

SAVE WOMEN'S SPORT AUSTRALASIA

Keeping it fair for women and girls

Submission on Final Consultation of “The Guiding Principles for the Inclusion of Transgender Participants in Community Sport”

Those who demand blanket inclusion of trans athletes into whichever category that they wish don't understand that eligibility (to compete in a particular category in sport) automatically delivers inclusion. We categorise and sub-categorise athletes in order to achieve maximal inclusion.

Content of Submission

This submission is broken into 5 areas:

1. Inclusion + Eligibility (page 1-2)
2. Legislation (page 3-4)
3. Community Sports (page 4-5)
4. Previous Submission (page 5-6)
5. Conclusion + Request (page 6)

1. Inclusion + Eligibility

In a recent webinar Raelene Castle, CEO of Sport NZ, emphasised that “Sport NZ's focus is about inclusion and diversity, and giving all New Zealanders the opportunity to participate in active recreation in the way **they want to participate**.”¹

The fact remains, we don't allow people to participate in any category they want because it undermines the inclusion of those who the category was created for.

Just as we don't allow a 25 year old male to participate in an U15 age grade, or a heavy weight boxer to box in the featherweight division, biological males should not be able to participate in the female category due to the known performance advantages male bodies have over females bodies, even after testosterone reduction.²

Once you realise that inclusion depends on eligibility, the tension between fairness, safety and inclusion disappears. We are left with two values only. We categorise guided by fairness and safety, and this is how we achieve maximal inclusion³. Inclusion has no guiding role, because it springs from eligibility.

Under our current community sport eligibility rules, it is important to note that transgender participants are not excluded from the category of their biological sex or from a mixed sex category.⁴ Our rules already allow the inclusion of everyone in sport. What is required to

¹ <https://youtu.be/6R8q7dcTp70>

² <https://www.savewomenssport.com/the-facts>

³ <https://www.tandfonline.com/doi/abs/10.1080/17461391.2021.1943715>

⁴ Throughout this submission, all references to sex are references to a person's biological sex, which is fixed and immutable. This is differentiated from a person's gender identity.

change are the attitudes of those who fail to accept the diversity of expressions of biological sex, which is negatively impacting the rights of our LGBTQIA+ community to participate in sport. Therefore our focus should be on changing those attitudes and celebrating diversity, which will in turn ensure everyone can feel welcome and included in their appropriate category.

Female transgender, and non-binary, athletes benefit from the differentiation of categories by biological sex rather than gender identity and will be harmed by Sport NZ's proposal. Examples such as swimmer Iszac Henig at the US NCAA Championships, and Quinn and Alana Smith at the Tokyo Olympics, remain in female categories since they would be uncompetitive in male or open categories. Sport NZ's preferred categories will asymmetrically benefit male transgender athletes, gifting them a 10%-30% advantage⁵, at the expense of all female athletes, including female transgender and non-binary athletes.

Those who demand blanket inclusion of male transgender athletes in girls' or womens' categories fail to recognise that eligibility (to compete in a particular category in sport) automatically delivers inclusion. We categorise and sub-categorise athletes in order to achieve maximal inclusion.

We set eligibility criteria so that as many athletes as possible can take part in meaningful competition. By having several sub-categories in boxing (bantamweight, flyweight, middleweight, etc.) we include as many boxers as possible; this is only constrained by practical considerations (see, for example, the sub-categories in para-sports). Without the sub-categories in boxing the heavyweights would win most of the time, and the sport would become a 'battle of the heavyweights'.

Similarly, we have male and female categories to achieve maximal inclusion. If we did not categorise by sex, males would win most of the time. Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys, many doing so at the community level of sport. The same is true of Olympic, World, and U.S. Champion Allyson Felix's 400 meters lifetime best of 49.26. Just in the single year 2017, men and boys around the world outperformed her more than 15,000 times.⁶ Having male and female categories means that many more women/girls can be included in sports – and succeed.

Sport NZ's draft transgender guidelines allow ANYONE to self-identify into the sex category they wish. No questions are allowed to be asked, and no medical or surgical intervention is required. This undermines the eligibility criteria for each category, with the most profound impact being on the female category which was created to protect the inclusion of its participants and their rights to the same fairness, safety and opportunities in sport that their male counterparts have enjoyed unrestricted for generations. Rights which are protected under section 49 of New Zealand's Human Rights Act 1993.

Our challenge to Sports NZ is to ensure the participation of all, while protecting the inclusion, fairness, safety and opportunities for females in their own category.

⁵ <https://www.savewomenssport.com/the-facts>

⁶ <https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/>

2. Legislation

HUMAN RIGHTS ACT 1993

Section 49 of the Human Rights Act 1993 (HRA) explicitly protects separate sporting categories based on biological sex:

Exception in relation to sport

- 1) *Subject to subsection (2), nothing in section 44 shall prevent the exclusion of persons of one sex from participation in any competitive sporting activity in which the strength, stamina, or physique of competitors is relevant.*
- 2) *Subsection (1) does not apply in relation to the exclusion of persons from participation in—*
 - a) *the coaching of persons engaged in any sporting activity; or*
 - b) *the umpiring or refereeing of any sporting activity; or*
 - c) *the administration of any sporting activity; or*
 - d) *sporting activities by persons who have not attained the age of 12 years.*

The common law of New Zealand has defined a person's sex by reference to their biology, being "the congruence of chromosomal, genital and gonadal features."⁷ The Guidelines are now attempting to redefine sex and to collapse the distinction between sex and gender identity altogether. If there is no distinction between sex and gender identity the guiding principles for the inclusion of transgender participants in community sport are most likely unlawfully discriminatory, and almost completely superfluous. The legislative purpose of the section 49 of the HRA is unambiguously the protection of sporting categories based on biological sex not self-ID gender identity, otherwise the section makes no sense. Therefore, our submission proceeds on the basis that the purpose of this development and consultation process is so that Sport NZ, and our national sporting bodies, can make an informed decision on the extent to which it will use the exclusion provision in section 49 of the Human Rights Act 1993 to protect female athletes.

BDMRR ACT

We have heard Sport NZ repeatedly reference the Births, Deaths, Marriages, and Relationships, Registration Act 2021 (BDMRR) in support of its position that New Zealand law provides for a person to change their sex. The BDMRR provides for a person to nominate an alternative sex on their Birth Certificate, this process does not alter a person's biological sex. Section 79(2) of the BDMRR Act 2021 makes it clear that an altered birth certificate is not determinative of sex:

Any individual, private sector agency, or public sector agency authorised or required to ascertain an individual's sex or gender for a particular purpose may take into account either or both of the following:

(a) the information contained in a certificate issued under this Act:

(b) any other relevant information.

We note that a birth certificate is unlikely to be requested when someone signs up to play sport.

⁷ Annabel Markham "Transgender Ideology and the Law" [2019] NZLJ 14; *Corbett v Corbett* [1971] P 83; applied in *R v Tan* [1983] QB 105 and affirmed in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467).

And does it really need stating that we play sport with our bodies, not our birth certificates?

Equality between the sexes is a universal and fundamental human rights principle. In most sports, equality of opportunity for female athletes necessitates dedicated female categories.

3. Community Sports

Community Sport is the pathway to elite sport and this is why the “Guiding Principles for the Inclusion of Transgender Participants in Community Sport” risks impacting female participation and inclusion at all levels. While much of the debate about trans inclusion in sport has been focused on the elite level, the crisis facing women’s sport is just as serious at grassroots level.

Male-born people are competing in women’s sport all over NZ. We have heard from officials and event organisers, many of them volunteers, who now feel powerless to turn away requests from males to compete in the female category, whether their sports have transgender participation policies, or not. We know this, because we regularly hear about examples of it happening, however due to the sensitivities around this issue, including being targeted with abuse or labelled anti-trans or a ‘TERF’, those who share their stories with us are afraid to speak up publicly.

We know that in sports, such as traditional Saturday competition netball, where some associations have allowed males to compete in female teams, the result has been that other teams feel displaced and not competitive or forced to bring in male players to remain competitive, thus pushing their female players to the side-lines. We now have female athletes who deliberately avoid events in which male-born athletes are competing, and who are considering quitting altogether. Other than the netball example, we can’t say which sports, to protect the anonymity of those who have raised their concerns with us. But why should any female be put in this invidious position?

An example provided at a recent Sport NZ webinar⁸ of a male transgender athlete participating at the community level of sport in New Zealand demonstrated that their male performance advantage has remained - even after a medical transition. They were an average athlete in the male division prior to transition, and in the overall rankings now still fit within that range – far ahead of the second female competitor. However, their biological advantage has seen them deprive female athletes of opportunities to win both prize money and podium positions.

Another misunderstanding is the asymmetry of what the inclusion of male transgender athletes in the female category offers to the two sexes in community sport. Males can enjoy competition in the female category with retained male advantages, therefore enhancing their careers, bank balances, and opportunities to reach the elite level of sport. By contrast, females suffer exclusion in their own category and have zero chance of being competitive in the male category, even on testosterone, which while possible at the community level of sport, is banned at the elite level anyway.

⁸ <https://youtu.be/2PHyXGKAbvw>

This issue affects 51% of the population; it is a public health matter, and millions of tax-payers' dollars have been spent raising the participation levels of females in community sport. This ideological assault on fair and safe sport for women and girls is incredibly unfair, and would never be tolerated in men and boy's sport.

In the UK, Sports Secretary Nadine Dorries has instructed their national governing bodies to protect the female category⁹, which British Triathlon did just last week¹⁰. They recognised that Triathlon is a sex-affected sport, and so for competitive events for athletes over the age of 12 there will be two categories; a Female Category, (for those who are the female sex at birth), and an Open Category, (for all individuals including male, transgender and those non-binary who were male sex at birth).

However, in New Zealand quite the opposite is happening, with there clearly being a strong political element to this proposal. For example, in a recent webinar a Sport NZ representative stated that the Minister was "comfortable" with Sport NZ's definition of sex, despite him holding no scientific or medical qualifications or relevant expertise. It was also concerning to hear Sport NZ indicate in a subsequent webinar that those sports who don't comply and implement these guidelines into their own policies may suffer financial consequences¹¹.

Inclusion's supporters tout this as a social justice and human rights issue. If only they would include females in their crusade.

4. Previous Submission

As stated in our previous submission¹², should Sport NZ's Draft Guiding Principles for Transgender Participation be finalised in their current form, it will put the participation levels, the health, the safety, and the opportunities of females of all ages in Aotearoa New Zealand at risk. It will also see female players/athletes displaced from their own class of sport by male-bodied players/athletes, particularly in the highly competitive grades seeking selection for representative teams.

We wish to refer Sport NZ back to this submission. While all points made in it remain as relevant today as they were after the second round of consultation on these guidelines, we particularly wish you to refer back to the following:

6. *"Community" Sports and male acceptance of diversity (pages 6-7)*
7. *Importance of fair competition for female players/athletes (pages 7-8)*
8. *Lack of consideration for the safety of female players/athletes (pages 8-11)*
9. *Participation and displacement of female players/athletes (pages 11-12)*

5. Conclusion + Request

These guidelines, if implemented in their current form, could have serious ramifications for female athletes, officials and volunteers from our grass roots level of sports upwards.

⁹ <https://www.theguardian.com/sport/2022/jun/26/nadine-dorries-to-urge-british-sports-to-follow-fina-in-transgender-policies>

¹⁰ https://www.britishtriathlon.org/news/statement-from-british-triathlon-federation_17073

¹¹ <https://youtu.be/iEBDenwSPz8>

¹² https://www.savewomenssport.com/files/ugd/f0d3e1_f3d50737fd154039bcf04fc08636242a.pdf

During your first webinar¹³, we enquired if any research had been undertaken, or thought given, on how to deal with some of the potential impacts we had highlighted in page 2 of our submission during your last round of consultation¹⁴, which included:

- *The implications on female participation levels in sport should they not feel comfortable playing alongside, against, or sharing changing rooms with male bodies;*
- *The impact on female participation levels should the opportunity of winning become an unattainable feat, due to competitors in their division having a biological advantage that increased training could never overcome;*
- *How the losing of opportunities to male bodies at community levels will impact the numbers of females participating, and able to gain accolades, at the professional and elite level of sport;*
- *The displacement of female athletes from their own class of sport by physiologically advantaged male-bodied athletes, in particular where competing for selection for representative teams or pathways leading to elite/professional opportunities; and*
- *The mental health consequences for females especially in their teenage years should even more decide not to be actively engaged in sport, given research shows that their overall rates of mental health disorders tend to be around 20-40% higher than males¹⁵. Females are also more likely to suffer from psychological problems to self-harm, and to experience suicidal thoughts and attempt suicide. Research also shows that both depression and high instances of self-harm decline through physical activity¹⁶, hence the importance of continuing to invest in increasing female participation rates in sport, and not to implement policies that threaten the current levels*

It was disappointing to hear that Sport NZ has not yet considered any of these scenarios in this final version of the “The Guiding Principles for the Inclusion of Transgender Participants in Community Sport”. Therefore we would like to request Sport NZ undertake the following actions before they are finalised:

1. Independent and confidential research with your female athletes, officials and volunteers to gain a better understanding of their concerns;
2. Develop mitigations that respect the rights to fairness and inclusion for all participants, which can be shared with our national sporting organisations so they have a framework in place to work with should they encounter the most likely scenarios.

Finally, in the words of two athletes¹⁷:

‘Our human rights to equal opportunities (are) not being protected’

‘Why don’t women matter?’

¹³ <https://youtu.be/wqJwwuDnr4E>

¹⁴ https://www.savewomenssport.com/files/ugd/f0d3e1_f3d50737fd154039bcf04fc08636242a.pdf

¹⁵ <https://www.theguardian.com/science/2015/jan/21/suicide-gender-men-women-mental-health-nick-clegg>

¹⁶ <https://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=2448&context=theses>

¹⁷ <https://journals.sagepub.com/doi/abs/10.1177/10126902211021559?journalCode=irsb>