

# A FAIR PLAYING FIELD

PROTECTING WOMEN'S SINGLE-SEX SPORT



**WOMEN'S  
FORUM**  
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**About Women's Forum Australia:** Established in 2005, Women's Forum Australia is an independent think tank that undertakes research, education and public policy advocacy about social, economic, health and cultural issues affecting women. It has a particular focus on addressing behaviour that is harmful and abusive to women.

Women's Forum Australia  
PO Box 40  
Randwick 2031

[www.womensforumaustralia.org](http://www.womensforumaustralia.org)

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## FOREWORD

I am pleased to introduce to you *A Fair Playing Field: Protecting Women's Single-Sex Sport*.

Australia is known as a sporting nation. Like Australians' strong belief in a 'fair go', passion for sport is part of our national identity. And while there is still work to be done, great strides have been made over the years to improve participation, visibility and support for female athletes, both at the community and elite levels.

However, in Australia and internationally, sporting bodies face increasing pressure to cater for biological males who identify as women in female sporting events. This jeopardises the physical safety of women and girls, fairness in competition, and the full range of opportunities afforded by sport.

This is why Women's Forum Australia has undertaken a review of the issues raised by the inclusion of transgender athletes in women's sport and the laws and guidelines that govern their participation in Australia.

It explains that in events where power, stamina and strength are deciding factors, athletes that have passed through male puberty have a life-long advantage that tilts the playing field very significantly in their favour. In addition, transgender inclusion elevates the risk to women's safety, particularly for contact sports. Biological sex differences matter in sport, and ignoring them negates the very purpose of establishing a separate female sporting category, namely, to provide a forum in which women and girls enjoy a sporting chance of success.

The report also considers how current laws and guidelines – which remain remarkably unpopular with the Australian public – are failing women and girls. *The Sex Discrimination Act 1984* (SDA), which was designed to protect women, no longer adequately protects women's sex-based rights, because having removed the biological definitions of 'woman' and 'man' in 2013, it no longer recognises 'woman' as a sex-based category. When it comes to inclusion in women's sport and single-sex spaces, it is now generally unlawful to differentiate between women, and males who identify as women.

Everyone should have an opportunity to play sport, but we need to make sure we have a fair playing field. If women and girls are to enjoy the myriad benefits of sporting achievement – health, fitness, camaraderie, personal goal-setting, leadership, character development, career opportunities, sponsorship and more – it is vital that the women's sporting events that previous generations worked so hard to establish are protected.



Like Senator Claire Chandler has proposed in her *Save Women's Sport Bill*, I too urge the Federal Government to legislate protections for women's single-sex sport. This includes putting the biological definitions of 'woman' and 'man' back in the SDA in order to restore protections for women's sport and the sex-based rights of women and girls more broadly. It is critical that this issue be addressed and that everything is done to properly protect the rights and safety of women and girls.

I also need your help. If you care about the sex-based rights of women and see the value in this report, [I'd like to ask you to consider supporting our work](#) to help educate the wider Australian community on the negative impact of failing to protect women's sport on women's and girls' lives.

With your support, we can better ensure it reaches as many people as possible. I trust that it will be a useful resource for schools, universities, government, sporting bodies and lawmakers now considering this issue, as well as for all those who are working hard to make a difference for women and girls everywhere.

**Rachael Wong**

Chief Executive Officer





## QUICK FACTS

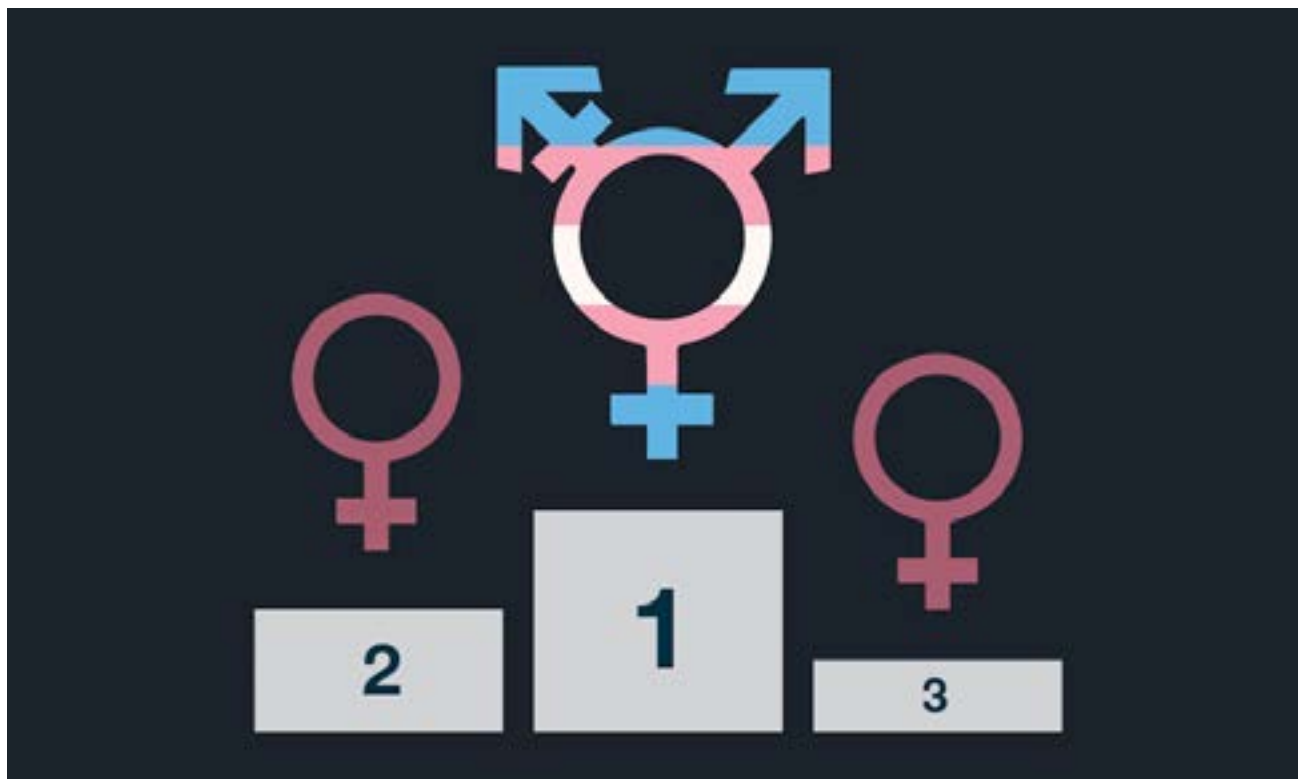
- 1. In Australia and internationally, biological males who identify as women (transwomen) are competing in women's sports.** High-profile examples include American college swimmer Lia Thomas, Kiwi Olympic weightlifter Laurel Hubbard, and Australian handball and football player Hannah Mouncey.
- 2. Athletes that have passed through male puberty have life-long physiological advantages that tilt the playing field very significantly in their favour.** Research has shown that male athletes are up to 50% stronger, 30% more powerful, 40% heavier, and about 15% faster than female athletes. Testosterone suppression has minimal impact on decreasing these advantages.
- 3. Allowing male-bodied transgender athletes to compete in women's sport elevates the risk to women's safety.** World Rugby modelling has shown that males competing against women in contact sports can put female athletes at a 20–30% greater risk of being injured. There are also safety concerns around male-bodied transgender athletes being entitled to use the same changerooms as women and girls.
- 4. The inclusion of biologically male transgender athletes in women's sports means that women and girls who would otherwise have a chance to compete miss out.** This in turn can lead to lost opportunities when it comes to sponsorship, careers and more.
- 5. In 2013, the biological definitions of 'woman' and 'man' were removed from Australia's *Sex Discrimination Act 1984* (SDA) and broad protections for 'gender identity' were added.** As a result, the law no longer adequately protects women's sex-based rights, because it no longer recognises 'woman' as a sex-based category.
- 6. The SDA's 'competitive sporting exemption' was never fit for purpose.** Whatever weak protections it was supposed to offer women's sports have been whittled away by subsequent interpretations, such as in the 2019 *Guidelines for the inclusion of transgender and gender diverse people in sport*. **The Guidelines – implemented by peak Australian sporting bodies – strongly recommend transgender inclusion with no consideration for how this will impact women in sport.**
- 7. The effect of the 2013 changes to the SDA, in conjunction with current interpretations, is that sporting codes and clubs who exclude males from women's sport may face legal action for discrimination.** This is because when it comes to inclusion in women's sport, it is now generally unlawful to differentiate between women, and males who identify as women.
- 8. In order to ensure fairness, safety and opportunities for women and girls in sport, protections for women's single-sex sport need to be clarified in Australian law.** This will involve reinstating the biological definitions of 'woman' and 'man' in the SDA. Everyone should have an opportunity to play sport, but we need to make sure we have a fair playing field.

## EXECUTIVE SUMMARY

The debate over whether transgender women (who are biologically male) should be included in women's sport and, if so, on what terms, will never be resolved to the satisfaction of all. In contest are two irreconcilable ideological universes. The claim that "transwomen are women" appeals to an internal perception of being male or female as the basis for "gender identity". This stands in direct contradiction to the millennia-old understanding that women and girls differ from boys and men because of female/male biological sex differences that cannot be erased through a process of social, or even medical "gender transition".

Sport is one area in which these biological differences materially impact on competitive outcomes, thus placing the demands of transwomen for inclusion in female sport in direct contention with the purpose of establishing a separate female sporting category, namely, to provide a forum in which women and girls enjoy a sporting chance of success.

Section 1 of this report considers the questions raised by intersex and trans inclusion in the women's sporting category and describes the recent work of international sporting bodies to establish a transparent and fair regulatory response. Advances in medical science over recent decades have resulted in the detection of intersex variations – or differences in sexual development (DSDs) – in athletes who would previously have been included automatically in the female category. Although in many respects distinct, the issues of trans and intersex inclusion in female sport both arise in the context of new-found ambiguity and complexity in previously uncontroversial definitions of "woman" and "female".





Although, intersex variations appear (statistically) to confer a competitive advantage on athletes, the relative rarity of DSDs creates a natural limitation on the degree to which intersex inclusion can impact female sport overall. By contrast, the number of trans athletes is potentially unlimited, meaning that trans inclusion in women's sport has the potential to negate the reasons for establishing female-only sports in the first place. In events where power, stamina and strength are deciding factors, athletes that have passed through male puberty have a life-long advantage that tilts the playing field very significantly in their favour. In addition, trans inclusion elevates the risk to women's safety, particularly for contact sports. Although medical interventions to bring the body into conformity with a transgender identity create problems particularly for transwomen whose ability to compete successfully in the male category is reduced, it does not follow that the answer is to include these individuals in the female category on the basis of their gender identity.

Section 2 describes the situation of women's sport in Australia. In 2013, the *Sex Discrimination Act 1984* (SDA) was amended with the intention of extending the legal protections offered to women (prohibiting discrimination on basis of sex) to LGBTIQ+ individuals who might suffer discrimination on the grounds of sexual orientation or gender identity. Provision was made for sports – particularly those in which strength, stamina or physique are significant – to be considered an exception to the rule. However, the details of how clashes in “sex-based rights” and “gender-identity-based rights” are to be resolved are still in contention.

The Australian Human Rights Commission (AHRC), which has consistently supported legal protections for “gender identity” has now been instrumental in producing the *Guidelines for the inclusion of transgender and gender diverse people in sport* (*Guidelines for inclusion*), which present strong policy recommendations to sporting clubs with no consideration for how these recommendations will impact women in sports.<sup>1</sup> Recent efforts, notably by Senator Claire Chandler, to achieve transparency on how and why these challenges to women's sports have been implemented without consulting women have brought to light a bigger problem that can be traced back to at least 2013, when biological definitions of “man” and “woman” were removed from the SDA and “gender identity” added as a protected attribute.

As a result of these changes, the SDA no longer serves the interests of the women whose rights it was intended to protect. If women's rights in Australia are to be protected, it will be necessary to amend the SDA to recognise a biological definition of “woman”. To this end, the efforts of politicians like Senator Chandler to introduce legislation to amend the SDA in order to protect single-sex sport for women and girls in Australia, should be supported.

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<sup>1</sup>“Guidelines for the inclusion of transgender and gender diverse people in sport”, Australian Human Rights Commission, 13 June 2019, 37. Accessed 26 May 2021, <https://humanrights.gov.au/our-work/lgbti/publications/guidelines-inclusion-transgender-and-gender-diverse-people-sport-2019>.

# SECTION 1: TRANS INCLUSION IN WOMEN'S SPORT

## **1. The issue: transwomen and the integrity of women's sport**

In recent years, transgender athletes around the world have been advocating for inclusion in sports on the basis of gender identity, rather than biological sex. Sporting regulations – even those governing elite events like the Olympics – have been changing to allow male-bodied athletes who identify as women (“transwomen”) to compete against biological females.

Particularly after puberty, the physical differences between male and female bodies give transwomen an advantage when they compete in the female category. Typically, men are taller, stronger, have larger lung capacity, broader shoulders, narrower hips, lower body fat mass, more haemoglobin and higher testosterone levels than women. Even when testosterone levels are artificially lowered as part of a medical “transition”, natal males retain various physical advantages that make them (on average) larger, stronger and faster than females.<sup>2</sup>

Until recently, the Olympic guidelines only allowed transwomen to compete in the female category if they kept their testosterone levels below 10 nanomoles per litre (nmol/L) for at least one year prior to the event. Now, even this inadequate rule has been abandoned under the International Olympic Committee's (IOC) latest guidelines (discussed further below).<sup>3</sup> The new guidelines potentially allow biological males to compete in women's sport without restriction, as long as they identify as female and authorities agree that this feminine gender identity has not been opportunistically declared, simply to gain entry to the women's category.

Females who transition to live as men can already compete in male sports without restriction. While there are very few transmen (biological females) competing in elite men's sport<sup>4</sup>, the potential for transwomen (biological males) to dominate women's sporting events is clear.

At the elite level, female sport celebrates and showcases the highest achievements of the female body. Even at the community level, separate female sporting events are needed to give women and girls a sporting chance at meaningful competition. The unrestricted inclusion of male-bodied athletes in female sports significantly undermines the purpose of having separate sporting events for women.

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<sup>2</sup>Anna Wiik et al, “Muscle strength, Size and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals”, *The Journal of Clinical Endocrinology & Metabolism* 105, no. 3 (2020): 805-813, <https://doi.org/10.1210/clinem/dgz247>.

<sup>3</sup>“IOC releases Framework on Fairness, Inclusion and Non-discrimination on the basis of gender identity and sex variations”, Olympics, 16 November 2021. Accessed 23 November 2021, <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>.

<sup>4</sup>Chris Mosier is a rare example. Mosier is a triathlete transman who competed in a 2020 Olympic trial but was unable to finish the race due to injury.

## 2. The right to play ... in which category?

Trans athletes argue that “transwomen are women” and should therefore have the right to participate in female events. Rachel McKinnon (now known as Veronica Ivy), a prominent trans cyclist, has explained that it is not fair for people to support transgender rights in every other part of society except sports:

*“All my medical records say ‘female’ ... My doctor treats me as a female person, my racing license says female, but people who oppose my existence still want to think of me as male ... By preventing transwomen from competing or requiring them to take medication, you’re denying their human rights.”<sup>5</sup>*

McKinnon makes reference to the Olympic Committee charter, which states that “the practice of sport is a human right”.<sup>6</sup>

Former British Masters Champion, Victoria Hood, agrees up to a point:

*“It is a human right to participate in sport. I don't think it's a human right to identify into whichever category you choose ... If people want to push this through some misguided idea that they are being inclusive, it is not inclusive. It is excluding women and girls from their own category. It's not fair.”<sup>7</sup>*

The concept of fair play is the bedrock of all competitive sport. It is a long-established principle that fair and meaningful competition is achieved by grouping different body types into different categories. This is why we commonly see competition based on differences in age, weight, skill level and other factors. This is also why sport is divided into male and female sex categories and why separate events have been created for athletes with disability. In the absence of these different categories, the contest between closely-matched athletes that is the heart of competitive sport is impossible and the competition is rendered meaningless.<sup>8</sup>

Most people accept the need for separate male and female categories in sporting events in which physical prowess matters. The debate about trans inclusion centres on the question of who can be included in the female category and the rationale for this decision.

As trans athletes set new world records in women’s sporting events, the injustice of requiring females to compete against males is becoming increasingly obvious. As

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<sup>5</sup>Mollie Walker, “Transgender cyclist Rachel McKinnon dominates as competitors cry foul”, New York Post, 21 October 2019. Accessed 11 March 2021, <https://nypost.com/2019/10/21/transgender-cyclist-rachel-mckinnon-dominates-as-competitors-raise-questions/>.

<sup>6</sup>“The Olympic Charter”, Olympics, 28 January 2011. Accessed 23 November 2021, <https://olympics.com/ioc/news/the-olympic-charter>.

<sup>7</sup>“Rachel McKinnon: Transgender athlete sets world best but rules out Tokyo 2020”, BBC Sport, 18 October 2019. Accessed 1 December 2021, <https://www.bbc.com/sport/cycling/50097423>.

<sup>8</sup>One case in point is the state netball championships held in Brisbane in 2021 where Netball Queensland made the decision to allow a boys team to play in the all girls competition. The all boys’ Queensland Suns U17s team decimated the girls’ Bond University Bull Sharks team 46-12 in the grand final, creating widespread backlash: James Matthey, “Uproar as all-boys netball team beats girls to win state title”, news.com.au, 24 September 2021. Accessed 23 December 2021, <https://www.news.com.au/sport/sports-life/uproar-as-allboys-netball-team-beats-girls-to-win-state-title/news-story/819d1d0101345dad1aee9ea814102456>.



Victoria Hood (Image, Fair Play For Women)

Senator Claire Chandler has explained:

*“Inclusion in sport is important and that’s why we have men’s sport for males, women’s sport for females, junior sport for children and a range of mixed and social sport options. Removing female-only sport as a stand alone category is not inclusive, it is insulting and unfair.”<sup>9</sup>*

In the contest between recognising the significance of gender identity and recognising the significance of biological sex, the International Association of Athletics Federations (IAAF) has recently come out in support of the latter:

*“The IAAF is convinced there are some contexts, sport being one of them, where biology has to trump identity ... The IAAF also believes the right to participate in sport does not translate to a right to self-identify into a competition category or an event, or to insist on inclusion in a preferred event, or to win in a particular event, without regard to the legitimate rules of the sport or the criteria for entry.”<sup>10</sup>*

<sup>9</sup>Claire Chandler, “Women’s sport sacrificed by sporting administrators”, Media Release, 1 October 2020. Accessed 14 October 2020, <https://senatorchandler.com.au/womens-sport-sacrificed-by-sporting-administrators/>.

<sup>10</sup>ZK Goh, Evelyn Watta, and Ed Knowles, “DSD athletes: What does it mean to be DSD and how gender and sex are the big issues in athletics”, Olympics, 25 September 2019. Accessed 26 May 2021, <https://www.olympicchannel.com/en/stories/news/detail/semenya-niyonsaba-wambui-what-is-dsd-iaaf-regulations/>.



### **3. Anabolic steroids (which artificially mimic testosterone) are banned because their use creates an unfair advantage**

One aspect of sporting competition is to celebrate the *natural* sporting ability of extraordinary individuals. As the preamble to the World Anti-Doping Code explains:

*“Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport.” It is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person’s natural talents. It is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport ... Doping is fundamentally contrary to the spirit of sport.”<sup>11</sup>*

Governing bodies of elite sports invest significantly in drug testing to ensure (as far as possible) that athletes are not using performance-enhancing drugs (PEDs), such as anabolic steroids.<sup>12</sup> These synthetic steroids imitate testosterone and help build muscle, endurance and strength. They are prohibited for two significant reasons:

#### **Use of PEDs compromises the integrity of the game**

Athletes who use PEDs have an unfair advantage over those who do not, meaning the outcome no longer depends only upon the skill, strength and talent of equally matched competitors. Instead, the competition is decided by which athlete has the best steroid cocktail or the money to buy the best drugs.

The use of PEDs therefore constitutes cheating: athletes found to be using illicit substances are disqualified and face bans from future events; where it is discovered after the event that a victory has been achieved by deception, medals are revoked.

#### **Use of PEDs threatens the health of athletes**

The use of steroids can have serious health repercussions, including high blood pressure, cardiovascular complications, tendon/ligament damage, liver damage, compromised endocrine and reproductive function, kidney and prostate cancer, and psychiatric symptoms including depression. In the worst case, long-term heavy steroid use can lead to heart attack, stroke and death.<sup>13</sup>

Given the pressure placed on athletes to win, the prohibition of PEDs and the rigorous policing of these rules is necessary to protect both the integrity of the sport as well as the health of players who might otherwise be tempted or pressured to risk their health to achieve sporting success.

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<sup>11</sup>“World Anti-Doping Code 2015 with 2019 Amendments”, World Anti-Doping Agency, 2019. Accessed 1 December 2021, [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_anti-doping\\_code\\_2019\\_english\\_final\\_revised\\_v1\\_linked.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf).

<sup>12</sup>“The Prohibited List”, World Anti-Doping Agency, 1 January 2020. Accessed 26 May 2021, <https://www.wada-ama.org/en/what-we-do/the-prohibited-list>.

<sup>13</sup>“Anabolic Steroids DrugFacts”, National Institute of Drug Abuse, August 2018. Accessed 1 December 2021, <https://www.drugabuse.gov/publications/drugfacts/anabolic-steroids>; Jeffrey T Laseter and Jeffrey A, “Anabolic steroid-induced tendon pathology: a review of the literature”, *Medicine and Science in Sports and Exercise* 23, no. 1 (1991), <https://pubmed.ncbi.nlm.nih.gov/1997802/>; Ana Isabel Hernández-Guerra et al, “Sudden cardiac death in anabolic androgenic steroids abuse: case report and literature review”, *Forensic Sciences Research* 4, no. 3 (2019), doi:10.1080/20961790.2019.1595350.

## 4. Detecting male imposters and intersex athletes

From the early days of elite women's sport, the IAAF was concerned to ensure male imposters were prevented from infiltrating women's events.<sup>14</sup> Just as it was necessary to make sure no one was cheating through doping, it was important to ensure that no one was cheating by entering a category where they would enjoy an unfair advantage.

At first, these checks took the form of sporadic anatomical examinations, particularly when athletes scored surprising new records. For a while after WWII, the IAAF was content to accept a doctor's reassurance that an athlete was female. Since this trust-based system was clearly open to abuse, it was later replaced by official compulsory "naked parades" to ensure contestants in the women's category were female.<sup>15</sup> Female athletes understandably objected to this invasion of their privacy.

From 1967, physical inspections were replaced with the Barr body test, which detected XY chromosomes. Believing the test to be successful, the IOC also adopted this method for the Mexico City Olympics (1968) and those that followed. Although neither the IAAF nor the IOC discovered a male imposter, the Barr body test for the first time detected "intersex" athletes.<sup>16</sup>

In rare cases (1 in 2,000 babies), hormonal or genetic irregularities result in "intersex" variations or differences of sexual development (DSD). For example, androgen insensitivity syndrome (AIS) – which affects fewer than 1 in 20,000 babies – either reduces or completely impedes the body's ability to respond to androgens, such as testosterone. A genetically XY embryo affected by AIS does not develop primary male sex organs. At puberty, AIS impedes the development of secondary male sex characteristics. As adults, AIS individuals will be incapable of female reproduction.<sup>17</sup>

Particularly in developing countries, where medical screening is unavailable, AIS individuals may be born and raised through puberty as female entirely unaware that their DSDs make them different from other women. DSDs that produce disadvantages in other aspects of life, appear to confer a distinct advantage in sport.<sup>18</sup>

In former years, standard IOC and IAAF policy was to advise athletes who "failed" the sex test to fake an injury as a pretext for withdrawing quietly from competition, thus avoiding any suspicion of doping or "cheating".<sup>19</sup> The feelings of injustice among those affected are understandable. Maria José Martínez-Patiño, a Spanish hurdler in the 1980s, complained that any perceived advantage she gained from her XY genes

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<sup>14</sup>Alan D. Rogol, and Lindsay Parks Pieper, "Genes, Gender, Hormones, and Doping in Sport: A Convolved Tale", *Frontiers in Endocrinology* 8, no. 251 (2017): 1, <https://doi.org/10.3389/fendo.2017.00251>.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid, 1-2.

<sup>17</sup>"Androgen insensitivity syndrome", NHS, 17 March 2010. Accessed 1 December 2021, <https://www.nhs.uk/conditions/androgen-insensitivity-syndrome/>.

<sup>18</sup>Rogol and Pieper, "Genes, Gender, Hormones", 2.

<sup>19</sup>Maria José Martínez-Patiño, "Personal Account: A woman tried and tested", *The Lancet* 366, Suppl 1:S38 (2005), [https://doi.org/10.1016/S0140-6736\(05\)67841-5](https://doi.org/10.1016/S0140-6736(05)67841-5).





Caster Semenya (Image, Flickr: Citizen59)

was negated by her androgen insensitivity and that she was therefore disqualified for an advantage she did not have.<sup>20</sup>

The Barr body test has now been superseded by various other tests but all are susceptible to the same challenge where the sex of an individual cannot be established unequivocally. In the last decade, two cases have been particularly influential in shaping IOC and IAAF policy with regard to intersex inclusion in women's sports.

### **Caster Semenya**

Caster Semenya is a South African middle-distance runner whose extraordinary achievements in the 2009 World Championships, in combination with her appearance, prompted calls for an official investigation of her sex. Testing revealed Semenya has a rare recessive genetic condition (5 $\alpha$ -Reductase deficiency): she has XY chromosomes, testes and hyperandrogenism (meaning her body produces testosterone in the male range).

In response to Semenya's case, the IAAF and IOC Medical Commission concluded hyperandrogenism confers an unfair competitive advantage. The amended Hyperandrogenic Regulations published by the IOC in 2012, required hyperandrogenic athletes in particular women's events to keep endogenous (i.e. naturally occurring) testosterone levels below 10 nmol/L.<sup>21</sup>

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<sup>20</sup>Ibid.

<sup>21</sup>"IOC Regulations on Female Hyperandrogenism", International Olympic Committee, 2012. Accessed 3 December 2021, [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf); Angelica LindénHirschberg, "Female hyperandrogenism and elite sport", *Endocrine connections* 9, no. 4 (2020), doi:10.1530/EC-19-0537.



Far left Dutee Chand (Image, Odisha Games 2017)

## Dutee Chand

This restriction was challenged in 2015 by the Indian sprinter, Dutee Chand. Unlike Semenya, Chand is androgen insensitive, meaning that the extent to which her performance is enhanced by naturally high levels of testosterone is far less certain. Taking her case to the Court of Arbitration for Sport (CAS), Chand argued that the requirement for medical interventions to artificially lower her body's natural testosterone levels was discriminatory and unscientific because the regulations target genetic traits and are grounded in the assumption that high levels of naturally-occurring testosterone are a key factor in athletic performance.<sup>22</sup>

Supporting Chand's challenge to the Hyperandrogenic Regulations, the CAS ruled that the IAAF had so far failed to demonstrate conclusively that elevated testosterone provided XY women with more of a significant competitive edge than factors like nutrition, age, height, weight, access to coaching and training facilities, and other genetic and biological variations like oxygen-carrying capacity. The CAS ordered a two-year suspension of the restriction to allow time for further investigation of the question. If, at the end of two years, the IAAF was unable to present more scientific evidence to establish that naturally high testosterone levels provide an unfair athletic advantage to hyperandrogenic female athletes as compared to their peers, then the suspension of the Hyperandrogenic Regulations would become permanent.

<sup>22</sup>*Dutee Chand v Athletics Federation of India (AFI) and The International Association of Athletics Federations (IAAF) (Interim Arbitral Award)* (Court of Arbitration for Sport, Case No CAS 2014/A/3759, 24 July 2015). Accessed 27 December 2021, [https://www.doping.nl/media/kb/3317/CAS%202014\\_A\\_3759%20Dutee%20Chand%20vs.%20AFI%20%26%20IAAF%20%28S%29.pdf](https://www.doping.nl/media/kb/3317/CAS%202014_A_3759%20Dutee%20Chand%20vs.%20AFI%20%26%20IAAF%20%28S%29.pdf).

## 5. The new IAAF regulations for athletes with differences of sex development

In May 2019, the IAAF announced that the CAS had accepted its newly drafted *Eligibility Regulations for the Female Classification (Athletes with differences of sex development)* as a necessary, reasonable and proportionate means of achieving the IAAF's legitimate aim of preserving the integrity of female athletics in the restricted events.<sup>23</sup> In an accompanying press release the IAAF explained:

*"We have seen in a decade and more of research that approximately 7.1 in every 1000 elite female athletes in our sport are DSD athletes with very high testosterone levels in the male range. The majority of those athletes compete in the restricted events covered by the regulations. This frequency of DSD individuals in the elite athlete population is around 140 times higher than you will find in the general female population, and their presence on the podium is much more frequent even than this. The CAS accepted that this demonstrates, in statistical terms, that they have a significant performance advantage."*<sup>24</sup>

The new regulations apply to legally female or intersex athletes who have XY chromosomes, testes (instead of ovaries), a blood testosterone level in the male range and who are androgen-sensitive. Such athletes are now required to lower their blood testosterone levels to under 5 nmol/L to qualify for international women's races from 400m to one mile. World records set by DSD athletes with blood testosterone over 5 nmol/L will not be counted. Women like Chand, who can demonstrate complete androgen insensitivity, are exempt from the requirement to artificially lower testosterone levels. Women like Semenya, whose bodies *do* respond to testosterone, are required to lower and maintain artificially-reduced testosterone levels to compete in certain elite women's events.

The current restrictions on DSD XY athletes are conservative and narrow. They only restrict athletes at the international level, and then only in track events between 400m and 1 mile in distance, where the performance-enhancing benefits of elevated levels of circulating testosterone (from the extra strength and power derived from the increases in muscle mass), are most apparent. The IAAF has promised to keep this policy under review and either narrow or expand the number of events affected by the regulations if new scientific knowledge indicates there is justification for such a change.<sup>25</sup>

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<sup>23</sup>"CAS Upholds IAAF's Female Eligibility Regulations", World Athletics, Media Release, 1 May 2019. Accessed 26 May 2021, <https://www.worldathletics.org/news/press-release/cas-female-eligibility-regulations>; Eligibility Regulations for the Female Classification (Athletes with differences of sex development), IAAF, 1 May 2019. Accessed 27 December 2021, <https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/05/IAAF-Eligibility-Regulations-for-the-Female-Classi-2-compressed.pdf>.

<sup>24</sup>"IAAF publishes briefing notes and Q&A on Female Eligibility Regulations", World Athletics, Media Release, 8 May 2019. Accessed 26 May 2021, <https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

<sup>25</sup>Ibid.



Even so, the scientific basis for the IAAF's regulations is contested by trans athletes who accuse Science of bowing to Politics:<sup>26</sup>



## 6. When does an advantage become an unfair advantage?

Critics of these new regulations argue that,

*“because their testosterone production is natural, and not a result of performance-enhancing substances, these individuals with genetic conditions that elevate androgen levels should be considered no different from others with genetic conditions that create extremes in height, body proportions, oxygen consumption, muscle bulk, and morphology.”<sup>27</sup>*

It is perfectly true that elite athletes are not regular humans and that their competitive edge can often be attributed to genetic irregularities. Arguably, the attempt to impose “normal” ranges on elite athletes (“a collection of mutants”<sup>28</sup>) and to exclude for traits that confer a competitive advantage is an impossible and self-defeating task, entirely contrary to the objectives of elite sporting competition. The question arises: what sort of advantages are “unfair”? Where do we draw the line and why?

In response, the IAAF has argued that testosterone can be considered different from other types of advantage by degree of magnitude – the advantage conferred by testosterone in the male range is substantial enough to dwarf any other biological and genetic variations and, if unaddressed, has the potential to compromise the purpose of establishing a separate women’s category altogether:

*“It is correct that elite sport celebrates and rewards genetic differences (height, wing span, fast twitch muscles, etc).*

*The only genetic difference that elite sport does not celebrate is the genetic difference between men (with male chromosomes, XY) and women (with female chromosomes,*

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<sup>26</sup>@HannahMouncey, Twitter, 10 October 2020. Accessed 27 December 2021, <https://twitter.com/HannahMouncey/status/1314736619253972993>.

<sup>27</sup>Rogol and Pieper, “Genes, Gender, Hormones”, 5.

<sup>28</sup>Dr James Barrett, President of the British Association of Gender Identity Specialists, quoted in Annie Hayes, “The Truth About Trans Athletes”, Men’s Health, 27 March 2019. Accessed 26 May 2021, <https://www.menshealth.com/uk/fitness/a26798247/trans-athletes-sporting-performance/>.



Cartoon by A.F. Branco

*XX) ... Everyone agrees there must be separate male and female competition categories precisely to ensure that this genetic difference (XY chromosomes producing testes and high testosterone levels rather than XX chromosomes producing ovaries and low testosterone levels) is not outcome-determinative.”<sup>29</sup>*

In 2015, the IOC issued revisions to its qualifying guidelines, requiring that testosterone be maintained below 10 nmol/L for twelve months before the event as the criterion for eligibility in the women’s category.<sup>30</sup> Following the controversial inclusion of Laurel Hubbard in the Tokyo 2020 Games (in 2021), the IOC announced it would issue further revisions. Given the controversy surrounding Hubbard’s participation, the revisions were expected to re-establish fairness for women in elite sport, or at the very least, bring the IOC in line with the IAAF’s regulations.<sup>31</sup>

However, in a cruel twist, the IOC’s new guidelines remove even the limited protection women had by abolishing the testosterone limit entirely.<sup>32</sup> The guidelines acknowledge very limited grounds for preserving women’s sport and place a strong emphasis on ensuring inclusion, privacy and non-discrimination for the gender diverse. The need to exclude particular players is referred to different sporting authorities to be argued out on a case-by-case basis. Clearly, this throws the burden of proof onto women’s sports, which must now marshal the scientific evidence to demonstrate the ineligibility of each trans athlete on an individual basis, muster the will and resources to defend these decisions and brace for the inevitable backlash by trans activists. This move by the IOC flies in the face of the available scientific evidence, as well as common sense.

<sup>29</sup>World Athletics, “IAAF publishes briefing notes and Q&A”.

<sup>30</sup>“IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015”, International Olympic Committee, 2015. Accessed 27 December 2021, [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

<sup>31</sup>Henry Bushnell, “IOC admits transgender athlete policy outdated, will change after Tokyo Olympics”, AOL, 2 August 2021. Accessed 26 August 2021, <https://www.aol.com/sports/ioc-admits-transgender-athlete-policy-033812361.html>.

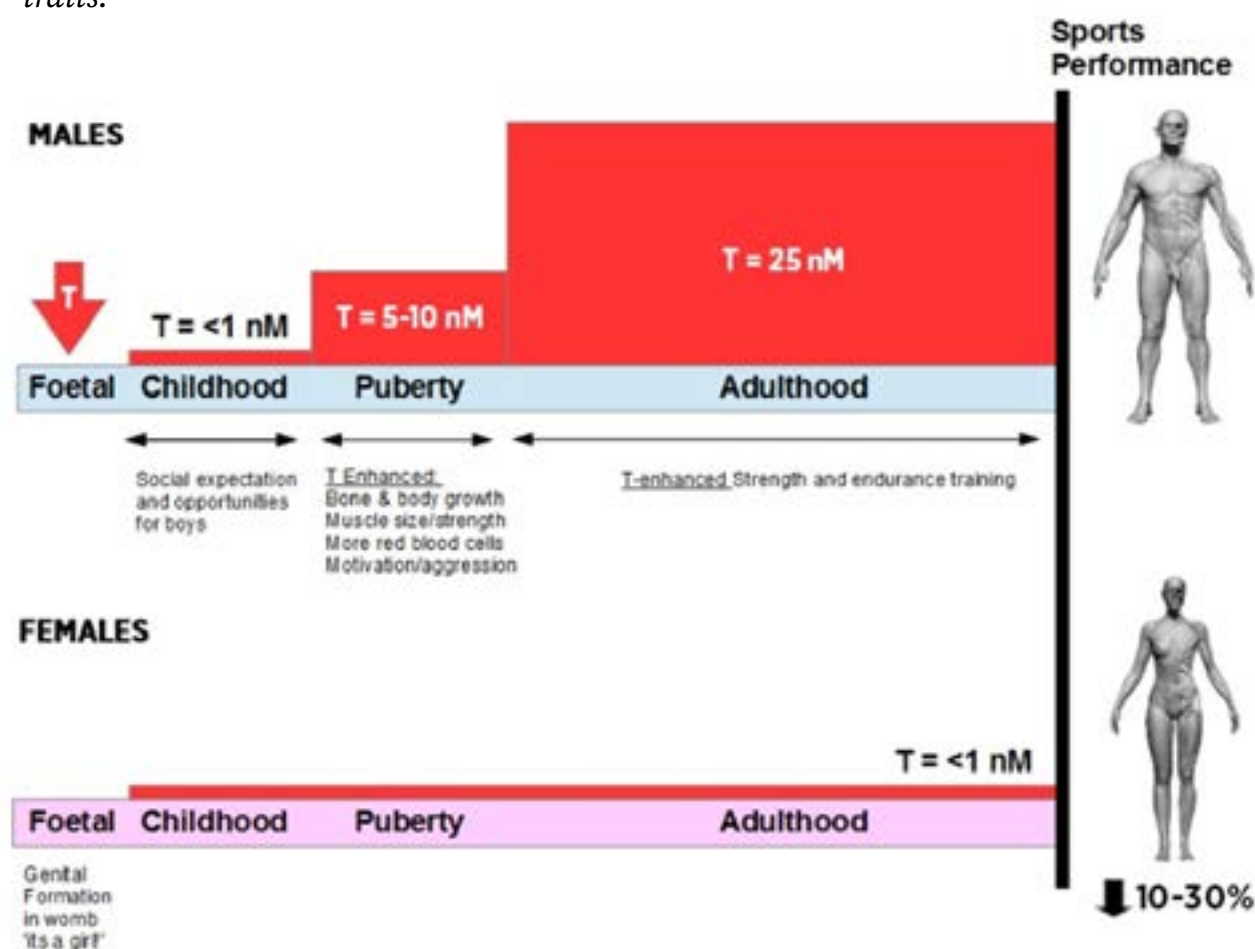
<sup>32</sup>“IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations”, International Olympic Committee, 2021. Accessed 30 November 2021, <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>.

## 7. Why is testosterone so significant?

The female range for testosterone is categorically different from the male range and there is no overlap. Beginning in puberty, the testes produce significantly more testosterone than ovaries and adrenal glands combined. Women produce testosterone in the range 0.06–1.68 nmol/L compared with men, 7.7–29.4 nmol/L. Higher levels of testosterone produce bigger and stronger bones, muscles and higher haemoglobin levels, conferring a “massive performance advantage” (10%–12% on average) on men and some DSD athletes.<sup>33</sup>

*“Compared to females, males have greater lean body mass (more skeletal muscle and less fat), larger hearts (both in absolute terms and scaled to lean body mass), higher cardiac outputs, larger hemoglobin mass, larger VO<sub>2</sub> max (i.e. a person’s ability to take in oxygen), greater glycogen utilization, and higher anaerobic capacity.”<sup>34</sup>*

*“The performance gap holds even when we adjust for the fact that the best elite athletes are ‘freaks of nature’ and that their success can be largely attributed to their unusual physical traits.”<sup>35</sup>*



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<sup>33</sup>World Athletics, “IAAF publishes briefing notes and Q&A”.

<sup>34</sup>Doriane Lambelet Coleman, “A Victory for Female Athletes Everywhere”, *Quillette*, 3 May 2019. Accessed 26 May 2021, <https://quillette.com/2019/05/03/a-victory-for-female-athletes-everywhere/>.

<sup>35</sup>Doriane Lambelet Coleman, “Sex in Sport”, *Law and Contemporary Problems* 80, no. 4 (2017): 89, <https://scholarship.law.duke.edu/lcp/vol80/iss4/5>.

<sup>36</sup>“Is it fair to allow transwomen to compete in female sport?”, *Fair Play for Women*, 20 December 2018. Accessed 31 January 2022, [https://fairplayforwomen.com/tw\\_in\\_sports/](https://fairplayforwomen.com/tw_in_sports/).



If no single metric is perfect for the purposes of defining separate eligibility for men's and women's sports, then testosterone seems to come pretty close. As Doriane Coleman, an athlete and law professor who has given careful thought to this subject, explains:

*“Sport already tests for T levels as part of standard anti-doping controls, and it is much less intrusive than other diagnostic techniques used to determine sex. Most importantly, it's the best single physiological marker for sport's purposes. That's because the primary reason for the sex differences in the physical attributes that contribute to elite athletic performance is exposure to much higher levels of testosterone during male pubertal growth.”*<sup>37</sup>

Unsurprisingly, those sports in which physical power and speed matter are the most affected by differences in testosterone levels. The male/female difference is likely to show in track and field events, such as weightlifting, cycling, triathlon or swimming, whereas in archery or shooting, for example, the outcome is not determined to the same extent by physical power. In time, the IAAF eligibility criteria may need to be extended to other sports beyond middle-distance running.

Some trans athletes have challenged rules requiring biological males to submit to medical intervention or artificially suppress *naturally-occurring* testosterone as a condition of their entry in women's sports on the basis that this violates the objective to celebrate an athlete's natural – unenhanced, unaltered – capacities. This rationale, which is valid in particular cases involving androgen insensitive intersex athletes (whose bodies cannot respond to testosterone), does not apply in the same way to all XY “women”. People with male bodies that experience all the performance-enhancing advantages of testosterone can obviously compete without artificial manipulation of naturally-occurring hormones in the male category.

## **8. The “T gap” is reflected in a performance gap between males and females**

Even recognising that some diminution in a trans athlete's strength and power follows upon cross-sex hormone therapies, there is no logical basis for treating this as analogous to the hormonal complexities related to rare intersex variations. The bodies of transwomen athletes are unambiguously male. Any diminution of sporting prowess that attends their gender transition is the result of *artificial* interference with their body's naturally occurring hormones. Chand might object to the *requirement* for testosterone levels to be reduced and, where androgen insensitivity can be established, there is a case for making an exception. The same case cannot be made for transwomen whose bodies respond to testosterone in the usual way.

Unrestricted “trans inclusion” in women's events poses a threat to women's sport of an altogether different magnitude to the inclusion of intersex athletes. Only 1 in 2,000 babies

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<sup>37</sup>Coleman, “A Victory for Female Athletes Everywhere”.

is born with a DSD. Intersex athletes may be disproportionately over-represented on the finalists' podium in elite female sports, but the rarity of the condition constrains the potential for such athletes to squeeze XX female competitors out completely. In contrast, there is no upper limit to the number of trans athletes that might apply to compete in women's events.

There is an average 10–12% performance gap between elite male and elite female athletes;<sup>38</sup> the best women can never run as fast as the best men. This sex differential explains why non-elite males are competitive with and often better than elite females. Adopting sex blindness in competitive sport has the perverse effect of enabling non-elite boys and men to win places and championships from elite girls and women.

Men who might be mid-field in men's sports, have a much better chance of winning in women's events. Certainly, there is an overlap in male and female sporting performance which means elite women can outperform many men. However, equally, there is a clear gap between the highest achievements of female athletes and the highest achievements of male athletes:

- The women's 100m, 400m, and 800m running records are beaten by literally hundreds of men each year, including by many high school boys.<sup>39</sup>
- Paula Radcliffe broke the world record for the women's marathon in 2003 with a time of 2:15:25. The record stood for 16 years until it was broken in 2019 by Brigid Kosgei with a time of 2:14:04. But Radcliffe's record is broken by upward of 250 men every year.<sup>40</sup>
- Missy Franklin set the women's world record for 200m backstroke in the 2012 London Olympics with a time of 2:04:06. Ryan Lochte set the men's world record for the same event at the 2008 Olympics in Beijing a full nine seconds faster (1:53.94). The competitors have a similar height and wingspan but, had they been in the same pool, Franklin would have been about half a lap behind Lochte at the finish.<sup>41</sup>



*Left* Ryan Lochte (Image, JD Lasica) *Right* Missy Franklin (Image, Oleg Bkhambri)

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<sup>38</sup>Dutee Chand v Athletics Federation of India, 516.

<sup>39</sup>Coleman, "Sex in Sport", 89.

<sup>40</sup>Ibid, 88.

<sup>41</sup>Ibid, 90.

- In 2017, John McEnroe caused a media stir by observing that Serena Williams probably ranks only about 700th among all the tennis players in the world.<sup>42</sup>



Serena Williams (Image, Edwin Martinez)

Sports scientist Ross Tucker has emphasised the point at issue, “[w]ithout a women’s category, elite sport would be exclusively male.”<sup>43</sup> Coleman agrees:

*“Without an eligibility rule based in sex-linked traits, we wouldn’t see female bodies on any podium. Equally important, without such an eligibility rule, it’s unlikely that societies could continue legally to sustain separate girls’ and women’s only sport. The set-aside is premised on inherent biological differences between the sexes. If that basis were eliminated, it’s unclear how the classification would pass muster under standard legal anti-discrimination analysis.”<sup>44</sup>*

Abigail Shrier is only the latest of many female authors to call down the ire of trans activists on her head for her presumption in questioning fundamental tenets of the transgender movement. In a recent opinion piece, she critiqued the effect of this movement on women’s sport:

*“To force young women to compete with male-bodied athletes will bring about the collapse of women’s sports. It will usher in a world where girls recognize the futility of striving to become the next Martina Navratilova, Sheryl Swoopes, Jackie Joyner-Kersey or Mia Hamm. It will strip young women of all the hard-earned entitlements of Title IX. And for what? A cynical contest whose fairness no honest observer will credit? A few limp claps from spectators who know—long before the starter pistol is fired—that the contest is fixed?”<sup>45</sup>*

<sup>42</sup>Tom Lutz, “Serena Williams tells McEnroe ‘respect my privacy’ after men’s ranking views”, The Guardian, 27 June 2017. Accessed 6 December 2021, <https://www.theguardian.com/sport/2017/jun/26/serena-williams-would-be-700-in-the-world-on-mens-tour-says-mcenroe>. Although the factual basis for McEnroe’s figure of 700 was debated, the point at issue was only reinforced in the subsequent media conversation. Victoria Coren Mitchell, objected that this observation was as pointless as comparing any two competitors who might excel in their sport but compete in different divisions: “Here’s the ultimate glitch in his argument. If you extrapolate logically from John McEnroe’s suggestion that 699 people are better at tennis than Serena Williams, then there’s no real point in her competing. And if there’s no point her competing, there’s certainly no point any other women competing.” (Victoria Coren Mitchell, “Serena Williams ranks 700th, reckons John McEnroe. Then there’s no point in her competing”, The Guardian, 2 July 2017. Accessed 6 December 2021, <https://www.theguardian.com/sport/2017/jul/01/serena-williams-john-mcenroe-tennis-gender-championship-equality-sexist>).

<sup>43</sup>Ross Tucker, “The Caster Semenya Debate”, The Science of Sport, 16 July 2016. Accessed 26 May 2021, <https://sportsscience.com/2016/07/caster-semenya-debate/>.

<sup>44</sup>Coleman, “A Victory for Female Athletes Everywhere”.

<sup>45</sup>Abigail Shrier, “The Transgender Threat to Women’s Sports”, Newsweek, 20 October 2020. Accessed 26 May 2021, <https://www.newsweek.com/transgender-threat-womens-sports-opinion-1540418>.

## 9. Does testosterone suppression level the playing field?

In confirming tighter eligibility restrictions for intersex athletes, the IAAF underscored the need to “protect” the female classification in order to ensure fair and meaningful competition in elite sports remains available to women.<sup>46</sup>

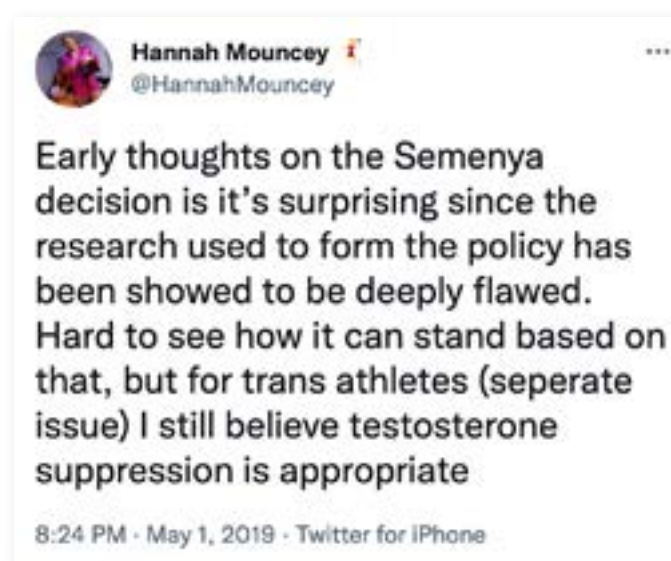
*“If that genetic difference makes it unfair for men to compete against women, it also (obviously) makes it unfair for 46 XY women to compete against women ... If a 46 XY DSD athlete's body can make use of the testosterone that it produces, then she has all the same advantages as a 46 XY man has over a 46 XX woman ...*

*In short, [the CAS] found that in this context ‘biological reality trumps gender identity’. That ruling should be respected and enforced by the national courts.”<sup>47</sup>*

One respondent to an anonymous survey of former female Olympians commented that the IOC guidelines (pre-2021) requiring transwomen to keep their testosterone levels below 10 nmol/L for at least one year prior to the event, “do not level the playing field, or protect our human rights to equal opportunities ... It’s a live experiment where female athletes will lose out until the obvious is proved. Then it will be changed. That’s not fair.”<sup>48</sup>

On the other hand, Rachel McKinnon, the first trans athlete to set a new world record at the 2019 Women’s Masters Track Cycling World Championship, advocates transgender inclusion in the women’s category on the basis of gender identity alone, without the need for any medication or reduction in testosterone. McKinnon complains that the IOC’s approach “already treats transwomen as ‘really’ men/male, who may only become women after sufficient medical intervention”.<sup>49</sup>

In contrast, Hannah Mouncey, an Australian trans rugby and handball player, believes on the basis of personal experience that testosterone suppression makes a huge difference to performance and is prepared to concede that testosterone suppression for trans athletes is appropriate.<sup>50</sup>



<sup>46</sup>World Athletics, “IAAF publishes briefing notes and Q&A”.

<sup>47</sup>Ibid.

<sup>48</sup>Sean Ingle, “British Olympians call for IOC to shelve ‘unfair’ transgender guidelines”, The Guardian, 12 June 2019. Accessed 26 May 2021, <https://amp.theguardian.com/sport/2019/jun/12/olympians-ioc-transgender-guidelines>.

<sup>49</sup>Dawn Ennis, “Report: IOC delaying stricter rules for trans athletes because scientists can’t agree”, Outsports, 26 September 2019. Accessed 26 May 2021, <https://www.outsports.com/2019/9/26/20885408/ioc-transgender-athletes-scientists-testosterone-guidelines-inclusion>.

<sup>50</sup>@HannahMouncey, Twitter, 1 May 2019. Accessed 27 December 2021, <https://twitter.com/HannahMouncey/status/1123533677042921472>.





Women's football (Image, iStock)

Where McKinnon thinks no testosterone suppression should be required and Mouncey accepts that some suppression is appropriate before biological males can compete against women, new research findings would seem to contradict both of these positions. In 2019, the prestigious Karolinska Institute in Sweden announced research showing that testosterone suppression for transwomen has little effect on reducing muscle strength even after a year of treatment.<sup>51</sup> And in 2021, two major reviews from top sports medicine journals found similarly.

The review in *Sports Medicine* found that “the muscular advantage enjoyed by transgender women is only minimally reduced when testosterone is suppressed. Sports organizations should consider this evidence when reassessing current policies regarding participation of transgender women in the female category of sport.”<sup>52</sup>

The review in the *British Journal of Sports Medicine* found that “Notwithstanding values for strength, lean body mass and muscle area in transwomen remain above those of cisgender women, even after 36 months of hormone therapy.” This review was first-authored by transwoman Joanna Harper, an academic who advises the IOC.<sup>53</sup>

In September 2021, an 18 month review of sporting bodies released in the UK also

<sup>51</sup>Martyn Ziegler, “Transgender row stoked by new findings”, *The Times*, 29 August 2019. Accessed 26 May 2021: [https://www.thetimes.co.uk/article/transgender-row-stoked-by-new-findings-3pwxjqrp?wgu=270525\\_54264\\_16038618617781\\_3c4156efe3&wgexpiry=1611637861&utm\\_source=planit&utm\\_medium=affiliate&utm\\_content=22278](https://www.thetimes.co.uk/article/transgender-row-stoked-by-new-findings-3pwxjqrp?wgu=270525_54264_16038618617781_3c4156efe3&wgexpiry=1611637861&utm_source=planit&utm_medium=affiliate&utm_content=22278); Anna Wiik et al, “Muscle strength, Size and Composition”, 805-813.

<sup>52</sup>Emma N. Hilton and Tommy R. Lundberg, “Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage”, *Sports Medicine* 51, (2021), 199, <https://doi.org/10.1007/s40279-020-01389-3>.

<sup>53</sup>Joanna Harper et al, “How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sport participation”, *British Journal of Sports Medicine* 55, (2021), 865, <http://dx.doi.org/10.1136/bjsports-2020-103106>.

found that trans athletes competing as women retain innate performance advantages over females, even after transitioning. It concluded that as a result, “for many sports, the inclusion of transgender people, fairness and safety cannot coexist in a single competitive model.”<sup>54</sup>

Apart from the serum testosterone levels circulating in the blood, the legacy effect of exposure to high levels of testosterone in early life and puberty is abundantly clear. Growing up male will give transgender athletes a lifelong edge that simply cannot be fully negated by any subsequent period of testosterone suppression.

Harper accepts that “transgender women after hormone therapy are taller, bigger and stronger on average than cisgender women”. However, Harper then weighs the social disadvantage suffered by transgender women in the balance against their physical advantage when competing in women’s sport.

*“In high levels of sport, transgender women are substantially underrepresented. That indicates that whatever physical advantages transgender women have – and they certainly exist – they are not nearly as large as the sociological disadvantages.”<sup>55</sup>*

Can sport be expected to level all physical, economic and sociological differences between athletes? Clearly not. Not everyone is born for a place on the podium. McKinnon is correct in pointing out that “[e]very athlete has physical advantages and we’re all trying to exploit them”:

*“We permit very tall women to compete against short women in sports that select for tallness like basketball, volleyball or rowing, and we consider that fair. So we [already] permit very large competitive advantages through natural characteristics.”<sup>56</sup>*

But sporting authorities can and must level the playing field sufficiently to make competition meaningful and, as the IAAF has now demonstrated, the magnitude of all the effects of testosterone on the male body are such as to threaten the very purpose of the female classification.

*“To the best of our knowledge, there is no other genetic or biological trait encountered in female athletics that confers such a huge performance advantage.”<sup>57</sup>*

The question goes to the very purpose in establishing different categories in the first place:

*“Empowering girls and women through athletics is a core value of the IAAF and the sport and sits at the heart of what all of us in athletics believe the sport can offer to participants*

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<sup>54</sup>Clarissa Bye, “Trans rules fail women, says report”, The Daily Telegraph, 7 October 2021. Accessed 24 December 2021, <https://www.dailytelegraph.com.au/news/nsw/trans-sporting-guidelines-calls-to-update-or-scrap-australian-policy/news-story/91c43687dd78e1fa072c008a15f10dac>.

<sup>55</sup>Ingle, “British Olympians call for IOC to shelve ‘unfair’ transgender guidelines”.

<sup>56</sup>Alistair Magowan, “Transgender women in sport: Are they really a ‘threat’ to female sport?”, BBC Sport, 18 December 2018. Accessed 6 December 2021, <https://www.bbc.com/sport/46453958>.

<sup>57</sup>“Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) Explanatory Notes/Q&A”, World Athletics, 6. Accessed 26 May 2021, <https://www.worldathletics.org/download/download?filename=c402eb5b-5e40-4075-8970-d66fccb10d41.pdf&urlslug=Explanatory%20Notes%3A%20IAAF%20Eligibility%20Regulations%20for%20the%20Female%20Classification>.



*and to the world ... This is why we introduced the eligibility regulation and why it must be defended: to ensure fair competition for all women.”<sup>58</sup>*

Given what we now know about the legacy effect of testosterone and the retained physical advantages in transwomen even when testosterone is suppressed, the IAAF will need to review its current 5 nmol/L testosterone limit, if it is genuinely committed to defending women’s sport.

Those arguing for the preservation of female-only sport object to the characterisation of their efforts as “discrimination”. They are not “singling out transgender women”; they are simply defending women’s sport. In fact, it is that commitment to equal treatment that mandates provision of a female-only competition category because this is the only way to guarantee female athletes an equal chance to excel and to secure the benefits of participation in sport.<sup>59</sup>

## **10. Gender ideology justifies female erasure from team sports**

The inclusion of biological males in the women’s category affects team sports as well as elite individual sports. In a 2018 interview with Dr Beth Jones, an academic advocate of trans inclusion, Jane Garvey, host of the BBC Radio 4 program *Woman’s Hour*, sketched the possibility of an apocalyptic future for women’s sport in which “no woman would ever play hockey for Great Britain or England again”.<sup>60</sup> She explained how this might happen:

*“Obviously it would be the duty of whoever picks the team to pick the best team and, to be brutal about it, that probably wouldn’t feature any women.”*

In responding, Jones did not dismiss the possibility of female erasure from women’s sports entirely but she attempted to smooth over the point with the feeble non-reassurance that “that is all in the future to be determined”. Attempting to paint a more optimistic picture, Jones stumbled on, hypothesising instead that perhaps the performance gap in men’s and women’s sporting capabilities is only the product of stereotypical expectations which artificially cap women’s achievements. Perhaps, Jones suggested, if women were forced to compete with males, they might find they can “push themselves further to achieve even more”.

Naturally, excellence in sport requires the mental toughness to push through psychological barriers but the suggestion that women do not perform like men through some deficiency in commitment or self-belief is both bizarre and insulting. Would we explain to an 8-year-old that, if they only had more grit, they might perform like a 12-year-old? The perversity of such a suggestion should be clear to any sensible

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<sup>58</sup>World Athletics, “IAAF publishes briefing notes and Q&A”.

<sup>59</sup>Ibid.

<sup>60</sup>Jane Garvey, “Woman’s Hour”, BBC4, 4 December 2018. Accessed 26 May 2021, <https://www.bbc.co.uk/sounds/play/m0001f05>.

person. Were women to disappear from the sports field in the manner foreshadowed by Garvey, Jones could comfortably interpret this as evidence that women lack the mental toughness necessary for success in competition. This is a conclusion that many Victorian patriarchs might have agreed with – it is certainly not “progressive”.

Proof that Garvey’s predictions of female erasure from team sport is not only possible but entirely probable can be found in a 2015 report pointing out that 8 out of 10 members of the Iranian women’s national football team were biological men awaiting sex-reassignment surgery.<sup>61</sup>



Iranian women’s national football team (Image source unknown)

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<sup>61</sup>Barney Henderson, “Eight of Iran’s women’s football team ‘are men’”, The Telegraph, 30 September 2015. Accessed 26 May 2021, <https://www.telegraph.co.uk/news/worldnews/middleeast/iran/11903290/Eight-of-Irans-womens-football-team-are-men.html>.

## 11. Trans inclusion limits career progression for young female athletes

Participation in sport is an important means for girls and women to develop the discipline, tenacity, determination, perseverance, goal-setting, leadership and teamwork skills that help contribute to career success both on and off the field. Trans inclusion threatens not only women's sporting achievements, but limits the career opportunities that would normally flow on from this.

Girls who would succeed in competition with other girls are more likely to be denied the rewards of success when they compete against boys. Since the hope of success is necessary to make the investment of their time and commitment in sport worthwhile, discouragement is the obvious result as girls are passed over for team places, leadership positions, scholarships, prize money and sponsorship opportunities. As Coleman explains:

*“Top ranked high school girls could still sometimes defeat non-elite high school boys, but even then, the boys would take up a lot of the room at the top. They would take up spots on teams and then in the semi-finals and finals of state and national age group events, and because these are the proving grounds for further opportunities, it is rational to assume that, without more, this would translate to diminished returns for girls and women.”*<sup>62</sup>

This prediction is coming to fruition in the state of Connecticut where the current regulations allow athletes to compete on the basis of gender identity, rather than biology. Andraya Yearwood and Terry Miller are biologically male. Miller had competed in boy's track events for the 2017 and 2018 seasons without distinction.<sup>63</sup>

This lacklustre record stands in marked contrast with Miller's sudden extraordinary

success in the 2019 girls events, where between them, Miller and Yearwood took “first place in 13 out of 14 events for females, and 23 out of 28 when including second-place awards, in seven state-level competitions.”<sup>64</sup> The same times that earned them 1st and



Female runners (Image, iStock)

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<sup>62</sup>Coleman, “Sex in Sport”, 97.

<sup>63</sup>Connor Ellington, “Female athlete alleges retaliation by coach because her mother complained about transgender policy”, The College Fix, 1 July 2019. Accessed 26 May 2021, <https://www.thecollegefix.com/female-athlete-alleges-retaliation-by-coach-because-her-mother-complained-about-transgender-policy/>.

<sup>64</sup>Ibid.





Female and male runners (Image, iStock)

2nd place in the girls' events would have seen them ranked 120th and 195th in the boy's event that year.<sup>65</sup>

The physical advantage of biological males not only helps ensure success, it makes it more likely that a single competitor will succeed in multiple events. For example, 15 track titles claimed by Yearwood and Miller between 2017-19 were previously held by nine different girls.<sup>66</sup> In one year, Miller broke ten state records for female events – records that were previously established by ten female athletes over a twenty year period.<sup>67</sup>

Selina Soule, a female athlete who was edged out of the 2019 Indoor Track & Field State Championships by Miller and Yearwood who placed first and second in her event, explained:

*“It’s very frustrating and heartbreaking when us girls are at the start of the race and we already know that these athletes are going to come out and win no matter how hard you try ... They took away the spots of deserving girls, athletes ... me being included.”<sup>68</sup>*

The impact of trans inclusion extends significantly beyond the question of who wins a

<sup>65</sup>Grace Carr, “Boys Sweeping Girls’ High School Track In Connecticut Wouldn’t Break Top 100 In Male Competition”, Daily Caller, 25 February 2019. Accessed 20 December 2021, <https://dailycaller.com/2019/02/25/transgender-high-school-track/>.

<sup>66</sup>“Fairness in Women’s Sports: Connecticut”, Alliance Defending Freedom. Accessed 6 December 2021, <https://adflegal.org/sites/default/files/2021-02/Soule%20v.%20Connecticut%20Association%20of%20Schools%20-%20One%20Page%20Summary.pdf>.

<sup>67</sup>“Biological boys compete in women’s sports?: Tucker Carlson Interview”, ADF Media Relations, Vimeo, 18 June 2019. Accessed 6 December 2021, <https://vimeo.com/342896225>.

<sup>68</sup>“Track Athletes Taking a Stand to Defend Women’s Sports: The Selina Soule, Chelsea Mitchell, and Alanna Smith Stories”, Alliance Defending Freedom. Accessed 6 December 2021, <https://adflegal.org/selina-soule-track-athlete-story>.

particular event. Failing to qualify for the finals put Soule on the sidelines at the New England Regional Championships, which is where college scouts regularly recruit. Soule explained:

*“This could greatly impact my future with college scholarships because on the results pages of the meets, there is no identification that these two athletes are transgender...The college coach ... would have no idea that these athletes are transgender but they are going to see that their times are way higher than any other girl in the field and they are going to want to recruit – or try to recruit – those two athletes.”<sup>69</sup>*

Soule’s predictions are coming true. At the time of writing, Yearwood has received recruitment interest from Harvard University, the University of Connecticut, Springfield College and West Point to run track and field in the National Collegiate Athletic Association (NCAA).<sup>70</sup>



Selina Soule (Image, Alliance Defending Freedom)

The discouragement and disqualification suffered by female athletes in their high school years arguably affects every point of their sporting career trajectory. Girls and women are already under-represented in sports and every place given to a trans athlete comes at the expense of a natal female. Since the young athletes of today become the coaches, mentors, ambassadors and role-models for the young athletes of tomorrow, reducing the opportunities for women to succeed in their own category has an inter-generational impact.

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<sup>69</sup>Anders Hagstrom, “High School Girls Sue After Being Forced To Compete Against Transgender Athletes”, Daily Caller, 13 February 2020. Accessed 26 May 2021, <https://dailycaller.com/2020/02/13/connecticut-transgender-sue-selina-soule/>.

<sup>70</sup>Mirin Fader, “Andraya Yearwood Knows She Has the Right To Compete”, Bleacher Report, 18 December 2018. Accessed 26 May 2021, <https://bleacherreport.com/articles/2810857-andraya-yearwood-knows-she-has-the-right-to-compete>.

In 2019, Soule, together with two other female athletes from Connecticut, filed a legal complaint against CIAC. They argued that CIAC's trans-inclusive policy violated Title IX legislation, which guarantees equal rights of women and girls in education, including sports. In May 2020, the U.S. Education Department's Office for Civil Rights ruled in their favour, contemplating withholding federal funds from states that refuse to uphold their obligations under Title IX.<sup>71</sup>

The case highlights the direct conflict between rights claimed on the basis of gender identity and those claimed on the basis of biological sex. In situations where biology has a material impact on outcomes – such as in sport – equal opportunities for women cannot be secured without regard to the sex-based differences that prompted the creation of sex-specific sporting categories in the first place.

In recognition of this, Idaho recently became the first US state to pass a law banning transwomen from competing in women's sports. The Fairness in Women's Sports Act was quickly contested on the grounds of discrimination and privacy but was defended by the U.S. Federal Attorney General, William Barr, on the grounds that “single-sex athletics is rooted in the reality of biological differences between the sexes and should stay rooted in objective biological fact.”<sup>72</sup>



Connecticut high school athletes from left, Alanna Smith, Chelsea Mitchell and Selina Soule (Image, Alliance Defending Freedom)

<sup>71</sup>Pat Eaton-Robb, “US: Transgender sports inclusion violates others’ rights”, AP News, 29 May 2020. Accessed 6 December 2021, <https://apnews.com/article/virus-outbreak-us-news-ap-top-news-hartford-sports-general-5c1d9682fb92ed9c277c7e139bdab9ed>.

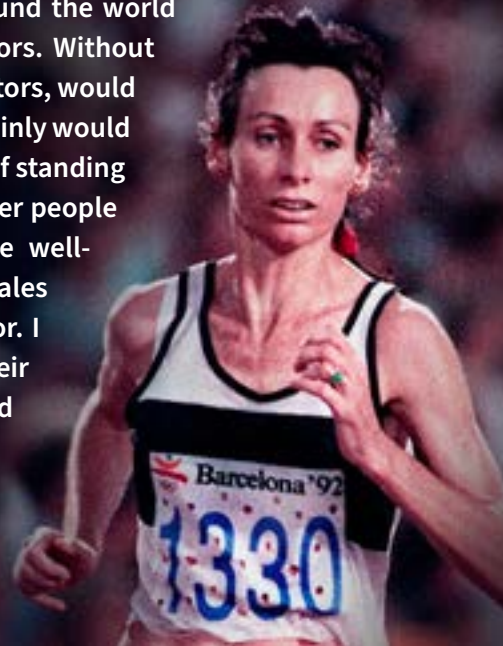
<sup>72</sup>The United States Department of Justice, “The Department of Justice Files Statement of Interest Defending the Constitutionality of Idaho’s Fairness in Women’s Sports Act”, Media Release, 19 June 2020. Accessed 24 November 2021, <https://www.justice.gov/opa/pr/departement-justice-files-statement-interest-defending-constitutionality-idaho-s-fairness>.



## 12. Establishing a transgender/non-binary category?

I was privileged to have an athletic career at the time of emergence of equity in middle-distance and distance events for women. The inclusion of the marathon in the 1984 Olympics was a huge milestone achieved by the efforts of women runners around the world lobbying to have their own category as female competitors. Without this biological distinction I, and my fellow women competitors, would never have been selected to run in the Olympics, and I certainly would have had zero opportunity of realising my lifelong dream of standing on the Olympic podium. While I appreciate that transgender people wish to compete in the category of their choosing, the well-documented hormonal advantage of biologically-born males over females simply undoes all that we worked so hard for. I would fully support transgender women lobbying for their own category, as pioneering sportswomen successfully did in the late 20th century.

**LORRAINE MOLLER MBE,**  
**Four-time Olympian, Boston Marathon Winner**  
**& Forerunner for Equality in Women's Athletics**



Lorraine Moller (Image, Athletics Weekly)

Many female athletes who oppose trans inclusion in women's sports are sympathetic to the difficulties facing male athletes who transition to live as women and still wish to participate in competitive sports. British cyclist Victoria Hood, for example, agrees that "solutions need to be found so that they can compete in sport".<sup>73</sup> However, if inclusion in the female category solves the problems facing trans athletes, it does so by creating new ones for women and girls. Even if prepared to treat transwomen with sympathy or accommodate their self-identity up to a point, it is unreasonable to demand that this accommodation extend to overwriting the biological basis for the identity of half the world's population.

The attempt to accommodate hormonally altered bodies in sex categories not designed with this in view creates the potential for feelings of injustice on all sides and works counter to the aims of sport to create meaningful and fair competition. The ugly booing of the crowd as Mack Beggs, a female-to-male transitioner, won the Texas girls' wrestling title for a second time demonstrates the problem. Beggs (a natal female) has repeatedly asked to be allowed to wrestle in the boys' division but is prevented by the rules for Texas public high schools that require athletes to compete under the sex on their birth certificate. Beggs is taking testosterone in the transitioning process, which confers a similar performance advantage to doping. The situation is not of Beggs' making but the injustice to Beggs' opponents is palpably felt by spectators to

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<sup>73</sup>Laura Silverman, "The Future of Sport: Transgender athletes – the controversy that could bring down women's sport", The Sun, 13 October 2019. Accessed 26 May 2021, <https://www.thesun.co.uk/fabulous/10103491/transgender-athletes-womens-sport/>.

the sport. In two years of competition, three of Beggs' female competitors forfeited their contest, rather than risk injury.<sup>74</sup>

One potential solution is to abandon the idea of separate male and female categories altogether. In her interview on BBC Woman's Hour, Jones expressed the view that "in an ideal world ... [that] would be great. It would overcome a lot of these issues around gender and sport."<sup>75</sup> Australia's 2019 *Guidelines for inclusion* also seem to be edging community-level sport in that direction by recommending that sporting clubs establish gender-neutral teams, or teams that allow players to join based solely on their gender identity, or mixed gender teams (made of 40% men, 40% women and 20% non-specific players) or else that they universally redesign the rules of a particular sport to accommodate non-binary players.<sup>76</sup>

On the other hand, none of these "solutions" provides an answer to the concern that women and girls would simply be squeezed from the field in all but recreational events. Perhaps a more constructive solution would be to establish an "open" or "transgender" category, separate to women's events, to ensure no one is excluded from sport.<sup>77</sup> Retired middle distance athlete Dame Kelly Holmes contends:<sup>78</sup>



Dame Kelly Holmes  
(Image, Facebook @DameKellyHolmesOfficial)

Powerlifting is one sport where the physiological differences between male and female bodies can obviously be expected to show significantly. In January 2019, US Powerlifting announced new regulations that prevent transwomen competing in the women's category.<sup>79</sup> In April 2019, Mary Gregory broke four women's world records in

<sup>74</sup>"Transgender boy wins girls' state wrestling title for second time", New York Post, 25 February 2018. Accessed 26 May 2021, <https://nypost.com/2018/02/25/transgender-boy-wins-girls-state-wrestling-title-for-second-time/>.

<sup>75</sup>Garvey, "Woman's Hour".

<sup>76</sup>*Guidelines for inclusion*, 37.

<sup>77</sup>Ingle, "British Olympians call for IOC to shelve 'unfair' transgender guidelines".

<sup>78</sup>@damekellyholmes, Twitter, 28 April 2019. Accessed 27 December 2021, <https://twitter.com/damekellyholmes/status/112245338430279680>.

<sup>79</sup>"Transgender Participation Policy", USA Powerlifting. Accessed 26 May 2021, <https://www.usapowerlifting.com/transgender-participation-policy/>.

a single day, only to have these victories disallowed by RAW Powerlifting on the basis that Gregory’s “correct physiological classification is male”.<sup>80</sup>

Unfortunately, sporting bodies have not applied the same standard to University of Pennsylvania trans swimmer Lia Thomas. Previously ranked #462 in male college swimming, Thomas’ “wins” and “records” at various women’s championships have been met with anger and frustration. However, this is all set to change with international swim body FINA’s landmark decision on 19 June 2022 to restrict biological men from competing in elite women’s swimming competitions.<sup>81</sup>



Male swimmer (Image, iStock)

The marked success of Laurel Hubbard in women’s weightlifting events has sparked similar outrage. Hubbard lifted in men’s competitions as Gavin Hubbard, before transitioning in his mid-30s. After transitioning, Hubbard:

- won the gold medal at the 2017 Australian International & Australian Open in Melbourne;<sup>82</sup>
- was leading the field in the 2018 Commonwealth Games, until an elbow injury forced withdrawal from the event;<sup>83</sup>

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<sup>80</sup>Rick Maese, “Transgender powerlifter Mary Gregory stripped of world records”, Washington Post, 19 May 2019. Accessed 27 December 2021, <https://www.washingtonpost.com/sports/2019/05/16/stripped-womens-records-transgender-powerlifter-asks-where-do-we-draw-line/>.

<sup>81</sup>“FINA announces new policy on gender inclusion”, FINA, Media Release, 19 June 2022. Accessed 20 June 2022, <https://www.fina.org/news/2649715/press-release-fina-announces-new-policy-on-gender-inclusion>.

<sup>82</sup>Matt Windley, “Laurel Hubbard wins female 90kg+ division at weightlifting’s Australian International”, Herald Sun, 20 March 2017. Accessed 20 December 2021, <https://www.heraldsun.com.au/sport/more-sports/laurel-hubbard-wins-female-90kg-division-at-weightliftings-australian-international/news-story/cd4a5fa012eb9a5ceb0281faceea5c7a>.

<sup>83</sup>Reuters staff, “Commonwealth Games: Transgender weightlifter Laurel Hubbard says injury career-ending”, Reuters, 10 April 2018. Accessed 20 December 2021, <https://www.reuters.com/article/games-commonwealth-weightlifting-idINKBN1HH0FH>.



- won two gold medals at the 2019 Pacific Games in Samoa;<sup>84</sup>
- won a gold medal in the women's +87 kg event at the Roma 2020 World Cup and;<sup>85</sup>
- became the first trans Olympian to compete in the women's category at the 2020 Tokyo Olympics.<sup>86</sup>

On the other hand, the loss of power that accompanies artificially-depressed testosterone levels and/or oestrogen supplements taken by transwomen competitors means that competition in the men's category is no longer an even contest. At the same time, anti-doping regulations have the effect of preventing transmen who use testosterone from competing in the women's category. One sensible solution to the problem has been adopted by the LGBT International Powerlifting Championships which has created a new "Mx Category" to answer the needs of transgender, gender expansive, and intersex athletes who would otherwise be excluded from competition.<sup>87</sup> FINA has also announced that it will be creating an open competition category.



Male weightlifter (Image, iStock)

<sup>84</sup>Michael Pavitt, "Samoa 2019 chairman says transgender weightlifter's involvement at Pacific Games is 'unfair'", Inside the Games, 16 July 2019. Accessed 20 December 2021, <https://www.insidethegames.biz/articles/1082150/hubbard-participation-in-games-unfair>.

<sup>85</sup>Brian Oliver, "Transgender weightlifter Hubbard keeps Olympic hopes alive at age 41", Inside the Games, 1 February 2020. Accessed 20 December 2021, <https://www.insidethegames.biz/articles/1089956/transgender-weightlifter-wins-in-rome>.

<sup>86</sup>Ina Fried and Ivana Suric, "Laurel Hubbard becomes first openly trans woman to compete at Olympics", Axios, 2 August 2021. Accessed 26 August 2021, <https://www.axios.com/laurel-hubbard-weightlifting-olympics-transgender-9266c853-f778-40db-af3f-2607e7c4bd9d.html>.

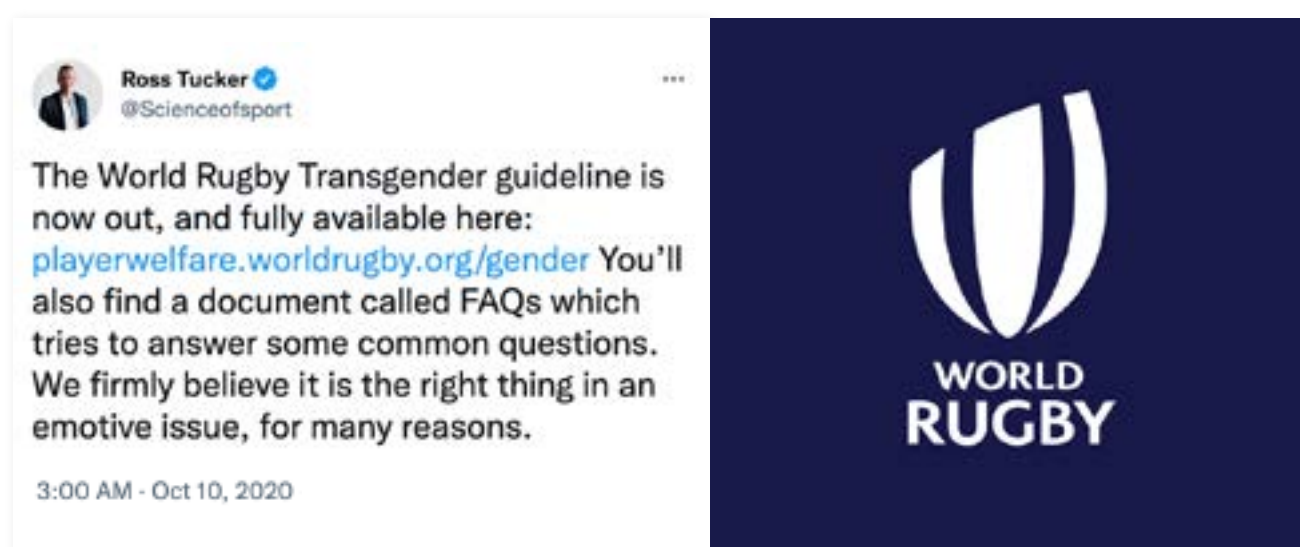
<sup>87</sup>Chris Morgan, "LGBT International Powerlifting Championships' Announce The Introduction of Inclusive Mx Category For Transgender, Non Binary and Intersex Athletes", LGBT Power Lifting, 2 January 2018. Accessed 26 May 2021, <http://lgbtpowerlifting.org/?p=252>.



### 13. Women's safety in contact sports versus trans inclusion

When it comes to contact sports, the disadvantages that trans inclusion creates for women extend beyond issues of competitive fairness or career opportunities. They relate to physical safety as well. Proposals that trans inclusion should be the default setting on women's sports pending an evaluation of residual (post-transition) male advantage, ignore the risk of harm to women, particularly in contact sports. Understandably, female athletes expect sporting codes to prioritise the safety of players, in which case, the onus of proof should lie squarely with those who advocate trans inclusion in women's contact sports to first demonstrate that such inclusion does not elevate the risks to women's safety.

In October 2020, World Rugby became the first international federation to regulate against trans inclusion in the female game based on injury predictions.<sup>88</sup> In support of their decision, they produced 49 studies showing that drugs to suppress testosterone in line with IOC rules, have only a limited effect in decreasing the physical advantages of a male body in terms of muscle mass, strength and power.



The research underpinning the new regulations is not based directly on trans athletes for the simple reason that an insufficiently large sample is available for study. Rather, the studies used scientifically well-established male–female differences, and made conservative assumptions about the extent to which male performance would be diminished with reduced testosterone. The results still showed that:

*“Ciswomen players (who do not undergo androgenisation during development) who are participating with and against transwomen (who do undergo androgenisation during development) are at a significantly increased risk of injury because of the contact nature of rugby.”<sup>89</sup>*

<sup>88</sup>“Transgender Guidelines”, World Rugby, 2020. Accessed 24 November 2021, <https://www.world.rugby/the-game/player-welfare/guidelines/transgender>.

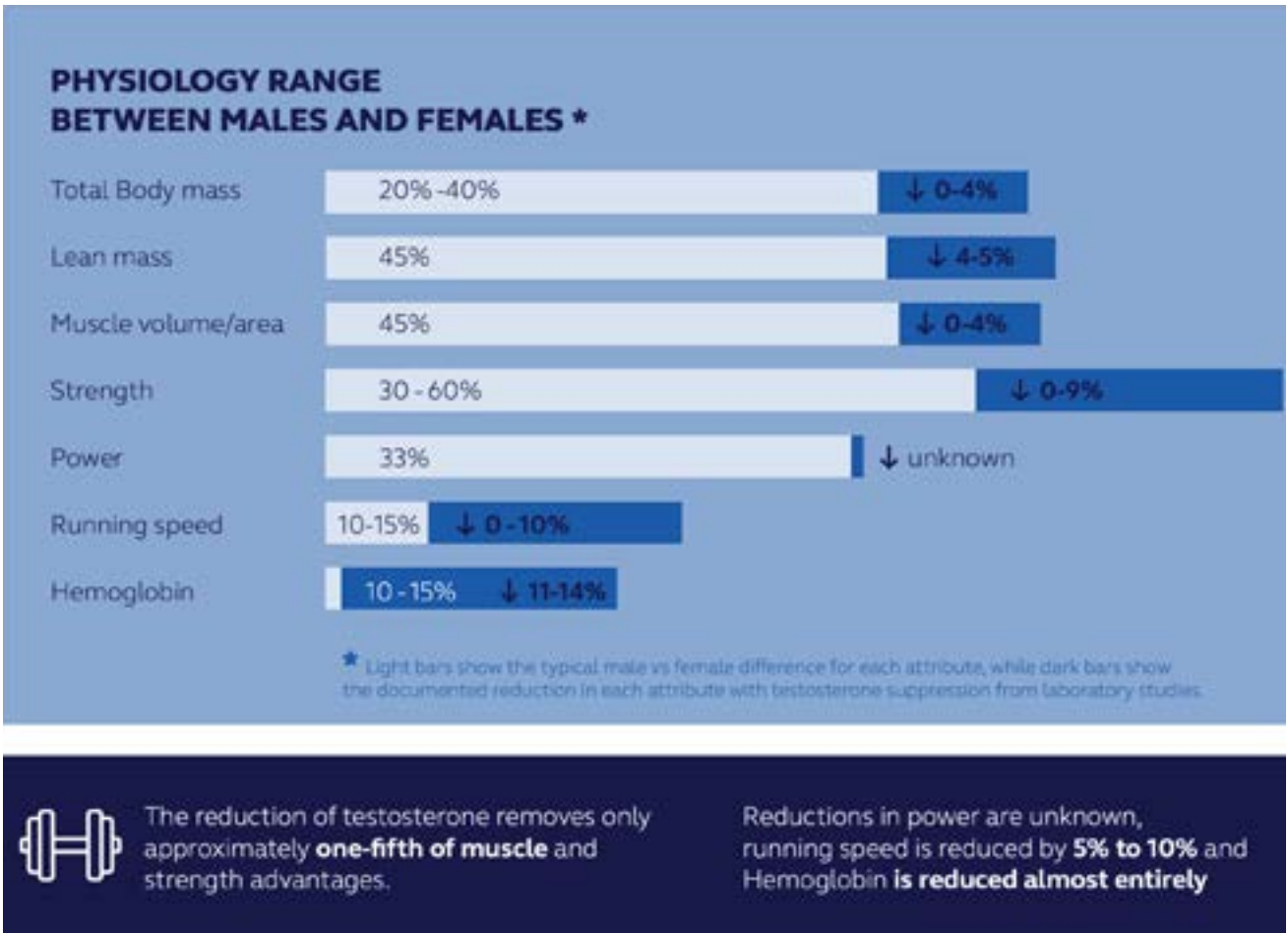
<sup>89</sup>Sean Ingle, “Transwomen face potential women's rugby ban over safety concerns”, The Guardian, 20 July 2020. Accessed 24 November 2021, <https://www.theguardian.com/sport/2020/jul/19/transwomen-face-potential-womens-rugby-ban-over-safety-concerns>.

Acknowledging there is an “overlap in variables such as mass, strength, speed and the resultant kinetic and kinematic forces”, World Rugby’s modelling explored risk factors in the situation where a typical player with male characteristics tackles a typical player with female characteristics. They found a minimum of 20% to 30% greater risk for those female players.

*“In the event of smaller female players being exposed to that risk, or of larger male players acting as opponents, the risk increases significantly, and may reach levels twice as large, at the extremes.”<sup>90</sup>*

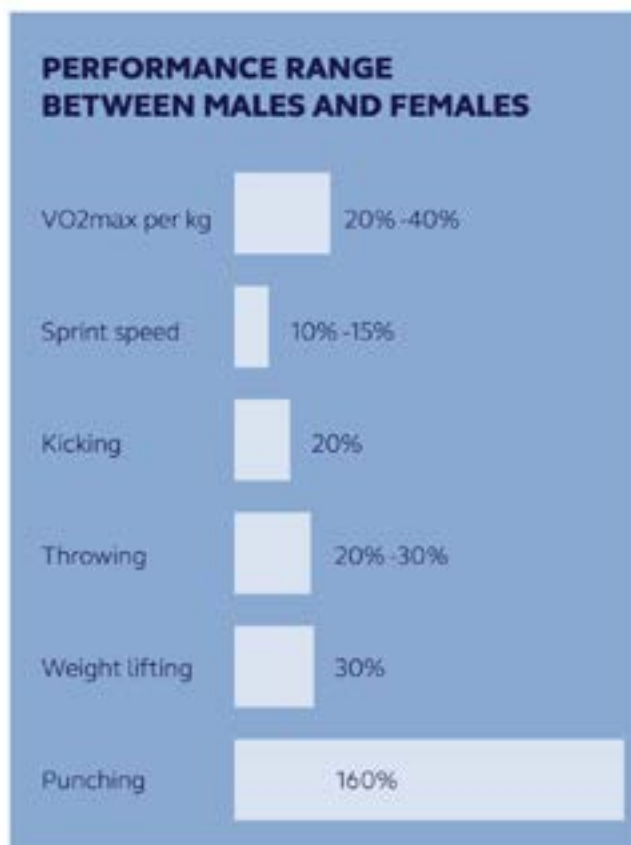
Male athletes, who have experienced male puberty, “are stronger by 25%–50%, are 30% more powerful, 40% heavier, and about 15% faster than [female] players”. Crucially, these advantages are not reduced by testosterone-suppressing medication, as was previously thought – “with only small reductions in strength and no loss in bone mass or muscle volume or size after testosterone suppression.”<sup>91</sup>

When Tasmanian Senator Claire Chandler called for urgent revision of Australia’s 2019 *Guidelines for inclusion* to protect Australian female rugby players in accordance with World Rugby’s recommendations, she encountered opposition from both the



<sup>90</sup>Ibid.

<sup>91</sup>Ibid.



The performance differences between biological males and females range from **10% to 160%**.

These differences are the result of biology. Males have **higher muscle mass, larger muscle cross sectional area**, longer levers (different skeleton), less fat mass, higher tendon stiffness and higher cardiovascular capacity (larger heart and lungs, more hemoglobin).



Current policy requires transgender women to reduce testosterone levels below **5 nmol/L for 12 months** in order to be eligible to compete in women's sport.

There is as yet, no direct evidence on how this affects **sports performance outcomes** like speed, throwing, weight-lifting performance.



There is evidence on **physiological changes** including mass, lean mass, and strength measured in laboratory trials.

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Australian Human Rights Commission (AHRC) and Sport Australia. Dr David Hughes, the Chief Medical Officer of the Australian Institute of Sport, underscored absolute commitment to women's safety:

*"Sport Australia and the Australian Institute of Sport have never and will never be party to any policy or any initiative which endangers women's safety in the female category or that compromises fairness."*<sup>93</sup>

Hughes also admitted that the *Guidelines for inclusion* were "never intended to be a scientific document" but, rather, were drafted to provide guidance to sporting associations on how they could give effect to anti-discrimination law. Nevertheless, Hughes took the view that World Rugby's conclusions were not sufficiently authoritative or certain to provoke a reconsideration of Australian policy. "They may be correct, but there is nothing in world literature to suggest that they are."<sup>94</sup>

Asked to respond to these comments, Ross Tucker, the world-renowned sports scientist with whom World Rugby consulted in the development of their guidelines, pointed

<sup>92</sup>"Summary of Transgender Biology and Performance Research", World Rugby, 9 October 2020. Accessed 2 February 2022, [https://resources.world.rugby/worldrugby/document/2020/10/09/a67e3cc3-7dea-4f1e-b523-2cba1073729d/Transgender-Research\\_Summary-of-data\\_ENGLISH-09.10.2020.pdf](https://resources.world.rugby/worldrugby/document/2020/10/09/a67e3cc3-7dea-4f1e-b523-2cba1073729d/Transgender-Research_Summary-of-data_ENGLISH-09.10.2020.pdf).

<sup>93</sup>Parliament of Australia, Community Affairs Legislation Committee, Estimates, Department of Health, Sport Integrity Australia, Hughes, 27 October 2020, 158. Accessed 26 May 2021, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F5a5bfd75-3c3f-4de2-9bd7-fc48a609ddb0%2F0009;query=Id%3A%22committees%2Festimate%2F5a5bfd75-3c3f-4de2-9bd7-fc48a609ddb0%2F0000%22>.

<sup>94</sup>Ibid.

out the problem of the reverse onus of proof. The claim of ‘no research’ should:

*“be a signal to defend the necessary protection of a female category in sport ... We should not be including (biological males who identify as female) into women’s sport, and then seeking a way to prove that they don’t belong. That to me is totally upside down.”<sup>95</sup>*

Senator Chandler echoed these sentiments in her synopsis of Sport Australia’s approach:

*“Sport Australia has conceded that World Rugby’s findings of a potential 30% increase in head-injury risk to women when playing against transwomen ‘may be correct’ but refuse to reconsider their own guidelines in light of these findings. They seem to suggest we need to see some more women getting head injuries before they reconsider their actions”<sup>96</sup>*



Claire Chandler (Image source unknown)

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<sup>95</sup>Bernard Lane, “Trans sport advocates ‘must prove it’s safe’ for women”, The Australian, 3 November 2020. Accessed 26 May 2021, <https://www.theaustralian.com.au/nation/transgender-sport-advocates-must-prove-its-safe-for-women/news-story/e0dd72e66522edc7d07739e200443b7c>.

<sup>96</sup>Commonwealth, Parliamentary Debates, Senate, “Women in Sport”, 11 November 2020, 6018 (Senator Claire Chandler). Accessed 25 May 2021, [https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/46cf08c2-ab15-473f-a4fc-69d1e15e79c3/toc\\_pdf/Senate\\_2020\\_11\\_11\\_8310\\_Official.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/46cf08c2-ab15-473f-a4fc-69d1e15e79c3/toc_pdf/Senate_2020_11_11_8310_Official.pdf;fileType=application%2Fpdf).



## 14. Misogyny versus “transphobia”

The expectation is that, because transwomen identify as women, they will naturally sympathise with the cause of women. In practice, this solidarity is tenuous at best and quickly breaks down wherever issues arise in which female physicality, socialisation and reproductive functions feature as significant (for example, issues relating to women’s shelters, prisons, toilets, changerooms, maternity wards, job quotas, lesbian relationships and sports). In the moment that the trans claim that “transwomen are women” clashes with the feminist claim that “women are female”, the illusion of “female solidarity” evaporates to be replaced, in many instances, with ferocious attacks by transwomen against women. Where sex-based violence and intimidation of women by men would normally be immediately recognised and condemned in the court of public opinion, the declaration of a transgender identity apparently makes misogyny invisible.

In male trans activists who challenge women’s self-definition, radical feminists recognise their traditional enemy; for them, transwomen are just the latest twist in a long history of men telling women what it is to be a woman. The well-established radical feminist position that “a woman is not a non-man” is efficiently summarised in Germaine Greer’s famous quip: “Just because you lop off your d\*\*k and then wear a dress doesn’t make you a f\*\*\*ing woman”.<sup>97</sup>

In a similar vein, the lesbian activist group “Get the L Out”, which has drawn the ire of the LGBT community for refusing to compromise on the biological definition of “woman”, states its position unequivocally:

*“We stand against any kind of misogynistic politics and systems that prioritise men’s interests: queer politics and transgenderism ... The LGBT community is coercing lesbians to accept penises as female organs and heterosexual intercourse as a lesbian sexual practice. We oppose this manipulative ideology and denounce it as a form of rape culture aimed at lesbians, as well as a form of conversion therapy ... Lesbians are same-sex attracted. Lesbians do not have penises. Lesbians do not want to have sex with men who identify as trans-women.”*<sup>98</sup>

Apparently, hell hath no fury like a transwoman scorned. Labelled “transphobes” or “trans-exclusionary radical feminists” (TERFs), these women routinely bear the brunt of ferocious abuse from transwomen and their allies, including in the world of sport.



<sup>97</sup>Nick Duffy, “Germaine Greer: Lopping off your d\*\*k and wearing a dress doesn’t make you a f\*\*\*ing woman”, Pink News, 26 October 2015. Accessed 26 May 2021, <https://www.pinknews.co.uk/2015/10/26/germaine-greer-lopping-off-your-dk-and-wearing-a-dress-doesnt-make-you-a-fing-woman/>.

<sup>98</sup>“About Us”, Get the L Out UK. Accessed 26 May 2021, <http://www.gettheloutuk.com/>.

In a world where “transwomen are women”, threats and intimidation – dare we name them as male-patterned aggression? – against “transphobes” and TERFs is not only rational but morally righteous. McKinnon (Veronica Ivy), for example, pins the responsibility for provoking the aggression of trans activists firmly on “transphobic” women:<sup>99</sup>



Were such veiled threats directed by male-identifying men towards a woman, they would be instantly recognised and condemned. But when “transwomen are women”, the moral compass swings through 180 degrees so that the women thus intimidated and assaulted deserve no compassion and the male-bodied individuals who threaten violence are hailed as righteous heroes.

The same rationale provoked McKinnon to rejoice at the imminent death of the lesbian feminist activist, Magdalen Berns in 2019. As Berns lay dying of inoperable brain cancer at the age of 36, McKinnon tweeted:<sup>100</sup>



McKinnon later justified this with reference to Bern’s moral culpability from which the world may draw this useful (if poorly phrased) moral lesson: “Don’t be the sort of person people are happy you’re dying of cancer!”

The same ‘righteous’ indignation against “TERFs” and “transphobes” underpins the recent salute to Fallon Fox from Outsports, which dubbed the now-retired MMA fighter “the bravest athlete in history”.<sup>101</sup> Fox began life as a man, had sex-change surgery in 2006 and began mixed martial arts. Fox debuted in women’s MMA fighting in 2013, seriously injuring the first two opponents, before revealing a transgender identity.

<sup>99</sup>@SportIsARight, Twitter, 29 September 2020. Accessed 20 December 2021, <https://twitter.com/SportIsARight/status/1310898138794909697>.

<sup>100</sup>@RachelVMcKinnon, Twitter, 24 August 2019. Accessed 26 May 2021, <https://twitter.com/rachelvmckinnon/status/1164906733627686913>. Rachel McKinnon (who now identifies as Veronica Ivy) is an Associate Professor of Philosophy at the College of Charleston in South Carolina. Rachel’s PhD thesis, completed in 2012 was entitled “Reasonable Assertions: On Norms of Assertion and Why You Don’t Need to Know What You’re Talking About”.

<sup>101</sup>Cyd Zeigler, “Fallon Fox is still the bravest athlete in history”, Out Sports, 14 January 2020. Accessed 26 May 2021, <https://www.outsports.com/2020/1/14/21062012/fallon-fox-trans-athlete-mma-courage-brave>.



MMA fighter Rhonda Rousey refused to fight Fox (Image, Flickr: Bill)

Fox's first opponent, Ericka Newsome, suffered career-ending skull injuries in the course of a fight that lasted only 39 seconds. Fox "secured a grip on Newsome's head ... With her hands gripping the back of Newsome's skull, she delivered a massive knee, bringing her leg up while pulling her opponent's head down. The blow landed on Newsome's chin and dropped her, unconscious, face-first on the mat."<sup>102</sup>

Fox's second opponent, Tamikka Brents, lasted two and a half minutes and escaped with concussion, seven staples to the head and a broken orbital bone. Interviewed after the fight, Brents said this:

*"I've fought a lot of women and have never felt the strength that I felt in a fight as I did that night. I can't answer whether it's because she was born a man or not because I'm not a doctor. I can only say, I've never felt so overpowered ever in my life and I am an abnormally strong female in my own right ... I still disagree with Fox fighting. Any other job or career I say have a go at it, but when it comes to a combat sport I think it just isn't fair."*<sup>103</sup>

In the media stoush that followed, "trans allies" and "transphobes" arranged themselves along the now-familiar identity versus biology lines. Joe Rogan, sided with the feminist position:

*"She wants to be able to fight women in MMA; I say no f\*\*\*king way. I say if you had a dick at one point in time, you also have all the bone structure that comes with having*

<sup>102</sup>"Biological male who broke a woman's skull named 'bravest athlete in history'", The Feminist Legal Clinic, 18 June 2020. Accessed 24 November 2021, <https://feministlegal.org/biological-male-who-broke-a-womans-skull-named-bravest-athlete-in-history/#.YZ29IJ4zZ-V>.

<sup>103</sup>"Exclusive: Fallon Fox's latest opponent opens up to #WHOATV", #WHOATV, 17 September 2014. Accessed 26 May 2021, <http://whoatv.com/exclusive-fallon-foxs-latest-opponent-opens-up-to-whoatv/#sthash.pf5lAbaq.dpuf>.



*a dick. You have bigger hands, you have bigger shoulder joints. You're a f\*\*\*king man. That's a man, OK?"*<sup>104</sup>

Ashley McGuire, author of *Sex Scandal: The Drive to Abolish Male and Female*, said:

*"Twenty years ago, if a man hit a woman so hard that he sent her to the hospital, he'd be in prison. Now he can get paid for it ... For the tiny percentage of people who experience gender dysphoria, we should have nothing but compassion. We should do everything we can to help them and protect their dignity, but we don't need to overturn biologically defined sex differences to do so."*<sup>105</sup>

The liberal media flocked to Fox's defence. Cyd Zeigler, writing for *Sports Illustrated*, insisted that "Joe Rogan is not about protecting women's sports ... It's simply transphobia. There's no other way around it".<sup>106</sup> Vice News published an article entitled "MMA Fighter Fallon Fox Is a Woman, Get Over It", which dismissed Brents' objections as "whining" and advised readers to override their "gut reactions" of sympathy for Brents with the realisation that she could have opted out: "Complaining after you lose isn't just sour grapes-it's downright tacky, Tamikka."<sup>107</sup>

Yes, MMA fighting is inherently violent but Fox's tweet following the event indicates motivations that extend beyond the pursuit of sporting excellence and ventured into personal (misogynistic?) vendetta against female opponents who question the claim that "transwomen are women":<sup>108</sup>



<sup>104</sup>Hunter Felt, "Transgender MMA fighter Fallon Fox faces toughest opponent yet: prejudice", *The Guardian*, 15 November 2014. Accessed, 26 May 2021, <https://www.theguardian.com/sport/2014/nov/14/transgender-mma-fighter-fallon-fox-joe-rogan>.

<sup>105</sup>"Transgender Fighter Fallon Fox Breaks Skull of Her Opponent", *BJJ World*, 21 October 2018. Accessed 26 May 2021, <https://bjj-world.com/transgender-mma-fighter-fallon-fox-breaks-skull-of-her-female-opponent/>.

<sup>106</sup>Robert Silverman, "How Joe Rogan Made Trans MMA Fighter Fallon Fox's Life a Living Hell", *The Daily Beast*, 2 July 2020. Accessed 26 May 2021, <https://www.thedailybeast.com/how-joe-rogan-made-trans-mma-fighter-fallon-foxs-life-a-living-hell>

<sup>107</sup>Paris Lees, "MMA Fighter Fallon Fox Is a Woman, Get Over It", *Vice News*, 26 September 2014. Accessed 26 May 2021, <https://www.vice.com/en/article/3b7j3j/fallon-fox-is-a-woman-get-over-it-925>.

<sup>108</sup>@FallonFox, Twitter, 16 June 2020. This tweet has since been removed.



Further, Vice News overlooked the fact that Brents was not informed of Fox's transgender status until after the event. Fox only "outed" herself as a biological male when a journalist threatened to break the story, if Fox did not. In the example of Texas high school wrestling mentioned earlier, three female competitors did choose to forfeit their contest, rather than risk injury wrestling against Beggs who, although biologically female, had been taking testosterone as part of the transition process to a male identity.<sup>109</sup> In 2015, Ronda Rousey, the Ultimate Fighting women's champion, similarly chose to bow out rather than fight Fox. As she explained in an interview:

*"I feel like if you go through puberty as a 'man' it's not something you can reverse. ... There's no undo button on that."*<sup>110</sup>

Bringing the debate back to identity, Fox responded by impugning Rousey's courage:

*"I'm quite sure that there are quite a few female MMA fighters who have the guts to fight another skilled woman without peeing their panties. ... I think they may be a little more mentally tough and say, 'I'll fight a trans woman, just like I'll fight a lesbian woman or a black woman.'"*

Again, Fox's tweets reveal personal animosity directed toward those women who refuse to overlook the small matter of biological difference between males and females.<sup>111</sup>



Over the course of an entire professional career, Fallon Fox went on to win every competition but one.

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<sup>109</sup>New York Post, "Transgender boy wins girls' state wrestling title for second time".

<sup>110</sup>Mitch Kellaway, "UFC Women's Champ Refuses to Fight Trans Athlete Fallon Fox, Out, 16 July 2015. Accessed 27 December 2021, <https://www.out.com/sports/2015/7/16/ufc-womens-champ-refuses-fight-trans-athlete-fallon-fox>.

<sup>111</sup>@FallonFox, Twitter, 15 November 2015. Accessed 27 December 2021, <https://twitter.com/fallonfox/status/665998500153450497>.

## SECTION 2: AUSTRALIAN LAW AND WOMEN'S SPORT

### 15. The Sex Discrimination Act 1984

In 1984, the *Sex Discrimination Act (SDA)* was passed with the intention of giving effect to the key provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – “the Bill of Rights for Women”. Among other things, the SDA was intended: “to promote recognition and acceptance within the community of the principle of the equality of men and women.”<sup>112</sup>

The SDA recognises that the sex-specific reproductive functions of women (pregnancy, childbirth, breastfeeding), and their elevated vulnerability to sexual harassment and predation, can produce workplace disadvantage. Because women's vulnerability is directly linked to their biology, the sex-specific definition of the terms “woman” and “man” were explicitly acknowledged in the 1984 Act:

*“Woman means a member of the female sex irrespective of age.”*

*“Man means a member of the male sex irrespective of age.”<sup>113</sup>*

While it makes discrimination against women unlawful, the SDA does allow for “legitimate differential treatment” between men and women where this is necessary to avoid the problem of indirect discrimination. Indirect discrimination occurs when a measure applied uniformly to different groups works to the disadvantage of one by virtue of their different attributes. Although apparently neutral, policies that treat women exactly like men may, in certain circumstances, work to disadvantage women.

In 1995, the SDA was amended to underscore the importance of allowing for legitimate differential treatment as not only *permissible* but (in certain circumstances) necessary to achieving the goal of equality between men and women:

*“measures which aim to achieve equality between a disadvantaged group and those who are not disadvantaged do not promote discrimination, rather, they are a crucial means of preventing and eliminating it ... These provisions recognise that identical treatment of people may produce unequal results and that consideration must sometimes be given to differences based on sex, marital status, pregnancy and potential pregnancy. Indirect discrimination is concerned with the effect not the form of the treatment.”<sup>114</sup>*

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<sup>112</sup>Sex Discrimination Act 1984 (Cth) (‘SDA’), as Registered 21 March 2012, C2012C00313, s 3(d) (superseded version). Accessed 26 May 2021, <https://www.legislation.gov.au/Details/C2014C00002>.

<sup>113</sup>*Ibid*, s 4(1).

<sup>114</sup>“1996 Guidelines for Special Measures Under the Sex Discrimination Act 1984”, Australian Human Rights Commission, 1996. Accessed 27 May 2021, <https://humanrights.gov.au/our-work/legal/1996-guidelines-special-measures-under-sex-discrimination-act-1984-0>. The principle is underscored again in the Explanatory Memorandum to the 2013 SDA: “The international human rights law principle of ‘legitimate differential treatment’ enables particular groups of people to be treated differently in certain circumstances. This differential treatment must be aimed at achieving a legitimate objective, be based on reasonable and objective criteria and be proportionate to the objective to be achieved.” (Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6. Accessed 27 May 2021, [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5026\\_ems\\_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b/upload\\_pdf/378454%20.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5026_ems_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b/upload_pdf/378454%20.pdf;fileType=application%2Fpdf)).

Under UN principles, differential treatment (if it is based on reasonable and objective criteria) does not fall into the category of prohibited discrimination at all. If Australia applied UN principles, differential treatment intended to protect women (applying the reasonable and objective criteria of their female biology), would not qualify as discrimination in the first place and so would not need to be enumerated as exemptions.<sup>115</sup>

## **16. The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013**

Protections against discrimination on the grounds of “gender identity” are now stronger than protections for discrimination on the grounds of “sex”.

In 2013, the SDA was re-purposed to operate as an LGBTIQ+ anti-discrimination Act (2013 SDA). Discrimination on the grounds of “sex”, “marital status” and “relationship status” continues to be prohibited but other protected attributes – “sexual orientation, gender identity, intersex status” – were added.<sup>116</sup> The parliamentary debates surrounding these amendments characterised the changes as merely “extending protections” against discrimination to additional groups.<sup>117</sup> If Parliament’s intention was to diminish existing protections for women as part of that process, this was nowhere openly acknowledged. It is reasonable to suppose that, in 2013 when gender identity was a very little understood concept, that the members of Parliament who voted on these changes did not fully understand the implications of the rewording for women and girls.

On a simple reading, the 2013 SDA still recognises the sex-based differences between men and women and discrimination claims arising between men and women are likely to be resolved in the usual way. However, at the same time that “gender identity” was added as a protected attribute, the biological definitions of “woman” and “man” were repealed. The Explanatory Memorandum explains the reason for this:

*“these definitions are repealed in order to ensure that ‘man’ and ‘woman’ are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.”<sup>118</sup>*

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<sup>115</sup>Explanatory Statement, Sex Discrimination Amendment (Exemptions) Regulation 2014 (Cth) 3-4. Accessed 27 May 2021, <https://www.legislation.gov.au/Details/F2014L01020/Explanatory%20Statement/Text>. The full text reads as follows: “The right to equality and non-discrimination is subject to the international human rights law principle of ‘legitimate differential treatment.’ This principle allows particular groups of people to be treated differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.”

<sup>116</sup>2013 SDA, s 3(b).

<sup>117</sup>Commonwealth, Parliamentary Debates, Senate, March - June 2013. Accessed 27 November 2021, <https://www.aph.gov.au/Parliamentary%20Business/Bills%20Legislation/Bills%20Search%20Results/Result/Second%20Reading%20Speeches?BillId=r5026>. The Explanatory Memorandum to the 2013 SDA states that, to the extent that “man” and “woman” appear in the Act, “they will take their ordinary meaning.” Their “ordinary meaning” is, of course, based on biology. How such a statement might be reconciled with the “new meaning” (based on a gendered social identity) instituted by the revised Act is unclear.

<sup>118</sup>2013 SDA Explanatory Memorandum, Items 8 and 14, 12

While the biological definition of “woman” stood, the law would have allowed for transwomen to be differentiated from biological women in certain circumstances. The new wording signifies that the categories “man” and “woman” are now established on the basis of gender identity, rather than biological sex. “Woman” now refers equally to gender congruent biological females and transwomen and, since the only common characteristic uniting these groups is that both identify as women, we can conclude that Commonwealth law now recognises gender identity, not biological sex, as the defining characteristic of “woman”.

If the MPs voting on the bill did not understand how it would change things for women, it appears that whoever in the Attorney General’s Department was responsible for writing the 2013 Explanatory Memorandum, did. In the passage quoted above, the anonymous author both recognised the potential conflict of protections claimed on the basis of “sex” and protections claimed on the basis of “gender identity” and solved this conflict by securing protections for transwomen as the priority. The rationale is explicit: the repeal of biological definitions was necessary to ensure that the sex-based rights of women did not present an obstacle to the rights of transwomen created on the basis of gender identity.

Australian government policy now recognises that anyone who identifies as a woman is a woman. Asked in May 2021 by Senator Chandler which definition of “woman” they used, the Office for Women responded:

*“We recognise individuals who identify as women. That’s in accordance with the Australian Government Guidelines on the Recognition of Sex and Gender.”<sup>119</sup>*

These Guidelines on the Recognition of Sex and Gender (2013), specifying the changed obligations incumbent on all federal government departments in consequence of the SDA were first issued in July 2013, a mere three days after the changes to the SDA received royal assent. Like the Explanatory Memorandum, they emanate from the Attorney General’s Department; both documents are, in all probability, the work of the same team of public servants.

The astonishing consequence of the 2013 amendments to the SDA is that the sex-based rights that the SDA was enacted to secure for women only apply in situations where these are challenged by gender congruent men. If the law no longer provides a mechanism for differentiating between a transwoman and a woman, then the capacity of the law to allow for the “legitimate differential treatment” that is sometimes necessary to secure women’s equality, is extinguished.

The outcome for women is worse than simply removing the benefit of legitimate differential treatment in cases involving the transgendered. In effect, the law now makes all differential treatment of transwomen and women unlawful, meaning

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<sup>119</sup>Parliament of Australia, Finance and Public Administration Legislation Committee, Estimates, Hawkins (Office for Women) 24 May 2021, 100. Accessed 20 December 2021, [https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/033ef268-e5ba-41f1-aeb1-6f9982303e1b/toc\\_pdf/Finance%20and%20Public%20Administration%20Legislation%20Committee\\_2021\\_05\\_24\\_8779\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/033ef268-e5ba-41f1-aeb1-6f9982303e1b/0000%22](https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/033ef268-e5ba-41f1-aeb1-6f9982303e1b/toc_pdf/Finance%20and%20Public%20Administration%20Legislation%20Committee_2021_05_24_8779_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/033ef268-e5ba-41f1-aeb1-6f9982303e1b/0000%22).



women could be penalised for “discrimination on the grounds of sex” were they to treat a transwoman differently to a biological female. For example, where a transwoman claims entrance to private female spaces, the law can no longer recognise any distinction between women and transwomen but could still recognise claims of “discrimination on the grounds of sex” made by transwomen who are denied entry to these spaces because they are male.

Such a result is clearly perverse. Where the 1995 changes to the SDA were intended to compel legitimate differential treatment as a necessary prerequisite for women’s equality, the 2013 SDA now makes it unlawful to differentiate between males and females where the male concerned identifies as female. Effectively, the Act intended to ensure protection for women from discrimination on the grounds of sex, now works to limit those protections and could potentially be used against women who insist on the importance of sex-based differentiation.

### **“Gender identity” is defined broadly so that fluid self-identity is protected**

As well as protecting gender identity, the 2013 SDA enshrines a very broad definition of this attribute:

*“gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth ... It includes the way a person expresses or presents their gender and recognises that a person may not identify as either male or female.”<sup>120</sup>*

According to the Explanatory Memorandum, the reason for adopting such a broad definition is to provide “maximum protection for gender diverse people”:

*“The definition is ... intended to apply to transsexual and transgender persons, but the definition does not use these descriptions to ensure the definition is not unnecessarily limited in its application. This is also consistent with the approach taken in the definition of sexual orientation.”<sup>121</sup>*

The UK’s Equality Act 2010 protects both “sex” and “gender reassignment” but not gender self-identity (which might change from moment to moment), or non-binary identification.<sup>122</sup> In contrast, Australian law does not require transwomen to be certified as such by a doctor, to undertake a legal change of their identity or to undergo medical interventions to qualify as a “woman”. Transsexuals, as well as “transgenders” (a word which is capable of various interpretations) and those who identify as neither male nor female (non-binary) now enjoy protection under Australian law from discrimination on the grounds of gender identity. The inclusion of non-binary identities means that even fluid gender identities that bear no correlation to a person’s established social identity now qualify for protection. Anyone who decides in the moment that they are

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<sup>120</sup>2013 SDA, s 4.

<sup>121</sup>2013 SDA Explanatory Memorandum, Item 6, 12.

<sup>122</sup>Equality Act 2010 (UK), ss 7 and 11.

female may arguably claim protection for that fluid identity.

Section 5B of the 2013 SDA, which prohibits discrimination on the grounds of gender identity, states:

*“(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s gender identity if, by reason of:*

- (a) the aggrieved person’s gender identity; or*
- (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or*
- (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.*

*(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.”<sup>123</sup>*

## **Protecting gender identity and protecting women and girls are mutually incompatible objectives**

CEDAW is unique among instruments dealing with sex-based discrimination because of its asymmetry, addressing only women as subjects of human rights violations. CEDAW Articles 5(a) and 10(c) require states to take measures to eliminate “stereotyped roles for men and women”. This is completely incongruent with protections for “gender identity”, which endue stereotypical dress, presentation or behaviours associated with women with new significance. Where radical feminists have argued that women cannot be defined with reference to oppressive socially-constructed stereotypes, laws protecting “gender identity” have the effect (if not the intention) of redefining women as “those people who identify with stereotypical feminine attributes, behaviour, dress and/or mannerisms”. Stereotypes become the yardstick by which identity can be established; they are endowed with greater power to establish identity than biology itself. As one feminist academic has explained:

*“While gender identity is commonly presented as a ground of discrimination that intersects with others, it is not truly intersectional with respect to sex and gender; rather,*

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<sup>123</sup>2013 SDA, s 5B.

*rights associated with gender identity require that it supersede or replace sex/gender classifications.”<sup>124</sup>*

Gender-critical feminists, and lesbians in particular, have also pointed out the impossibility of simultaneously protecting gender identity (which does not acknowledge sex as significant)<sup>125</sup> on the one hand, and both sexual orientation (where the sex of the sexual partner is of defining significance) and the sex-based rights of women and girls, which form the core obligations of CEDAW.

In contest are two ideological frameworks which understand the human person in fundamentally irreconcilable ways. At their simplest, one regards male/female biological differences as the whole basis for man/woman distinctions (biology = 100%). The other regards “sexual orientation and gender identity (SOGI)” as the important, constitutive components of individual identity; where gender identity and biological sex are incongruent, the superior indicator of true identity is taken to be gender identity (in which case, biology = 0%). (For the purposes of this SOGI-based identity, “sexual orientation”, like “gender identity”, is redefined without reference to biological sex).<sup>126</sup> In recognising gender identity as a protected attribute, and deleting the biological definitions of “man” and “woman”, the 2013 amendments transferred legislative protection from the “biology = 100%” view to the “biology = 0%” view. In effect, gender-identity trumps sex as a protected attribute.

Policies that differentiate between transwomen and women are not, a priori, “unlawful” because there may be circumstances in which “legitimate differential treatment” is necessary to avoid indirect discrimination against transwomen. Since the biological definition of “woman” has been erased, there is no provision left to recognise biological women as a class distinct from transwomen warranting protection because of their particular attributes. In a single maneuver, a law created to protect women has been repurposed to work against women wherever their interests conflict with those of biological males who identify as women.<sup>127</sup> The legitimate intentions of the 2013 Act to secure protections for a transgendered minority and to address prejudice have been secured at the expense of established and essential protections for women.

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<sup>124</sup>“Female Autonomy vs Gender Identity - A critical analysis of gender identity in CEDAW jurisprudence and the Yogyakarta Principles”, Faculty of Law, University of Oslo, Candidate number: 7004, 1 December 2016, 3. Accessed 27 June 2021, [https://www.duo.uio.no/bitstream/handle/10852/54626/1/PILTHESIS\\_7004.pdf](https://www.duo.uio.no/bitstream/handle/10852/54626/1/PILTHESIS_7004.pdf).

<sup>125</sup>Andrew Sullivan agrees that transgender ideology makes a nonsense of homosexuality: “The Nature of Sex”, *Intelligencer*, 1 February 2019. Accessed 27 May 2021, <http://nymag.com/intelligencer/2019/02/andrew-sullivan-the-nature-of-sex.html>.

<sup>126</sup>The definition of “sexual orientation” used by modern SOGI advocates, like their definition of gender identity, represents a significant expansion on the previously legally recognised concepts. For example, Victoria’s Change or Suppression (Conversion) Practices Prohibition Act 2020, removes the previous definition of “sexual orientation” which encompassed “homosexuality (including lesbianism), bisexuality or heterosexuality” and replaces this with a new definition: “[A] person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender” (s. 59(3)).

<sup>127</sup>Pat Byrne explains: “The definition of gender identity in the SDA allows biological men who identify as women to claim the rights, privileges, protections and access to services previously granted only to biological women. This has undermined the integrity of the original Act, which aimed to protect biological women from discrimination by virtue of their sex.” (Patrick Byrne, *Transgender: one shade of grey*, Melbourne, 2018, 121).

## 17. Protections for women are now only available as “exemptions” to anti-discrimination law

Section 42 of the 2013 SDA allows for competitive sport to be considered as an exemption to the prohibition on differentiation between transwomen and women:

*“(1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons 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;*
- (b) the umpiring or refereeing of any sporting activity;*
- (c) the administration of any sporting activity;*
- (d) any prescribed sporting activity; or*
- (e) sporting activities by children who have not yet attained the age of 12 years.”<sup>128</sup>*

The 2013 SDA Explanatory Memorandum provides:

*“Exemption for competitive sporting activity, which ensures that the Act does not make it unlawful to restrict competitive sporting events to people who can effectively compete. It is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities. Limiting this exemption to situations in which strength, stamina or physique are relevant is a proportionate means of achieving this objective.”<sup>129</sup>*

At the second reading of the Bill to amend the SDA, Simon Birmingham MP summarised his understanding of the proposed amendments, making it clear that women’s sport would represent one of the significant exemptions:

*“Exemptions and limitations will apply in relation to membership of voluntary organisations, competitive sporting activity and, as I was discussing earlier, religious organisations, save for the foreshadowed government amendment.”<sup>130</sup>*

The preservation of women’s sport now rests exclusively on this exemption and it is poorly designed to discharge such a burden. When applied in practice, several problems emerge:

- 1) Because the 2013 SDA requires blindness to biological sex (“transwomen” must, as a general rule, be treated as “women”), any sporting authorities attempting

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<sup>128</sup>SDA, s 42.

<sup>129</sup>2013 SDA Explanatory Memorandum, 6.

<sup>130</sup>Commonwealth, Parliamentary Debates, Senate, 24 June 2013, 3819-20 (The Hon Simon Birmingham). Accessed 27 May 2021, [https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/70ac34e4-7be0-4e97-b879-74b4286624bd/0207/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/70ac34e4-7be0-4e97-b879-74b4286624bd/0207/hansard_frag.pdf;fileType=application%2Fpdf).



to preserve the female sporting category now have the burden of proving that male strength, stamina or physique are relevant to the sport and sufficiently significant to justify the exclusion of particular males in particular instances.

- 2) Sporting organisations are placed in the rationally indefensible position of having to justify such a decision only with reference to strength, stamina or physique: transwomen cannot be excluded because they are male but they can be excluded because they are “too good”. Such an outcome undermines the common principle that sporting teams should be selected on merit and introduces a nonsensical criterion that runs contrary to the objectives of competitive sport.
- 3) Where separate male and female facilities are normally provided to protect the safety, privacy and dignity of women, the exclusion of biological males (transwomen) from these facilities is no longer provided for. The 2013 SDA is silent on this subject.

It is axiomatic of good law that “the law should be certain, so that it can be easily enforced and so that people can know where they stand”.<sup>131</sup> However, the 2013 amendments to the SDA have introduced mystery and potential conflict where the rights of women (formerly protected) are now in contest with new rights created for transgender and non-binary individuals. How are sporting organisations to navigate their obligations to promote trans inclusion in sport while simultaneously fulfilling their obligations to protect the health and safety of all players when these objectives are in contention?<sup>132</sup>

## **18. The Guidelines for the inclusion of transgender and gender diverse people in sport**

This is the question that the AHRC claimed to address in their 2019 *Guidelines for inclusion*, which explain:

*“sporting organisations have identified the need for national guidance on how they can be inclusive of transgender and gender diverse people, and the operation of relevant anti-discrimination laws, while also protecting the health and safety of all players.”*<sup>133</sup>

If this was the brief, the *Guidelines for inclusion* fall short of the stated objective by examining only one side of the question. The matter of how sports organisations can “comply with their legal obligations under the Act, and to maximise the inclusion of transgender and gender diverse people in sport”<sup>134</sup> is addressed to the exclusion of any consideration for the impact that this trans inclusion might have on the wider sporting community. The Commission has admitted as much. In response to a freedom

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<sup>131</sup>Lord Birmingham, *The Rule of Law*, Lecture given to the Royal Society of Arts, 2010. Accessed 27 November 2021, <https://itc2u.wordpress.com/2012/06/01/lord-bingham-the-rule-of-law/>.

<sup>132</sup>*Guidelines for inclusion*, 11.

<sup>133</sup>*Ibid.*

<sup>134</sup>*Guidelines for inclusion*, 12.

of information (FOI) request from Fair Go for Queensland Women, the Commission explained that the *Guidelines for inclusion*, focused on anti-discrimination law and trans inclusion and, for this reason, no risk assessment on how the guidelines might affect women and girls was undertaken.<sup>135</sup>

Although “the lead organisation in the development of the guidelines was the Human Rights Commission”,<sup>136</sup> the final document was endorsed by and published in partnership with Sport Australia and the Coalition of Major Professional and Participation Sports (COMPPS). In a foreword, COMPPS commends the *Guidelines for inclusion* as “a significant opportunity for all of those involved in Australian sports—from grassroots participants and clubs to governing bodies—to reflect on how they can facilitate diversity and inclusion”.<sup>137</sup> Hughes, speaking on behalf of Sport Australia, has also emphasised that the *Guidelines for inclusion* are, in themselves, non-binding:

*“They are directed at sport administrators to advise sport administrators how they could, if they so choose, operationalise the act. It's very important to point out that these guidelines do not compel any person or any organisation to do anything. They are merely guidance, which was requested by sport, because this is a complex area and they wished to operationalise the act and make sure that they were acting lawfully under the act.”*<sup>138</sup>

This soft-language is contradicted within the *Guidelines for inclusion* themselves, which underscore the potential adverse consequences for sporting organisations that fail to “maximise the inclusion of transgender and gender diverse people”:

*“Both an individual or an organisation who discriminates against an individual, and a person who aids or permits the unlawful discrimination, can be held liable under the Act. It is also important to note that a sporting organisation can be vicariously liable for the actions of their employees or agents where these amount to unlawful discrimination, or an unlawful request for information ... The Act does not exclude the operation of state and territory anti-discrimination legislation that is capable of operating alongside the Act. This means that state and territory anti-discrimination legislation might impose different, or stricter, obligations.”*<sup>139</sup>

The effect of this is clearly intimidating. Sports administrators ignore the *Guidelines for inclusion* at their peril.

Even those who assiduously comply may not be immune to prosecution:

*“The Guidelines do not provide a definitive legal answer to all of the issues of discrimination ... [and] an organisation or individual will not be protected from a finding of unlawful*

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<sup>135</sup>Bernard Lane, “Call for rethink on trans safety in women’s sport”, The Australian, 5 July 2020. Accessed 27 May 2021, <https://www.theaustralian.com.au/nation/call-for-rethink-on-transgender-safety-in-womens-sport/news-story/bfd63ea12ee8325031c8183b390e0401>.

<sup>136</sup>Dalton, Estimates, 27 October 2020, 161.

<sup>137</sup>*Guidelines for inclusion*, 9.

<sup>138</sup>Hughes, Estimates, 27 October 2020, 159.

<sup>139</sup>*Guidelines for inclusion*, 29.

*discrimination if they claim that they complied with, or relied on, these Guidelines*".<sup>140</sup>

At best, assiduous compliance with the *Guidelines for inclusion* will merely "minimise the likelihood of a successful discrimination claim being made".<sup>141</sup>

The *Guidelines for inclusion* appropriate the benefits of "legitimate differential treatment" (previously applied to accommodate male/female sex differences) and apply these exclusively to the situation of transgender and gender diverse athletes:

*"Equality in substance recognises that, for disadvantaged groups, formal equality before the law—or treating everyone the same—is not always sufficient to eliminate the effects of historical discrimination, and may actually entrench existing discrimination. Positive actions that confer an extra benefit on members of a disadvantaged group may be required to attain 'real' or substantive equality."*<sup>142</sup>

Since the potential conflict between the rights claimed for transgender people and the rights formerly recognised for women are never addressed, and the whole focus of the document is trans inclusion, we can safely infer that these references to "historical discrimination" are not a reference to the historical denigration of women. Rather, transwomen are regarded as the disadvantaged group vis-à-vis women, and have therefore superseded women when it comes to any concerns regarding discrimination.

## **19. The "strength, stamina or physique" exemption**

Arguably, the *Guidelines for inclusion* have the effect of creating "soft law" which resolves any ambiguity or uncertainty in the 2013 SDA exclusively in favour of transgender and gender diverse minorities. While repeatedly affirming the noble objective of ensuring that "[t]he opportunity to participate in sport should be available to everyone in the community, regardless of their sex or gender identity"<sup>143</sup>, the *Guidelines for inclusion* fail to acknowledge that rights claimed on the basis of sex are sometimes in contest with those claimed on the basis of gender identity; securing both at once is impossible at least in some circumstances.

Further, every matter in which the interests of transwomen and women are in contention is decided in favour of the former (ensuring that "gender identity" trumps "sex"). For example, where the "strength, stamina or physique"<sup>144</sup> exemption allows that "it is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities"<sup>145</sup>, the *Guidelines for inclusion* underscore the limitations of this exemption, defining very narrow parameters for its use:

*"When seeking to rely on the 'competitive sporting activity' exemption, the following*

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<sup>140</sup>*Guidelines for inclusion*, 12.

<sup>141</sup>*Ibid.*

<sup>142</sup>*Guidelines for inclusion*, 22.

<sup>143</sup>*Guidelines for inclusion*, 11.

<sup>144</sup>SDA, s 42(1).

<sup>145</sup>2013 SDA Explanatory Memorandum, 6.

*factors should be considered ... Sports are diverse. Different sports require different skills and physical input from participants. If strength, stamina and physique are relevant, the assessment should be based on these factors and not on gender identity.”<sup>146</sup> (Emphasis added)*

The result, as noted above, is perverse. Sporting authorities may exclude certain players on the basis that these players have superior stamina, strength or physique but they must be careful to avoid connecting this competitive advantage to sex differences. Transwomen may, in limited circumstances, be excluded from women’s sport because they are too good for the women’s category; not because they are male.

As counter-intuitive as it may seem, Hannah Mouncey appears to be correct in pointing out that – viewed through the prism of gender ideology which requires blindness to male/female differences – the decision to exclude Mouncey from the Australian Rules Women’s team must send a bad message to girls with a larger physique:

*“Think about the message it sends to women and girls about their bodies: if you’re too big, you can’t play. That is incredibly dangerous and backward.”<sup>147</sup>*

Mouncey is six-foot-two and weighs 220 pounds but we may not notice that Mouncey is biologically male because that is irrelevant; where biology = 0%, Mouncey is a woman if Mouncey says so.

In practical terms, the pathway for organisations to invoke the “stamina, strength or physique exemption” is fraught with potential legal hazard. The “proportionate means of achieving [the] legitimate objective” of preserving women’s sport necessarily involves recognising biology as significant; but maintaining a convincing pretence that no significance is attached to biological sex is essential if such actions are to avoid being regarded as “unlawful discrimination”. Such a polite fiction is unlikely to withstand serious challenge in the long term.

Further, the *Guidelines for inclusion* emphasise that, even when a sporting organisation could rely on an exemption, it is under no obligation to do so:

*“Relying on an exemption is not mandatory. Sporting organisations may choose to comply with the core anti-discrimination provisions of the Act even when it is possible to rely on an exemption.”<sup>148</sup>*

This communicates an extraordinary message: sporting clubs are not obliged to have regard for the dangers to women’s safety or to the competitive disadvantage suffered by women who are obliged to compete against men, unless they choose.

Section 42(2)(e) of the 2013 SDA excludes the use of the “strength, stamina or physique”

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<sup>146</sup>*Guidelines for inclusion*, 36.

<sup>147</sup>Hannah Mouncey, “AFL’s trans participation policy sets a dangerous precedent for women”, *The Guardian*, 3 September 2018. Accessed 28 December 2021, <https://www.theguardian.com/sport/2018/sep/03/afls-trans-participation-policy-sets-a-dangerous-precedent-for-women>.

<sup>148</sup>*Guidelines for inclusion*, 22.



exemption for sporting activity involving children under the age of 12. Neither the 2013 SDA nor the *Guidelines for inclusion* provide a rationale for this exclusion, but logic suggests it might be based on the supposition that the physical differentiation between pre-pubertal males and females is insignificant.<sup>149</sup> If so, the supposition is at odds with a significant body of scientific literature, which points to even pre-pubertal male advantage. Although this advantage is smaller than the post-pubertal male advantage, it is still notable and consistently disadvantages girls. (Ironically, even this clause treating under 12s differently implicitly acknowledges that differences in “strength, stamina or physique” are significant after the age of 12).

John Whitehall, Professor of Paediatrics, lists a number of studies from Australia, Holland, Portugal, Greece, Poland and Norway which indicate pre-pubertal male advantage in aerobic fitness, strength (including explosive strength of upper and lower limbs and hand-grip strength), speed, agility, cardiovascular endurance, muscle endurance and hand-eye coordination.<sup>150</sup> Girls, it seems, have greater flexibility and better balance but are also more prone to ligamentous damage. Anatomical differences between the pelvis and knees of girls and boys is significant. Based on an analysis of 175 track, field and swimming records published by the NSW Department of Education, Whitehall found a difference of 1%–4% between the performances of boys and girls aged 12 or under, compared with a difference of 10%–17% after the age of 12.<sup>151</sup>

In his appearance before Senate Estimates on 27 October 2020, Hughes expressed Sport Australia’s and the Australian Institute of Sport’s commitment to fairness for women:

*“Sport Australia and the Australian Institute of Sport have never and will never be party to any policy or any initiative which endangers women’s safety in the female category or that compromises fairness.”*<sup>152</sup>

How such a statement is consistent with Sport Australia’s endorsement of the *Guidelines for inclusion* is unclear. There appears to be a gap between the rhetoric and the reality: a sporting organisation that prioritised women’s safety and fairness in the female category would have to depart from the *Guidelines for inclusion* (endorsed by Sport Australia) and risk falling foul of the law in the process.

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<sup>149</sup>Certainly, the guidelines play down the impact of testosterone on sporting performance: “There is limited research examining the impact of testosterone on the sporting performance of transwomen ... Higher testosterone levels are generally associated with greater strength, muscle mass and endurance ...[but] many factors can have an impact on a person’s sporting ability.” (*Guidelines for inclusion*, 37).

<sup>150</sup>John Whitehall, “Guidelines for the Destruction of Female Sport”, *Quadrant*, 3 October 2019. Accessed 27 May 2021, <https://quadrant.org.au/magazine/2019/09/guidelines-for-the-destruction-of-female-sport/>.

<sup>151</sup>*Ibid.*

<sup>152</sup>Hughes, Estimates, 27 October 2020, 158.

## 20. “Gender identity” trumps “sex”

Rather than recognising the potential for conflict between the rights claimed by transwomen on the basis of gender identity and those claimed by women on the basis of sex, in several places both the 2013 SDA and the *Guidelines for inclusion* seem to suggest that “sex” and “gender identity” are simply different ways of saying the same thing. *The Explanatory Memorandum* commends the 2013 SDA as providing:

*“an important federal symbolic statement about the unacceptable nature of such discrimination [that] ... would contribute to ensuring that all persons are treated with dignity and respect regardless of their sexual orientation or sex/gender identity.”*<sup>153</sup>  
(Emphasis added)

In various places the *Guidelines for inclusion* mention the importance of avoiding discrimination on the basis of “sex or gender identity”, as though this is a single issue.

Even the authors of the *Guidelines for inclusion* confuse “discrimination on the basis of sex” and “discrimination on the basis of gender identity”. Exploring a scenario in which transmen or non-binary players are playing for a male team, the *Guidelines for inclusion* explain that failing to provide female changing rooms disadvantages trans or non-binary people and therefore constitutes indirect discrimination.

*“Though the players who are not transgender are treated in the same way as the players who are transgender or non-binary, the transgender and non-binary players are not able to use the changeroom that matches their gender identity.”*<sup>154</sup>

This is an error. If the law condemns as “indirect discrimination” the provision of male facilities to male-identifying female-bodied players, this could only be found on the grounds of “sex”, not “gender identity”. The subset of “men” disadvantaged by such a policy are those with female bodies (i.e. transmen and non-binaries). Transmen *are* able to use the (male) changerooms that match their gender identity but might (legitimately) choose to use the changeroom that matches their (female) sex. Even the AHRC appears to have become tangled in the logical contortions required to resolve conflicting interests where rights claimed on the basis of “gender identity” and rights claimed on the basis of “sex” are in contest.

The *Guidelines for inclusion*, however, do not instruct sporting clubs to show the same consideration regarding the need for personal privacy to *all* female-bodied players because this would involve excluding transwomen from female changerooms on the basis that they are male. Considering this question, the *Guidelines for inclusion* are careful to prioritise the feelings of trans individuals: “being told they are in the wrong bathroom and asked to leave” is provided among other examples of “exclusion or harassment experienced by transgender and gender diverse people”.<sup>155</sup>

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<sup>153</sup>2013 SDA Explanatory Memorandum, 29.

<sup>154</sup>*Guidelines for inclusion*, 18.

<sup>155</sup>*Guidelines for inclusion*, 38.

Where single-sex facilities discomfort transgender individuals and the sporting organisation does not have the resources to refurbish the bathrooms, the *Guidelines for inclusion* recommend changing the signage to make all the bathrooms unisex.<sup>156</sup> Recognition of gender identity is thus prioritised above the club's duty to provide for the safety, privacy and dignity of biological women and girls. Where junior sporting clubs use public (rather than club-owned) facilities, the *Guidelines for inclusion* provide no means of ensuring that adult, male-bodied transwomen are not entitled to occupy the female changerooms used by young girls. This clearly creates opportunities for sexual harassment and assault that any predator (transgender or otherwise) might freely exploit. The reckless disregard for the safety of women and girls is astounding.

## 21. "Inclusion" trumps women's safety

By whatever illogical or unpredictable method it is reasoned, the *Guidelines for inclusion* invariably conclude that sporting clubs must prioritise trans and non-binary inclusion, whether this involves noticing and catering for biological distinctions (sex-specific changerooms for transmen) or maintaining determined blindness to biological distinctions (so that transwomen may not be distinguished from women and should be allowed to use the female changerooms). At the same time, the ability of clubs to cater for the sex-specific needs of their members is impeded by the prohibitions against any requests for the type of information that would reveal incongruence between a new member's sex and gender identity.<sup>157</sup>

When asked by Senator Chandler about its policy in relation to the use of changerooms by participants who are of one sex but identify as a different gender, Sport Australia replied that it does not have such a policy and referred the Senator back to the *Guidelines for inclusion*, which "provide advice and examples regarding how sporting organisations can design new facilities or use existing facilities to support greater inclusion."<sup>158</sup> Women cannot, apparently, look to Sport Australia for any defence of their right to privacy.

The common law principle of *volenti non fit iniuria* (also known as "the voluntary assumption of risk") works to shield sporting organisations from liability for injury to players where players can reasonably anticipate, and choose to accept, the risks of engaging in a particular sport. So, for example, boxers consent to being hit as an inherent risk of engaging in the sport of boxing. But they engage knowing that the sport is governed by particular rules and that a referee will enforce these rules; they consent to being hit with gloved fists, not with weapons; they consent in the knowledge that the match will take place within a ring, on padded mats, etc. The principle of

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<sup>156</sup>*Guidelines for inclusion*, 41.

<sup>157</sup>*Guidelines for inclusion*, 17: "An example of indirect discrimination might be a sporting organisation requiring a birth certificate upon registration, and not accepting any alternative form of documentation to verify a person's gender. This may disadvantage transgender and non-binary players if their birth certificate does not align with their gender identity."

<sup>158</sup>Parliament of Australia, Community Affairs Committee, Additional Estimates 2019–2020, Department of Health, Sport Australia, Portfolio Question Number SQ20-000141, 4 March 2020.

*volenti non fit iniuria* only applies where a player is 1) aware of all the risks involved, including both the nature and the extent of these risks and; 2) has consented to waive all claims for damages either expressly (by statement) or implicitly (by actions).

Where the usual terms of a sport are varied, this information needs to be communicated to all players so that they can choose – or not – to accept the altered risk profile of the activity. The Texas high school girls who bowed out of wrestling matches against Mack Beggs (the biological female who had been taking testosterone as part of the transitioning process) were exercising their right not to accept the increased risk of engagement. Similarly, Ronda Rousey, after assessing the risks of fighting Fallon Fox, decided not to accept the risk. In contrast, Fox’s first two opponents were not aware that Fox was biologically male and were therefore denied the information needed to assess the risk they were assuming. Under common law, they could legitimately bring a claim against the MMA fighting authority for their injuries.

Similarly, the *Guidelines for inclusion* deny all women playing in community-level sport in Australia the information needed for them to assess the risk of engagement. Sporting clubs who ask for information that would reveal a transgender identity of a new member, or who communicate this information to other players, now fall foul of anti-discrimination law. On the other hand, where sporting clubs fail to find out this information and/or fail to communicate this to other players, this failure compromises their legal defence in the event of injury. Wherever male physiology increases the risk of injury, the women and girls playing in these sports cannot be said to have given informed consent or to have voluntarily assented to the risks involved in the sport.

## 22. Hannah Mouncey

In many ways, Hannah Mouncey’s sporting career has been a testing ground for Australian sport policy with regard to trans inclusion at both elite and community levels. Mouncey’s participation in women’s sport, and the terms of that participation, have required sporting organisations to consider the questions trans inclusion raises around both the issues of “strength, stamina or physique” and sex-specific changerooms. By turns encouraged and excluded, Mouncey has suffered the uncertainty and disappointment that arises when rules are in flux, poorly defined or applied inconsistently.



Male handball player (Image, iStock)



## Strength, stamina or physique

Mouncey claims the distinction of being the only sports person in any sport, anywhere in the world, to have represented their country at international level in both the men's and women's categories. In 2013, Callum Mouncey represented Australia in the 2013 World Men's Handball Championships.<sup>159</sup> In 2016, at the age of 25, Callum transitioned to identify as "Hannah", joining a local Canberra women's football team shortly afterwards.<sup>160</sup> In 2017, Mouncey was nominated for the AFL Women's draft before being declined, in a late decision, under the "strength, stamina or physique" clause of the Victorian Equal Opportunities Act.<sup>161</sup> This decision drew public criticism and calls for clarification of parameters for transgender participation in women's sport.

In 2018, the AFL supported Mouncey's request to play in the VFL Women's (VFLW) where Mouncey ended the season second in VFLW goal-kicking record.<sup>162</sup> Subsequently, in an apparent reversal of their 2017 decision, the AFL seemed to entertain the idea that Mouncey might join the 2018 AFL Women's draft but produced policies for trans inclusion at the elite level that were, according to Mouncey, "by design, too difficult for anyone to meet".<sup>163</sup>

## Changerooms

In response to all this equivocation, Mouncey withdrew from football in 2018 and turned back to handball, helping the Australian women's team qualify for the Asian championships and, subsequently, for the 2019 World Championships. This time, tension arose around the question of changerooms. The team manager, prompted by concerns raised by the other players, asked Mouncey to use a separate changeroom. Mouncey rejected this proposal as inherently unreasonable.

*"The thing is, it shouldn't be an issue – there was no issue. And this is the thing, it's really easy: you just say to the team 'Guys, No. I'm not asking that question. That's actually really inappropriate'. You know? It's that simple and I think there are a lot of people who would know that."*<sup>164</sup>

The situation presented an impasse: female players in the team were clearly uncomfortable sharing changerooms with a biological male; Mouncey was not

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<sup>159</sup>Jorge Dargel, "He played the Men's World Cup in 2013 and could play the Women's six years later", Marca, 21 December 2018. Accessed 20 December 2021, <https://www.marca.com/en/more-sports/2018/12/21/5c1d0814e5fdea7d7b8b45bf.html>.

<sup>160</sup>David Polkinghorne, "Hannah hopes to play for Australian women's handball team after transitioning from a man", The Canberra Times, 30 July 2016. Accessed 20 December 2021, <https://www.canberratimes.com.au/story/6046081/hannah-mouncey-hopes-to-play-for-australian-womens-handball-team-after-transitioning-from-a-man/>.

<sup>161</sup>"Transgender footballer Hannah Mouncey ineligible for AFL Women's draft", The New Daily, 17 October 2017. Accessed 7 December 2021, <https://thenewdaily.com.au/sport/afl/2017/10/17/transgender-footballer-hannah-mouncey-ineligible-afl-womens-draft/>.

<sup>162</sup>"AFL clears transgender footballer Hannah Mouncey to play in state women's leagues", ABC News, 13 February 2018. Accessed 20 December 2021, <https://www.abc.net.au/news/2018-02-13/afl-transgender-player-hannah-mouncey-to-play-vflw-football/9443590>.

<sup>163</sup>"Handball and Aussie rules football player Hannah Mouncey Outsports", Five Rings To Rule Them All, podcast, Episode 38, 8:30, 24 August 2020. Accessed 29 November 2021, <https://open.spotify.com/episode/1JiToQRNSrqlxJtk2wGcfP>.

<sup>164</sup>Ibid.

prepared to compromise on an issue which, from Mouncey's point of view, is equally clear-cut – "From my perspective, if I'm on the team, I'm on the team and I'm not going to be treated any differently". Such a position allows no room for compromise.

The club encouraged Mouncey to accommodate the requirement for separate changerooms. Mouncey refused. Consistent agitation from Mouncey to "resolve the changeroom issue" (which, presumably, meant resolving it in Mouncey's favour by disregarding the wishes of the female players who had raised concerns) resulted in no policy reformation. Eventually, feeling as if "being strung along", Mouncey told the manager to "go f\*\*k himself", later reflecting:

*"Honestly, that was the best thing I did and I wish I did it six or twelve months before. Because I was standing up for myself, y'know, what was right and what was wrong. So, I will always say to myself that that was the best thing I ever did."*<sup>165</sup>

The impossibility of resolving the problem to everyone's satisfaction is clear. Mouncey's demand to be treated on the same terms as everyone else on the team cannot admit the information that Mouncey is not "just the same" as everyone else on the team. The clash of rights is only one small example of the wider conflict which will inevitably continue to arise as a result of the redefinition of "woman" currently enshrined in the 2013 SDA.

The result of the conflict, in Mouncey's case, was non-selection for the team attending the 2019 World Championships. Acknowledging that, having capitulated on the changeroom issue, inclusion on the team was certain, Mouncey still contends having done the right thing by making a moral stand against "transphobia".<sup>166</sup>

*"Yes, I would be playing in a World Championship right now if I had given in and accepted the quite frankly ludicrous requests made by the team manager both on his own behalf and those players he represented. Yes, I could stay quiet about this and not speak, so no one knew what happened ... [but] I have a much bigger responsibility to you, and we have a much bigger responsibility to each other to not settle for second best when it comes to being treated equally ... we need to be prepared to not be liked, prepared to speak out and if I have to give up throwing a ball into a goal as a result, well that's a pretty small sacrifice to make."*<sup>167</sup>

## Guidelines and mediation

Having come to public prominence through these experiences, Mouncey was invited to contribute to the consultation process which resulted in the 2019 *Guidelines for inclusion*. While welcoming the guidelines in principle, Mouncey raised concerns first that they applied only to community level sport and second, that "[b]eing guidelines,

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<sup>165</sup>Ibid.

<sup>166</sup>@HannahMouncey, Twitter, 21 June 2020. Accessed 29 November 2021, <https://twitter.com/HannahMouncey/status/1274653079363710977>.

<sup>167</sup><sup>49</sup>"People Will Do What's Easy Over What's Right': Hannah Mouncey speaks out", The Star Observer, 7 December 2019. Accessed 27 May 2021, <https://www.starobserver.com.au/opinion/people-will-do-whats-easy-over-whats-right-hannah-mouncey-speaks-out/190555>.

sports can choose to ignore them and there would be nothing stopping them from doing that."<sup>168</sup>

Having produced the *Guidelines for inclusion* in June, from November 2019, the AHRC began mediating between Mouncey and Handball Australia. These negotiations resulted in a September 2020 media release from Handball Australia which stated:

*"[W]e acknowledge that at the Asian Championships in November 2018, a request was made of Hannah Mouncey which in hindsight was inappropriate. We recognise that this caused Hannah distress, anger and to feel isolated."*

*Handball Australia regrets and acknowledges the hurt caused and extends a sincere apology to Hannah for not being able to resolve the issue before it impacted Hannah's relationship with the sport and organisation."*<sup>169</sup>

The statement also foreshadowed Mouncey's agreement to work with Handball Australia in:

*"improving its inclusion policies and participant education, using her experience to help improve and pave the way for current and future players ... [and] to help significantly update the LGBTQI+ aspects of the policy and inform Handball Australia's practical implementation for players, officials, and administration."*<sup>170</sup>

The question of how biological males can be treated as "just the same" as the female members of the team with respect to showers and changerooms without compromising the safety and dignity of women in sport has yet to be made clear. What is clear, is that an array of activists stand ready to pressure sporting organisations such as Handball Australia into prioritising "trans inclusion" over women's safety and privacy.

## 23. Gender ideology in community sport

The *Guidelines for inclusion* and all the supporting training and resources produced by this coalition of affiliates, uses anti-discrimination as the rationale for imposing gender ideology on sports. As Whitehall observes:

*"Under the banner of anti-discrimination ... [the] beliefs and doctrines [of gender ideology] will be imposed by legal force on all the mums and dads, and their children, and all the teachers, officials, volunteers and workers responsible for the running of sporting competitions across the nation."*<sup>171</sup>

The *Guidelines for inclusion* point sporting organisations toward "further resources" offered by a coalition of organisations working to promote gender ideology through

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<sup>168</sup>Lucie Bertoldo, "Sport Australia take 'stand for inclusivity' with transgender guidelines", The Canberra Times, 13 June 2019. Accessed 27 May 2021, <https://www.canberratimes.com.au/story/6216225/sport-australia-stand-up-for-inclusivity/?cs=14280#>.

<sup>169</sup>Handball Australia, Media Release, 28 September 2020. Accessed 3 December 2020, <https://handballaustralia.org.au/2020/09/28/4419/>.

<sup>170</sup>Ibid.

<sup>171</sup>Whitehall, "Guidelines for the Destruction of Female Sport".

sport at all levels. Sport Australia has networked with Play by the Rules, ACON's Pride in Sport, Proud2Play, Minus18, Sexualities and Gender Research (SaGR) at the University of Western Sydney, Pridecup, and Twenty 10 among others to provide resources and training on how clubs can be more inclusive of diversity. Its website offers "inclusive sport" training, which links to online modules, materials and resources predominantly developed by Play by the Rules.

Unsurprisingly, given the level of behind-the-scenes coordination, the resources promoted through Sport Australia and the *Guidelines for inclusion* have substantially similar suggestions for practical initiatives to improve inclusion. Sporting clubs should, for example:<sup>172</sup>

- secure a written commitment to transgender and gender diverse inclusion from Board Members, Management Committees and the Executive.
- take active steps (such as training or information packs) to "educate players, coaches, staff, volunteers and members about this commitment".
- enlist "support from prominent players, parents and coaches in the form of 'champions' ... for transgender and gender diverse inclusion".<sup>173</sup>
- ensure uniforms are available to accommodate the body shapes of male and female players in all sizes.
- remodel changeroom facilities, showers and toilets to enable everyone to use the facilities of their choice.

The burdens to be assumed by community sporting organisations – the energy and resources to be directed away from the core business of organising sport – though not insignificant, are not considered in these policies. Local clubs that rely on meagre funds and volunteer support to run at all, now have additional burdens to bear, under threat of legal action should they fail to comply. As Professor Whitehall observes:

*"Those formerly dedicated to teaching children how to run faster or kick balls further, and who organise rosters, barbecues and raffles to support the process, will now have to fathom the mysteries of undefined discrimination."*<sup>174</sup>

The recommendations of the *Guidelines for inclusion* supported with this training from Sport Australia, have the effect of imposing acceptance of gender ideology on that third of the Australian population (between 9 and 10 million) actively involved in sport. COMPPS, which partnered with the AHRC and Sport Australia to produce the *Guidelines for inclusion*, includes Australian Football League, Cricket Australia, Football Federation Australia, National Rugby League, Netball Australia, Rugby Australia and Tennis Australia. COMPPS comprises 16,000 sporting clubs.

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<sup>172</sup>*Guidelines for inclusion*, 32 and 40.

<sup>173</sup>*Guidelines for inclusion*, 32.

<sup>174</sup>Whitehall, "Guidelines for the Destruction of Female Sport".



## 24. Elite versus community level sport

Sporting authorities may be satisfied to concede the field to activist demands for unrestricted inclusion as far as community sport is concerned. However, if Australia's best athletes are to compete internationally, elite sports need to have some regard to international sporting codes. Many of these recognise the problems of trans inclusion in the women's category and place restrictions on this which have successfully been defended in court.

In October 2020, eight Australian sports – including AFL, hockey, netball, rugby, tennis, touch football, netball and water polo – released new trans inclusion policies.<sup>175</sup> The announcement was applauded by Pride in Sport's National Program Manager, Beau Newell:

*“This launch demonstrates a fundamental shift within Australian sport towards the greater inclusion of trans and gender diverse athletes. By formalising their stand to be inclusive of trans and gender diverse people, these Australian sports have shown a true and tangible commitment to providing environments where everyone involved is treated with respect and dignity.”*<sup>176</sup>

In contrast to the community-level codes, however, the codes for elite sport place conditions on the participation of trans athletes in women's sports and carve out significant margins of discretion for sporting authorities to exercise judgement on a case-by-case basis. In particular, the elite sporting codes seem to have settled on testosterone limits of 5 nmol/L or lower – following the example of the IAAF, rather than the recently reviewed Olympic code, which has scrapped even its liberal 10 nmol/L limit.

*“The AFL considers that the presence of testosterone levels above the thresholds set under this Policy would provide an Applicant with a relevant, and significant, disparity in the Applicant's strength, stamina or physique and consequential competitive advantage.”*<sup>177</sup>

The AFL code also takes into account height, weight, bench press, squat, 20m sprint, vertical jump, GPS data and the results of 2km time trials to determine a player's eligibility.<sup>178</sup> The policy is to be reviewed at least every two years and the AFL sub-committee reserves the right to consult “independent legal, medical, gender diverse and/or other expert advice obtained by it as it sees fit” and asserts “its absolute discretion in understanding and assessing information provided to it in connection

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<sup>175</sup>Bernard Lane, “Female Pushback Over Trans Sport Rules”, The Australian, 12 October 2020. Accessed 27 May 2021, <https://www.theaustralian.com.au/nation/female-pushback-over-trans-sport-rules/news-story/12f99017aee7b8155e6b9224fb2ec45a>.

<sup>176</sup>“Netball Australia commits to the inclusion of transgender and gender diverse athletes in elite competitions”, Netball Australia, Media Release, 30 September 2020. Accessed 27 May 2021, <https://netball.com.au/news/netball-australia-commits-inclusion-transgender-and-gender-diverse-athletes-elite-competitions>.

<sup>177</sup>“AFL Gender Diversity Policy - Elite Football”, AFL, 31 August 2018, 10. Accessed 27 May 2021, <https://resources.afl.com.au/afl/document/2019/12/04/0901c87f-571b-4eb9-b7b5-42d55015a1c5/Gender-Diversity-Policy.pdf>

<sup>178</sup>AFL Gender Diversity Policy, 10.

with the nomination.”<sup>179</sup> Female players may draw some comfort from all this that their concerns will at least have equal billing on the sub-committee’s agenda.

The AFL code briefly explains the rationale for treating elite sports differently to community sports:

*“It is the AFL’s view that the relative priority of considerations of competition success and social inclusion may differ between community and elite football, noting the latter has the greatest potential rewards, including remuneration, for participants.”*<sup>180</sup>

This rationale, regrettably, ignores the impact of unrestricted trans inclusion on the early careers of would-be future elite female athletes. The example of the Connecticut high-school female athletes demonstrates the clear potential for unrestricted trans inclusion to discourage female athletes and narrow the avenues available for them to advance to elite level. It is not sufficient to protect the careers of women who advance to elite sport, the opportunities for girls to progress to this level also need to be defended.

In this respect, the Netball code provides better protections than AFL. Noting that “the International Netball Federation considers that netball is a Female Category Sport”, Netball Australia’s guidelines allow for restrictions to trans inclusion for all events involving players over the age of 15.<sup>181</sup>

## **25. Asymmetric consultation in the development of the *Guidelines for inclusion***

The asymmetric consideration of women’s rights in the development of the *Guidelines for inclusion* has been most effectively highlighted by Senator Claire Chandler. Asked by Chandler whether he thought girls might be deterred from playing sport if there were children of the male sex competing in their competition, Rob Dalton (CEO of Sport Australia) responded that he did not have an opinion.<sup>182</sup> Chandler referred to correspondence from parents concerned that their daughters should not be obliged to compete against biological males and expressed her concern that she had been unable to extract from Sport Australia a clear position on “whether or not you believe women’s sport should be for women”. Dalton took the question on notice. The answer eventually returned, evaded the issue, stating blandly that:

*“Sport Australia aims to ensure that all Australians regardless of biological sex or gender*

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<sup>179</sup>AFL Gender Diversity Policy, 11

<sup>180</sup>AFL Gender Diversity Policy, 7.

<sup>181</sup>“Inclusion of Transgender and Gender Diverse Athletes in Elite Netball Competitions Policy”, Netball Australia, 31 March 2020, 5. Accessed 27 May 2021, <https://netball.com.au/sites/default/files/2020-10/POLICY-INT015-Inclusion-of-Transgender-and-Gender-Diverse-Athletes-in-Elite-Netball-20200331.pdf>.

<sup>182</sup>Parliament of Australia, Community Affairs Legislation Committee, Estimates, Department of Health, Dalton (Sport Australia), 4 March 2020, 41. Accessed 27 May 2021, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F66ba932e-d456-4ae0-a126-3505810be0f8%2F0003;orderBy=customrank;page=0;query=Title%3ASport%20Dataset%3Aestimate%20Date%3A01%2F03%2F2020%20%3E%3E%2024%2F11%2F2020;rec=3;resCount=Default>.

*identity have the opportunity to enrich their lives through sport.”<sup>183</sup>*

Dalton also took on notice the question about how the term “woman” is defined “for the purposes of supporting, promoting, encouraging and making policy with regard to women’s sport.” The answer, when it came, was that “Sport Australia has not defined the term ‘woman’.”<sup>184</sup>

Significant questions remain about which organisations provided the impetus for the development of the *Guidelines for inclusion* and the range of interest groups consulted in their development. In her “Foreword” to the guidelines, Sex Discrimination Commissioner for the AHRC, Kate Jenkins, suggests the initiative came from Sport Australia:

*“When Sport Australia first approached the Australian Human Rights Commission ... we welcomed this opportunity to partner with them and the Coalition of Major Professional and Participation Sports (COMPPS) on the development of these Guidelines for the inclusion of transgender and gender diverse people in sport”.<sup>185</sup>*

This is consistent with Sport Australia’s official answer to a Question on Notice by Senator Claire Chandler from March 2020, which stated:

*“Sport Australia initiated the development of the Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport in response to requests by sporting organisations for support and guidance on legal obligations regarding discrimination as well as inclusive policies and practices.”<sup>186</sup>*

However, at Additional Senate Estimate hearings in October 2020, Dalton contradicted this answer, stating instead that:

*“the guidelines were in fact initiated by the Human Rights Commission and we were a sponsor, along with the COMPPS.”<sup>187</sup>*

The consultation process too, seems to have been led by the AHRC. The answer to another question on notice supplied by Sport Australia states that:

*“[t]he consultation process which informed the development of the Guidelines was led by the AHRC and was undertaken on a confidential basis. As such, Sport Australia is unable to share a list of the organisations which were consulted.*

*AHRC led the drafting of the Guidelines in close consultation with Sport Australia and a review group which included participants from the consultation process.”<sup>188</sup>*

Although Sport Australia and the AHRC have refused to divulge the list of organisations

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<sup>183</sup>Additional Estimates 2019–2020, Senator Claire Chandler, Portfolio Question Number SQ20-000015, 4 March 2020.

<sup>184</sup>Additional Estimates 2019–2020, Senator Claire Chandler, Portfolio Question Number SQ20-000381, 4 March 2020.

<sup>185</sup>*Guidelines for inclusion*, 5.

<sup>186</sup>Additional Estimates 2019–2020, Senator Claire Chandler, Portfolio Question Number SQ20-000319, 4 March 2020.

<sup>187</sup>Dalton, Estimates, 27 October 2020, 161.

<sup>188</sup>Additional Estimates 2019–2020, Senator Claire Chandler, Portfolio Question Number SQ20-000319, 4 March 2020.

consulted in the process of developing the *Guidelines for inclusion*, we can speculate as to some of those on the list. The “further resources” section of the document refers readers to a list comprised almost exclusively of LGBTIQ+ activist organisations and certainly one of these, Proud2Play, has independently boasted that “many” of its members served as advisers for the *Guidelines for inclusion* and shared in a \$20,000 grant from Sport Australia to help develop fact sheets to go with it.<sup>189</sup> Several aspects of the *Guidelines for inclusion* suggest that the ideological profile of the organisations and/or individuals consulted was undemocratically narrow:

- The interests of women are not considered where these conflict with the interests of trans inclusion.
- The resources linked to the guidelines show significant input from LGBTIQ+ organisations to the exclusion of women’s groups.
- The effect of the *Guidelines for inclusion* is to progress gender ideology based on SOGI, which cannot recognise biology as significant.
- The apparently spontaneous production of guidelines for eight different sporting codes at elite level in September and October 2020, trumpeted by Pride in Sport to the media, suggests some involvement of this organisation in the creation of these code-specific documents.

In a 2020 speech in Parliament, Chandler voiced the same conclusion. She criticised both the consultation process, and the *Guidelines for inclusion* that this narrow consultation process has produced, for ignoring the interests of women completely:

*“What we have, in short, is a set of guidelines impacting on women’s sport that women weren’t consulted about, that its creators admit are not based in science and that legal experts say are predicated on an inaccurate interpretation of the law. It is simply unacceptable for Australia’s peak sporting body to have conspired in secret with favoured lobby groups to undermine the integrity, safety and fairness of women’s sport.”*<sup>190</sup>

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<sup>189</sup>“National guidelines for transgender and gender diverse inclusion in sport released”, Proud2Play, Media Release. Accessed 27 May 2021, <https://www.proud2play.org.au/single-post/2019/06/13/national-guidelines-for-transgender-and-gender-diverse-inclusion-in-sport-released>.

<sup>190</sup>Senator Claire Chandler, “Women in Sport”.



## 26. The sex-based rights of Australian women need to be re-established in our law

If sporting organisations were free to ignore the interests of women without challenge in the past, that at last appears to be changing. Organisations such as Save Women's Sport Australasia are beginning to voice strong opposition to the incursions and to call for change. As their co-founder Katherine Deves says, "Bodies play sport. Gender identities do not".<sup>191</sup> Science and common sense affirm that male bodies are different to female bodies and, when it comes to sport, those differences really matter.

The firm champion of the cause in Parliament, of course, is Senator Chandler who has warned sporting organisations of impending situational change:



Katherine Deves  
(Image source unknown)

*"Sporting organisations should expect very close scrutiny on why they have ignored scientific evidence about risks to safety and fairness of female athletes, and how they justify receiving taxpayer dollars to promote women's sport while actively undermining the very basis of it."*<sup>192</sup>

On 29 May 2021, Senator Chandler announced that the Liberal Party's Federal Council passed the following motion to support sex-based women's rights.<sup>193</sup>

### 20. Female-specific Sports, Facilities and Services (Federal Women's Committee)

That Federal Council:

a. acknowledges that:

- i. differences between men and women are a legitimate reason for the existence of female-specific sports, health services, domestic violence services, refuges, shelters, change rooms and prisons;
- ii. these single-sex services and facilities continue to play a critical role in society, particularly in protecting the privacy, safety, dignity, health and wellbeing of women; and
- iii. all Australians have a right to speak freely about the reality of biological sex and express views about the importance of single sex services;

<sup>191</sup>Katherine Deves, "Bodies play sport, not gender identities", Sky News, 22 June 2021. Accessed 20 December 2021, <https://www.skynews.com.au/opinion/chris-kenny/bodies-play-sport-not-gender-identities/video/b1d6dd0871ea67cc8084cdd894b9bdb6>.

<sup>192</sup>"Chandler, "Women's sport sacrificed by sporting administrators".

<sup>193</sup>Senator Claire Chandler, Facebook, 29 May 2021. Accessed 20 December 2021, <https://www.facebook.com/2067887946766818/photos/a.2069530443269235/3012579135631023/?type=3>.

- b. *condemns the abuse and threats of violence against women advocating in relation to these matters, particularly on social media; and*
- c. *calls on the Federal Government to affirm its support for the provision of single-sex sports, facilities and services.*

Part 20 b of the motion takes on new significance in light of the vicious media and social media attacks against Deves (including death threats) when she ran for Parliament in the 2022 Federal Election. However, while the abuse of Deves was particularly nasty, other Australian women, including Senator Chandler, have also been subject to abuse and threats of violence for speaking out.



Then in November 2021, Chandler announced that she would be “drafting a bill to protect single-sex sport for Australian women and girls”.<sup>194</sup> She said her bill would be based on the following key principles:

- “Single-sex sport for women and girls will be lawful: nobody, whether it’s our biggest national sporting codes or a volunteer at the local footy club, will be breaking Commonwealth Law by offering single-sex women’s sport.
- “The law applies equally to everyone at every level of sport: women’s single-sex sport is not a privilege only for elite competitions, it’s just as important at local level.
- “The law must be simple to understand and administer: sporting clubs and codes shouldn’t have to hire teams of lawyers, doctors and sport scientists to prove they can keep their women’s sport’s competitions and teams single-sex.
- “Trans people will NOT be banned from playing sport: I continue to support trans people playing in sport – it’s up to sporting codes to offer both single-sex sport for women and other options that support participation for everyone.”

<sup>194</sup>“Protect women and girls in sport”, Senator Claire Chandler. Accessed 29 November 2021, <https://www.senatorchandler.com.au>

On 10 February 2022, Chandler introduced her *Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022* to the Senate.<sup>195</sup> She explained that while the SDA has always acknowledged the relevance of sex in sport, recent interpretations have meant that sporting bodies are at risk of legal action if they exclude males who identify as women from women's sport. Her Bill will “make clear that single-sex sport for women is lawful, encouraged and supported by the Parliament of Australia”.

*“[The Bill] does not seek to ‘ban’ anybody from playing sport. What it does do is seek to restore respect for women’s rights and acknowledge the long-understood reality that categorisation by sex is important in the vast majority of sports.”*

Most significantly, the Bill seeks to reinstate the biological definitions of “man” and “woman” in the SDA.

The fundamental problem is that women were ultimately disenfranchised vis-à-vis transwomen in the 2013 SDA. The exemptions are clearly inadequate if the rights of women are to be recognised and protected in Australian law as our international obligations as signatories to CEDAW demand that they should. By reinstating these definitions, the Bill will not only recover the legal recognition and protection women lost in 2013 in the sporting arena, but across all areas of life.

If passed, Chandler's Bill will be a significant victory for women.

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<sup>195</sup>“Save Women's Sport Bill to be introduced”, Senator Claire Chandler. Accessed 10 February 2022, [https://www.senatorchandler.com.au/save\\_women\\_s\\_sport\\_bill\\_to\\_be\\_introduced](https://www.senatorchandler.com.au/save_women_s_sport_bill_to_be_introduced).

*“Single-sex sport for women and girls  
is a fundamental good for our society...  
It should not only be legal, it should  
be celebrated, promoted and  
encouraged at every level of sport.”*

SENATOR CLAIRE CHANDLER

