRA.

⁶ Human Rights Act 1993, s 21(2)(b).

⁷ Deputy Solicitor General Cheryl Gwyn to Attorney-General, *re Human Rights (Gender Identity) Amendment Bill: Ref ATT395/9*, letter dated 2 August 2006, para [30]. The opinion was prepared for the purposes of providing advice on the Human Rights (Gender Identity) Amendment Bill, which sought to expressly include gender identity as a protected ground of discrimination under the HRA. The opinion concluded at [30] that "there is no reason to suppose that sex discrimination would be construed narrowly to deprive transgender people of rights under the HRA". Retrieved from: <https://www.beehive.govt.nz/release/crown-law-opinion-transgender-discrimination>.

⁸ Brookers Human Rights Law, Vol.1, para HR21.10(2) and (9). Retrieved at: Westlaw NZ online. However, the New Zealand courts are yet to issue a finding on this particular matter.

⁹ 'Discrimination against transgender people' *Employment New Zealand*, <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination-against-transgender-people/>.

Part 1A of the HRA applies when the University is performing a public function, including developing policies.

Part 2 of the HRA deals with discrimination by private individuals and organisations, including the sporting and recreation services provided by the University Sport and Recreation Centre.

Part 1A of the Human Rights Act 1993

Part 1A applies when the University is performing a public function or exercising powers or duties that are set down in legislation. For example, this includes:

- the wording of University policies
- decisions based on University policies
- the use of University facilities
- the provision of services by the University of Auckland.

The relevant legal test for unlawful discrimination under Part 1A of the HRA is set out in section 5 of the NZBORA.

Any action or omission by the University that limits a trans or gender diverse person's right to freedom from discrimination based on their gender identity will be unlawful, unless that action or omission is a "reasonable limit prescribed by law" that can be "demonstrably justified in a free and democratic society"¹⁰.

Any University policy, facility or service that was considering restricting trans or gender diverse people from participating in sport, based on their gender identity, would need to provide evidence that the restriction:

- would serve a purpose that is sufficiently important to justify curtailing trans and gender diverse people's right to freedom from discrimination
- was rationally connected to achieving that purpose
- did not impair trans and gender diverse people's right to freedom from discrimination any more than was reasonably necessary to sufficiently achieve that purpose ('minimal impairment') and
- that impairment was in due proportion to the importance of the purpose ('proportionality').¹¹

The onus of proof remains on the University to provide the necessary evidence.

Part 2 of the Human Rights Act 1993

There are two circumstances when discrimination related to the University's sport and recreation services may fall under Part 2 of the HRA. These involve:

- the conduct of the University Sport and Recreation Centre's sports administrators, referees or coaches. These are likely to be seen as individuals providing services rather than as the University exercising its public function, duties or powers¹²

¹⁰ "There is body of complex case law that has been developed over the years by the Courts that guides the application of this legal test in practice." Brookers Human Rights Law, v1, HR201.02. This includes the legal tests for defining and determining discrimination (e.g. *Ministry of Health v Atkinson* [2012] NZCA 184) and for assessing whether a limitation on freedom from discrimination is justified (e.g. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1).

¹¹ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

¹² Part 1A of the HRA is limited to acts or omissions carried out by a person or body referred to in Section 3 of the NZBORA (as stated in section 201 of the HRA). In addition to the branches of Government, Section 3 of the NZBORA includes acts "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

- employment discrimination. For example, if a trans or gender diverse person working for the University Sport and Recreation Centre complains about being discriminated against based on their gender identity.¹³

As already stated, discrimination against trans and gender diverse people because of their gender identity falls under the ground of 'sex' in the HRA. It is therefore likely to be unlawful unless there are any relevant exceptions to either the provision of sporting and recreation services to trans and gender diverse people, or to their employment. Each of these exceptions is discussed below.

The exception to sex discrimination in sport

Section 49 of the HRA details when it is lawful to discriminate in sport based on a person's sex. This exception to sex discrimination in sport applies to players only, not to coaches, umpires, referees or administrators.

Subsection 49(1) of the Human Rights Act 1993 allows, but does not require, the exclusion of players of one sex from participating in some sporting events if:

- it is competitive sport and
- participants are over the age of 12 and
- it is an activity in which the strength, stamina, or physique of competitors is relevant.

This exception does not apply to non-competitive sport or recreation activities, or to competitive sport where a player's strength, stamina or physique does not give them a competitive advantage. In all these circumstances, it will always be unlawful to discriminate against trans and gender diverse people.

This exception reflects a concern to ensure that individuals of one sex do not have an unfair advantage or disadvantage compared to individuals of another sex. In the limited sports and circumstances where the exception applies, it would not be unlawful to discriminate against one sex by holding, for example, women only or men only events.

This exception does not *require* any exclusion of any person, whether they are cisgender or transgender women or men, or identify as gender diverse. It only *permits* it in some limited circumstances.¹⁴

¹³ Subsection 21(A)(1)(a) of the HRA specifies those provisions of Part 2 of the HRA that also apply to government and entities, such as the University, that perform public functions, or exercise powers or duties prescribed by law. This includes sections 21 to 35 of the HRA which relate to employment discrimination.

¹⁴ Australian Capital Territory Human Rights Commission, *Everyone Can Play: Guidelines for local clubs on best practice for inclusion of transgender and intersex participants*, April 2017. Retrieved at: <http://hrc.act.gov.au/everyone-can-play-guidelines-local-clubs-best-practice-inclusion-transgender-intersex-participants/>

Victorian Equal Opportunity and Human Rights Commission, *Guideline: Trans and gender diverse inclusion in sport – Complying with the Equal Opportunity Act 2010*, 2017. Retrieved at: <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/ea-practice-guidelines/item/1560-guideline-trans-and-gender-diverse-inclusion-in-sport-complying-with-the-equal-opportunity-act-2010>

Canadian Centre for Ethics in Sport, *Creating Inclusive Environments for Trans Participants in Canadian Sport*, 2016. Retrieved at: <http://cces.ca/gender-inclusivity>

United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/33, 2016. Retrieved at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/32/33&Lang=E>

The overriding sporting objective is and remains the guarantee of fair competition. Restrictions on participation are appropriate to the extent that they are necessary and proportionate to the achievement of that objective.

If the University was to exclude trans or gender diverse people from playing sport in their gender identity, or to impose restrictive eligibility criteria, it bears the onus of proof to show evidence that:

- the exception applies to their specific sporting activity, particularly that it is a competitive sport where strength, stamina, or physique of competitors is relevant
- the exclusion or restriction on trans and gender diverse people's participation is necessary and proportionate in order to achieve the objective of fair competition.

In discharging the onus of proof, those arguing for exclusion must show evidence that trans and gender diverse people have an unfair advantage in competitive sporting events. The available research tends to demonstrate the opposite,¹⁵ as summarised below, and so this evidence will have to be addressed and either disproven or distinguished:

- often decisions to exclude or restrict trans women's participation in women's sport assume that they will have an unfair competitive advantage because of their previous or current levels of testosterone, or their physique or muscle mass. When sex-based differences in height, weight, strength and speed are compared, the highest performing elite men outperform the highest-performing women. However, there is significant overlap between men and woman in each of these areas. This means that many women are as tall, as strong and as fast, as many men
- exposure to testosterone does not necessarily make a person better at sport. For example, an article published in August 2014 in *The Journal of Clinical Endocrinology and Metabolism* states that "there is no clear scientific evidence proving that a high level of testosterone is a significant determinant of performance in female sports".¹⁶ Studies also suggest that testosterone levels are dynamic, depending on many factors. Even if testosterone does increase performance in some sports, other factors that also affect sporting ability including fitness, training, age, limb length, body shape, and experience¹⁷
- a 2017 systematic literature review concluded that: "Within competitive sport, the athletic advantage transgender athletes are perceived to have appears to have been over interpreted by many sport organisations around the world . . . there is no direct and consistent research to suggest that transgender female individuals (and transgender male individuals) have an athletic advantage in sport and, therefore, the majority of competitive sport policies are discriminatory against this population"¹⁸
- a July 2015 ruling by the Court of Arbitration for Sport found that "there is no available evidence...as to the quantitative effect on female athletic performance of levels of endogenous testosterone"¹⁹

¹⁵ Much of the research and case law about the effects of testosterone on female athletes relates to athletes with intersex variations that result in higher levels of testosterone.

¹⁶ Bermon et al. 'Serum Androgen Levels in Elite Female Athletes', *The Journal of Clinical Endocrinology & Metabolism*, 99:11, 2014.

¹⁷ In addition, many of the effects of testosterone are reversed if levels are reduced, and not all the effects are generated if testosterone is administered to trans men or gender diverse people only after puberty.

¹⁸ BA Jones, J Arcelus, WP Bouman, E Haycraft, 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies' *Sports Medicine (Auckland, N.Z.)*, 47(4), 2017, pp.701–716. Retrieved at: <http://doi.org/10.1007/s40279-016-0621-y>

¹⁹ Court of Arbitration for Sport, Interim Arbitral Award, 24 July 2015, pp.150. Retrieved at: www.tas-cas.org/fileadmin/user_upload/award_internet.pdf. Based on that evidence, the Court temporary suspended the International Association of Athletics Federation's (IAAF)

- in 2016, the UN Special Rapporteur on the Right to Health published a report on sport and healthy lifestyles as contributing factors to the right to health. The report recommended that States “protect the physical integrity and dignity of all athletes, including intersex and transgender women athletes, and immediately remove any laws, policies and programmes that restrict their participation or otherwise discriminate or require them to undergo intrusive, unnecessary medical examinations, testing and/or procedures in order to participate in sport”²⁰
- even at the most elite Olympic level of sport, the strongest statement the International Olympic Committee (IOC) makes is that testosterone “*may provide a competitive advantage in sports*” [italics added].²¹ This 2012 IOC regulation does not elaborate on when, or how much, competitive advantage may be obtained, nor on which sports may or may not be affected
- the IOC guidelines focus primarily on testosterone levels. These require trans women to show evidence of low testosterone levels for at least twelve months prior to their first competition.²² In addition, trans men and gender diverse people who compete at an international level and take prescribed testosterone, currently need to apply for a Therapeutic Use Exemption, to meet anti-doping requirements. Some sporting organisations rely on the IOC guidelines as the basis for determining eligibility for sex-segregated sport. Such international policies and regulations for elite sporting activities represent the tightest application of procedures governing sex segregation in sport. It is very important that sport organisations set policies that are appropriate to their level of sport, and not a reflection of requirements at higher levels of competition. Based on the evidence described above, it would be difficult to argue that such restrictions would be reasonable and proportionate in non-elite sport, including participation in university sports teams and events.

The exception to employment discrimination

Section 27 of the HRA includes exceptions which allow employment discrimination in certain circumstances that are related to authenticity and privacy. This includes where, for reasons of authenticity, being of a particular sex is a genuine occupational

hyperandrogenism rule, that had barred women with high natural testosterone levels from competing as women. The Court has indicated that, in order to reinstate the regulation, the IAAF must show that female athletes with higher total testosterone have a performance difference that approximates the level of advantage male athletes typically have over female athletes. The Court suggested this would require evidence of between a 10-12 per cent competitive advantage. A subsequent study undertaken by IAAF and the World Anti-Doping Agency has found much smaller effects, Stephane Bermon, Pierre-Yves Garnier, ‘Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes’, <http://bjsm.bmj.com/content/early/2017/07/12/bjsports-2017-097792>. The IAAF had until the end of September 2017 to file new evidence with the Court, in its attempt to reinstate the hyperandrogenism rule. Source: <http://www.cecileparkmedia.com/world-sports-advocate/hottopic.asp?id=1525>. In April 2018, the IAAF issued new regulations about intersex athletes’ eligibility to be classified as female. In a joint letter written in September 2018, three United Nations human rights mandates critiqued the eligibility criteria as appearing to contravene multiple international human rights norms and standards. Source:

<https://www.ohchr.org/Documents/Issues/Women/WG/Communications/OL-OTH-62-2018.pdf>

²⁰ United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/33, 2016, para 101(i).

²¹ International Olympic Committee, *Regulations on Female Hyperandrogenism*, 2012. Retrieved at: https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf. These regulations were developed for female athletes with an intersex variation that results in naturally occurring, higher testosterone levels.

²² International Olympic Committee, November 2015.

qualification for a position. There are very few jobs where a strong case could be made that it is appropriate for the position to be, for example, for women only or men only.

The initial onus would be on the University, as the employer, to prove that sex is a genuine occupational qualification for a specific sporting and recreation position. If that evidence threshold was met, there would also be an additional onus to show why a trans or gender diverse applicant was not eligible to apply for the position.

Definitions

Gender identity means a person's internal sense of being male, female, something other, in between or agender. A person's gender identity may or may not correspond with their sex assigned at birth.

Gender diverse refers to people who do not identify as exclusively female or male, whose gender identity and/or gender expression is outside the female/male binary. Some alternative terms used are genderqueer, gender non-conforming, or non-binary.

Gender expression means the external presentation of one's gender. This can be expressed through one's name, clothing, behaviour, hairstyle, voice or any other way. A person's gender expression may or may not conform to socially defined behaviours and characteristics typically associated with being either solely masculine or feminine.

Sex assigned at birth means the sex recorded on a person's birth certificate and/or other official identification documents at birth.

Transgender (or trans) refers to someone whose gender identity does not exclusively align with their sex assigned at birth. This term is often used as an umbrella term, recognising that people may describe themselves in many ways including by using indigenous terms.

For example, trans people might describe themselves as transgender, transsexual, trans man, trans woman, gender diverse, genderqueer or non-binary. The term 'trans woman' refers to a trans person assigned a male sex at birth who identifies as a woman.

Similarly, the term 'trans man' refers to a trans person assigned a female sex at birth who identifies as a man.

Indigenous terms to Aotearoa / New Zealand include *tāhine* for transgender, *whakawahine* for trans women and *tangata ira tane* for trans men. Many Māori trans people identify with the umbrella indigenous term *takatāpui* that encompasses all Māori of diverse gender identities, sex characteristics, or sexualities.

Pacific cultural terms used by trans feminine people, including in New Zealand, include *fa'afafine* (Samoa and Tokelau), *fakaleiti / leiti* (Tonga), *fakafifine* (Niue), *akava'ine* (Cook Islands), *vakasalewalewa* (Fiji), *palopa* (Papua New Guinea) and *mahu* (Tahiti and Hawaii). One Pacific cultural term for trans masculine people is *fa'afatama* (Samoa). *Fa'atamaloa* is also sometimes used as an alternative term.

Transitioning (or gender affirmation) refers to steps taken by trans or gender diverse people to affirm their gender. This process and level of change sought is different for every trans or gender diverse person. Transition steps may be social, legal and/or medical. For example, a trans person may change the type of clothes they wear, their hairstyle, or the pronoun they use, to match their gender. Legal steps could include changing one's name or gender on official documents. For some people, transitioning involves medical treatment, such as hormones and/or surgeries, to change one's body to match one's gender.