



Australian
Human Rights
Commission

Issues Paper

National Guidelines:

Trans and intersex inclusion

in sport

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Table of Contents

Issues Paper

1	Introduction	3
1.1	<i>The Guidelines</i>	3
1.2	<i>About the Commission</i>	3
2	Purpose of the Issues Paper	3
3	Background	4
4	Terminology.....	4
4.1	<i>Sex and gender identity</i>	5
4.2	<i>The difference between trans and intersex</i>	5
5	Federal Sex Discrimination Act	6
5.1	<i>Overview</i>	6
5.2	<i>Relevant provisions</i>	6
6	Issues relating to the inclusion of trans people in sport	8
6.1	<i>Membership and participation</i>	8
6.2	<i>Policies relating to sex and gender</i>	9
6.3	<i>Harassment</i>	10
6.4	<i>Elite level sport</i>	11
6.5	<i>Information collection and records</i>	12
6.6	<i>Facilities</i>	13
6.7	<i>Uniforms</i>	14
7	Issues relating to the inclusion of intersex people in sport	14
8	Scope of the Guidelines.....	15
9	Contacts.....	16
	<i>Appendix A – Key terms and concepts</i>	17

1 Introduction

1.1 The Guidelines

The Australian Human Rights Commission (Commission), in partnership with the Australian Sports Commission (ASC) and the Coalition of Major Professional and Participation Sports (COMPPS), is developing federal Guidelines for National Sporting Organisations (NSOs) to provide clarity on the law and promote the inclusion and participation of trans, gender diverse and intersex people in sport.

The purpose of the Guidelines is to provide practical guidance to sports organisations on promoting inclusion in a manner that is consistent with the *Sex Discrimination Act 1984* (Cth) (Act). This guidance will be relevant in both elite and non-elite contexts.

1.2 About the Commission

The Commission is Australia's national human rights institution. It operates under the *Australian Human Rights Commission Act 1986* (Cth) as well as federal laws that prohibit discrimination including on the basis of age, disability, race, sex, pregnancy, marital status, family responsibilities, sexual orientation, intersex status and gender identity. The Commission's role is to work towards an Australia in which human rights are respected, protected and promoted, finding practical solutions to issues of concern, advocating for systemic change and raising awareness across the community.

The Commission has significant expertise in engaging in partnerships with public and private sector organisations to address discrimination and build diversity and inclusion.

Additionally, the Commission has a complaint-handling function which requires it to investigate and, where appropriate, try to conciliate complaints made under federal anti-discrimination laws.

2 Purpose of the Issues Paper

The Commission is developing the Guidelines in consultation with key stakeholders.

This Issues Paper has been developed to facilitate the consultation process. In particular, it is designed to provide participants with:

- an overview of the operation of the Act, including the exemption provisions, and
- information regarding common barriers to inclusion faced by trans and intersex athletes in sport.

The Issues Paper includes a number of focus questions to guide the consultations. These questions are designed to facilitate discussion on key issues to ensure the Guidelines address the practical barriers faced by trans and intersex people in relation to participation in both team and individual sports and to provide clarity on the law for

sporting organisations at the elite and non-elite level, acknowledging the complexities faced by sports. Participants are also invited to raise any other relevant issues, concerns or examples during the consultation process.

The Commission acknowledges that the lived experiences of trans and intersex people are very different. This is reflected in the discussion on different barriers faced by trans and intersex people (see sections 6 and 7 below). The Commission also recognises that there are likely to be differing views and opinions within each group.

3 Background

In 2015, the Commission conducted a consultation and review of the experiences of trans, gender diverse and intersex people in Australian sports. The research revealed that issues specifically faced by trans, gender diverse and intersex people have been overlooked in both policy and programme initiatives aimed at making sports more inclusive of Australian LGBTI communities.

In addition to the Commission's own research, recent high profile cases in elite sports have focused attention on the barriers to inclusion faced by trans and intersex athletes. In response to the growing public awareness of such barriers, there has been an increasing concern from sporting organisations to be inclusive, and a request for practical guidance on the law in this area.

In the absence of formal national guidance, sporting organisations may rely on the International Olympic Committee's (IOC) 2015 Consensus Meeting Statement on Sex Reassignment and Hyperandrogenism,¹ or regulations set by other international federations, such as the International Association of Athletics Federations (IAAF).² Relying on these international regulations in the context of Australian sport, particularly in non-elite sporting competitions, may, however, result in unlawful discrimination under the Act.

The ACT Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission have developed jurisdiction-specific guidelines. However, there is a clear need for national guidance.³

In addition to providing guidance on best practice for inclusion in sport (non-elite and elite) the national Guidelines will also outline how the Act operates to permit discrimination in certain circumstances.

4 Terminology

The Commission recognises that terminology can have a significant impact on a person's identity, well-being and inherent dignity. The use of inclusive terminology respects individuality and enables visibility of important issues.

The Commission also recognises that terminology in this area can be strongly contested and is evolving. However, in order to facilitate a discussion around the issues faced by trans and intersex participants in sport it is important to have a broad

understanding of relevant terminology. The following terminology is therefore not definitive, rather is provided as general guidance.

See [Appendix A](#) for a further glossary of key terms and concepts.

4.1 Sex and gender identity

The term ‘sex’ refers to biological sex or sex characteristics. These may be genetic, hormonal, or anatomical. In contrast, ‘gender identity’ refers to a person’s internal sense of self, and how they identify, understand or perceive their gender.⁴ A person’s gender identity (man, woman, neither or both) may be the same or different from their sex.

Traditionally, there has been a focus on two fixed biological sex categories, male and female, which correspond with the gender categories, man and woman. This understanding of sex and gender is referred to as the ‘gender binary’. There is now greater recognition that sex and gender are two separate but related concepts.

There are a large number of intersex variations within society. These variations may be characterised by diverse hormonal, genetic or physical characteristics. The fact that someone has an intersex variation does not necessarily mean that they identify as intersex, or that they do not consider themselves male or female. Some examples of how a person may choose to define themselves include, for example:

- being assigned as biologically male at birth (sex) and identifying as a woman (gender)
- having an intersex variation and being assigned biologically female at birth (sex) and identifying as a woman (gender)
- being assigned as biologically female at birth (sex) and identifying as neither a man nor a woman (gender).

4.2 The difference between trans and intersex

Some people have difficulty understanding the difference between the terms ‘trans’ and ‘intersex’. In the context of sport the issues that trans players may face are often very different from those faced by intersex players.

‘**Trans**’ is a general term used to describe a person whose gender is different from the sex they were assigned at birth.

Being trans is about how an individual internally identifies their gender. It is not about their body. However, if an individual takes steps to physically transition, this can change their sex characteristics. As part of this process, many trans people will change their [personal pronouns](#) to reflect their gender identity. For example, someone who has spent most of their life referred to as he/him may wish to be referred to as she/her or they/them.

‘**Intersex**’ is a term used to describe bodies that are different from medical and social norms for ‘male’ or ‘female’ bodies. There are over forty recognised intersex variations.⁵ Many intersex people may not know that they are intersex, and may only

find out in the context of unrelated medical treatment (e.g. treatment for infertility), or after being informed by their parents.

The term ‘intersex’ does not describe a person’s gender identity (man, woman, neither or both). Like everyone else, people with an intersex variation can have a variety of different gender identities.

See [Appendix A](#) for a glossary of key terms and concepts.

5 Federal Sex Discrimination Act

5.1 Overview

The Act protects people against unlawful discrimination (both direct and indirect) on the basis of sex, gender identity, and intersex status⁶ in many areas of public life - including employment, education, accessing goods and services, and participating in and joining clubs.

The Act adopts language consistent with the social model of sex and gender, which is based on the concept of gender identity, rather than the medical model which is based on concepts of biological sex and medical variations or ‘disorders’. The medical model often uses ‘deficits-based’ language (for example, ‘disorder’ or ‘corrective’ surgery) and does not consider gender identity as an experience separate to the biological nature of sex.

The Act also provides for ‘special measures’ (also known as positive discrimination) to address substantive inequality, as well as both permanent and temporary exemptions from the operation of its provisions.

Additionally, the Act protects people from sexual harassment.⁷

5.2 Relevant provisions

The following section provides an overview of the provisions of the Act that are relevant to the Guidelines.

Direct and indirect discrimination

‘Direct’ discrimination occurs when a person treats another person less favourably because of that person’s sex, gender identity or intersex status — or a characteristic generally associated with a person of their sex, gender identity or intersex status — than they would treat a person of a different sex, gender identity or intersex status in the same or similar circumstances.⁷

‘Indirect’ discrimination can be less obvious. Indirect discrimination occurs when a condition, requirement or practice that applies to everyone, disadvantages a person because of their sex, gender identity or intersex status.⁸

Indirect discrimination will not be unlawful when the condition, requirement or practice is reasonable, in the circumstances.⁹

When deciding whether a condition, requirement or practice is reasonable, the following will be considered:

- the nature and extent of the disadvantage that the condition, requirement or practice creates
- the feasibility of overcoming the disadvantage
- whether the disadvantage is proportionate given the outcome that is trying to be achieved.¹⁰

Areas of public life

The Act makes discrimination unlawful in particular areas of public life. Of relevance to sporting organisations, discrimination on the basis of sex, gender identity or intersex status is unlawful in relation to:

- the provision of goods, services and facilities¹¹
- clubs (for members and non-members).¹²

Special measures

The Act provides that organisations or individuals may take 'special measures' for the purpose of achieving substantive equality between men and women, people who have different gender identities, and people who are of intersex status and those who are not.¹³ This is sometimes referred to as 'positive discrimination'.

Exemptions

The Act provides for the Commission to grant two types of exemptions from the sex, gender identity and intersex status discrimination provisions: permanent and temporary.

Section 42(2) is a permanent exemption and provides that it is not 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'.¹⁴ This exemption does not apply in relation to the exclusion of persons from participation in:

- the coaching of persons engaged in any sporting activity
- the umpiring or refereeing of any sporting activity
- the administration of any sporting activity
- any prescribed sporting activity, or
- sporting activities by children who have not yet attained the age of 12 years.¹⁵

There are no prescribed sporting activities for the purposes of the Act.

The words 'strength', 'stamina' and 'physique' are not defined in the Act.

A temporary exemption from the operation of the sex, gender identity or intersex discrimination provisions may be sought.¹⁶ The effect of a temporary exemption is that discrimination covered by the exemption is not unlawful under the Act while the exemption remains in force. In practical terms, this means that the activities or circumstances falling within an exemption cannot be the subject of a successful complaint under the Act. An exemption can be granted subject to certain terms and conditions¹⁷ and for a period of up to five years.¹⁸

The Commission has published guidelines about how it assesses applications for temporary exemptions under the Act.¹⁹

Sexual harassment

The Act protects people from sexual harassment in the areas of employment, provision of goods, services and facilities, and in clubs.²⁰

Sexual harassment is defined as ‘an unwelcome sexual advance’, ‘an unwelcome request for sexual favours’ or ‘unwelcome conduct of a sexual nature’ in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.²¹ The sex, gender identity and intersex status of the person who is harassed are relevant circumstances to be taken into account in determining if a person has been sexually harassed.²²

6 Issues relating to the inclusion of trans people in sport

6.1 *Membership and participation*

Trans people have reported difficulties in becoming members of sporting clubs, and being able to participate fully in sport.

Some examples of potential issues relating to membership and participation include:

- a trans woman being told that she cannot register to play for a women’s soccer club
- a basketballer, who does not identify as either male or female, being excluded from a competition game against a single-sex team from another state
- a trans man being told that he cannot play in a men’s rugby league competition because his perceived increased risk of injury compromises the club’s insurance policy, or
- a trans woman being counted by an umpire as a male player for the purpose of allocating gendered positions in a mixed gender competition.

Trans people may be excluded in the above scenarios based on assumptions about the strength and stamina of males versus females. People may consider that males have a natural advantage over females as a result of their relatively greater height, weight and testosterone levels.

Recent studies in the context of elite sport indicate that:

- this assumption may be incorrect
- the key determinants of success vary from sport to sport, and
- variations in body size and strength occur across the gender spectrum.²³

A concern that is raised is how the health and safety of other competitors, at both the non-elite and elite levels, are affected by the inclusion of trans athletes. This may be paired with the concern that trans people (particularly trans women) might have a competitive advantage, particularly in an elite sporting context.

There are separate issues faced by players and administrators of mixed sex competitions. As a way of minimising competitive advantage between male and female participants, many mixed competitions have rules that limit the number of men who can play at any time, or otherwise limit the positions or scoring opportunities that can be assumed by men. Mixed sex competitions therefore present obstacles for trans and particularly non-binary participants. For example, a non-binary participant may not identify as either male/man or female/woman.

Issues relevant to membership and participation extend to situations where someone wants to be involved and included in a sporting organisation as a coach, administrator or supporter.

Focus questions

1. What are the practical barriers to including a trans man or trans woman in a single sex competition of the gender they have affirmed? For example, a trans woman playing in the women's competition.
2. Should the sex-based eligibility requirements for participation in a particular sport differ depending on the level at which someone is competing? For example, elite vs non-elite levels (see section 6.4 for discussion of issues relating to elite level sport).
3. If a mixed sex sporting competition requires a certain number of female players in each team, what steps can be taken to ensure that trans and non-binary athletes are included?

6.2 Policies relating to sex and gender

Many sporting organisations do not have a gender diversity policy to help them respond to the particular issues that may arise as a result of a trans person participating in their sport.

Gender diversity policies, particularly when they are publicly available, can help a trans person identify a club, code or association that is able to meet their needs as a player.

Gender diversity policies can do this by:

- providing for unisex teams and competitions, or teams and competitions based on gender identity and not sex
- encouraging staff to ask all players about their preferred pronouns, and encouraging everyone within the club to use preferred pronouns when talking about others
- providing guidance on requesting personal information from trans players (for example, birth certificates)
- providing a designated contact person within their organisation who can assist trans players who wish to join the club and/or manage how they would like to communicate any transition or affirmation they may be planning, and
- being clear (particularly in non-elite sport) that players will not be asked to submit themselves to a medical examination for gender verification purposes.²⁴

Policies should also provide guidance on how players can make a complaint regarding any discrimination or harassment they may experience. A comprehensive policy should also include information about how the organisation will respond to complaints and/or instances of harassment.

Focus questions

4. Are you aware of any sporting organisations which have gender diversity policies in the nature described above? If so, what is included in this policy? If not, what might be key components of such a policy, for example, the complaints process and the obligations of the sporting organisation to respond?
5. How can gender diversity policies provide support for a player's transition or affirmation?

6.3 Harassment

Trans people have reported harassment when they participate in sport. This may come from their own teammates, officials (such as referees), spectators or other teams. This issue may present a very significant barrier to participation.

Harassment may take the form of sexual harassment or harassment more broadly (for example, bullying).

Examples of common experiences of harassment include:

- being asked sexually suggestive or invasive questions
- being asked inappropriate questions about physical characteristics, this kind of harassment can also be discrimination
- the intentional use of incorrect pronouns

- team members or players from other teams refusing to play with a trans person.²⁵

While harassment can be addressed through the policies adopted by sporting organisations, a shift in culture may also be required to ensure that participation is as safe as possible for trans players.

Focus questions

6. How might harassment be addressed in a sporting organisation's policies?
7. In addition to having robust policies for players, what else can sporting organisations do to create a harassment-free environment?

6.4 Elite level sport

There are a range of issues relating to the inclusion of trans athletes that may only arise in the context of 'elite level' sport. These issues may also be relevant for some intersex athletes (see section 7).

For the purpose of this discussion 'elite level' sport is understood to mean sport at the national or international level of competition.²⁶ Elite level sport often involves the awarding of prizes, such as medals and/or money. In contrast, while non-elite sport may take the form of a competition this is often not the sole focus. Non-elite sport can also be about exercise, socialisation and inclusion.

Two issues relevant for elite level sport are:

- anti-doping policies and practices, and
- requirements of international competition as set by International Federations or bodies, such as the IOC.

Drug testing and other anti-doping measures are sometimes undertaken at the elite level in order to ensure the fairness of a competition. These measures can create a barrier to participation for trans athletes who are undergoing hormone therapy as part of their transition. Exemptions for the therapeutic use of prohibited substances are available. However, it has been reported that such exemptions can be difficult to obtain.²⁷

In addition to federal, state and territory anti-discrimination laws, sporting organisations need to take into account the international regulatory context in which they operate. This may include considering the regulations of an international federation, such as the IAAF, or the IOC. Complying with these regulations is a requirement for competing at the highest international levels.

The different approaches of these regulatory regimes can pose a challenge for sporting organisations in terms of ensuring their policies are compliant. For example, depending on the particular sport and circumstances, in order to participate

internationally a trans woman may be required to comply with testosterone level requirements outlined in the IOC's Statement from its *Consensus Meeting on Sex Reassignment and Hyperandrogenism*.²⁸ However, depending on the particular sport, facts and circumstances, this may raise questions regarding discrimination under the Act.

Focus questions

8. In elite level sport what policies are in place, or relied upon, when determining which sex based category a trans athlete is permitted to compete in?
9. Are there any other issues that arise in the context of elite level sport in relation to the participation of trans athletes?

6.5 Information collection and records

As part of registering to participate in a sport a player will generally have to provide personal information to the relevant sporting organisation. General privacy considerations mean that the organisation requesting the information should have strict policies regarding what information is requested, how it is used, and what steps are taken to ensure it is kept confidential.

There are a number of other privacy related issues which trans players will face when providing personal information. These include being asked to:

- provide identity documents which indicate their:
 - sex, where the player's sex does not reflect their gender identity (for example, in the case of a trans woman whose birth certificate may have a 'male' designation), or
 - legal name where the player's legal name does not reflect their affirmed gender,
- indicate on a form either 'male or female' or 'Miss/Ms/Mrs/Mr' when the player does not identify with any of these descriptors (and leaving the classification blank is not an option).

To reduce the potential for exclusion of trans players, organisations should only request essential information, and then keep this information confidential.

Further, requesting the above information from a player who may be in the process of transitioning is likely to present additional barriers depending on the stage of their transition or affirmation.

Where non-elite sport is based on men's and women's competitions the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health provides the following guidance:

*States, sporting organizations and other actors should adopt anti-discrimination policies that permit all persons to participate in amateur sport on the basis of their self-identified gender.*²⁹

Focus questions

10. Do sporting organisations generally have robust privacy and confidentiality policies in relation to player information?
11. What information is it necessary to ask for? What identification documents can be requested? When can they be requested?
12. How might a sporting organisation manage player information in relation to differences between biological sex, gender and legal names in a way that respects confidentiality and privacy?
13. What are the practical barriers to allowing a person to choose which team (based on sex or gender) they wish to join?

6.6 Facilities

Meaningful inclusion in sport goes beyond being allowed to sign-up and play.

Trans people may also face additional difficulty participating in their chosen sport if appropriate facilities are not available to them. Change rooms, showers and bathrooms that are designated as ‘male/men’ and ‘female/women’ based on general assumptions about sex and gender may exclude trans players, and possibly put their safety at risk.

Where facilities are designated in this way, trans people can be treated with suspicion or scorn regarding their choice of which facilities to use. Even though someone may identify as a particular gender, they might not feel comfortable being in a state of undress around others. This is the case for many people regardless of their sex or gender. Further, for people who do not identify solely with either gender, providing a private unisex or gender neutral space may be more appropriate.

Focus questions

14. Do sporting organisations generally provide any gender neutral or private facilities?
15. Is the provision of gender neutral or private facilities a consideration when sporting grounds are refurbished?
16. What might be some practical barriers to providing gender neutral or private facilities?

6.7 Uniforms

Uniform requirements can create a barrier to the participation of a trans person in sport.

Some examples include:

- a women's netball club might only make netball dresses up to size 16, which may not be appropriate for a trans woman
- a person who does not identify as either a woman or a man might not feel comfortable wearing the designated 'women's' training singlet for an VFL club.

The Canadian Centre for Ethics in Sport suggests allowing players to wear a uniform that is consistent with their gender identity, and to minimise the gendering of uniforms where possible.³⁰

Focus question

17. Is it necessary to have different uniforms for men and women for any sport? If so, why?

7 Issues relating to the inclusion of intersex people in sport

As outlined in section 4, people may have difficulty understanding the difference between the terms 'trans' and 'intersex'. In the context of sport, the issues that trans players face are often very different from those that intersex players face.

The main barrier to inclusion in sport is faced by intersex women only (ie not intersex men) particularly at the elite level (see discussion in section 6.4 above).³¹ Some intersex women have been excluded from women's competitions on the basis of their naturally occurring high levels of testosterone.³²

The impact of testosterone on sporting performance is disputed. In 2015, the Court for Arbitration in Sport (CAS) examined this issue in the context of the IAAF's *Regulation Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition*.³³ In its decision, the CAS suspended the IAAF regulation on the basis that the IAAF had not been able to provide 'sufficient scientific evidence' regarding the link between naturally occurring testosterone and sporting performance.³⁴

In April 2018, the IAAF released a new regulation, based on the assertion that testosterone does play a role in competitive advantage for some events.³⁵

Intersex people may also face barriers in relation to their identity documentation, if they have changed their legal sex classification (see section 6.5 above for a discussion).

Focus questions

18. Are you aware of policies within sporting organisations that provide guidance on the participation of intersex people?
19. If you are aware of such policies:
 - a. do they apply at an elite or non-elite level, or both?
 - b. do they refer to testosterone levels or any form of medical intervention?
20. Are you aware of any instances where athletes have not been adequately included in sport because of their intersex variation?
21. What other steps could be taken by sporting organisations to support intersex people to participate in sport?

8 Scope of the Guidelines

It is important to note that the Guidelines will take the form of information and guidance only. The Guidelines are not intended to provide a definitive legal answer to the range of discrimination or harassment issues that a sporting organisation may face. Further, compliance with the Guidelines will not constitute a defence in any court proceedings that may be commenced under the relevant legislation. Sporting organisations and other associated bodies should seek their own legal advice if they have concerns regarding their compliance with federal, state or territory anti-discrimination legislation.

Focus questions

22. Are there any particular elements that you consider should be included in the Guidelines?
23. Would the development of education resources to support the Guidelines (for example, training) be helpful?
24. Are you able to contribute any de-identified case studies or scenarios for the purpose of inclusion in the Guidelines?

9 Contacts

If you have any questions regarding the development of the Guidelines please contact:

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Appendix A – Key terms and concepts³⁶

Some of the terminology used in this Issues Paper is explained below:

Assigned or legal sex: the sex recorded when a child is registered at birth, typically on hospital records, birth certificate or another form of identification.

Cisgender: people whose gender identity and gender expression is the same as the sex they were assigned at birth (ie people who are not trans). Most people are cisgender. For example, a person who was assigned male (sex) at birth and identifies as a man (gender) is cisgender.

Elite: sport at the national or international level of competition.

Gender: the way in which a person identifies their masculine or feminine characteristics. A person's gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex as assigned at birth.

Gender diversity: the diverse range of different binary and non-binary gender identities and expressions. The term recognises that people may express their gender in diverse ways.

Gender expression: the way in which a person externally expresses their gender or how they are perceived by others.

Gender identity: a person's internal and individual sense of gender.

Intersex: used to describe bodies that are different from medical and social norms for 'male' or 'female' bodies.

LGBTI: an acronym which is used to describe lesbian, gay, bisexual, trans and intersex people collectively.

Non-binary: people whose gender identity or gender expression falls outside of the male/female, man/woman binary. People who are non-binary may or may not look androgynous, or may express their gender differently from day to day.

Non-elite: sport other than sport at the national or international levels of competition.

Pronouns: how we refer to other people, for example, 'he had a great game' or 'she is playing midfield today'. Pronouns are relevant to everyone, regardless of gender identity and intersex status, as they signify how others relate to and perceive us. Some trans people who identify as neither man nor woman may use gender neutral pronouns, such as 'they/them'.

Sex: a person's biological sex. A person's sex is usually described as being male or female. Some people may not be exclusively male or female.

Sex characteristics: the chromosomal, gonadal and anatomical features of a person. These can include primary characteristics such as reproductive organs, genitalia, chromosomal structures and hormones; or secondary characteristics such as muscle mass, hair distribution, breasts and or structure.

Sexual orientation: a person's emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Trans: an umbrella term for people whose gender identity does not conform to the sex that they were assigned at birth.

Transition: also referred to as affirmation, transition is the term used to describe the steps taken by a trans person to affirm their gender identify. Transitioning may or may not involve medical treatment, and may be a lifelong process.

Trans man: is a term used to describe a person who was assigned biologically female at birth (sex) and who identifies as a man (gender).

Trans woman: is a term used to describe a person who was assigned biologically male at birth (sex) and who identifies as a woman (gender).

¹ International Olympic Committee, *Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015) (Consensus Statement) <https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_loc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf>. Amongst other requirements, the Consensus Statement sets a 10 nmol/L testosterone level for intersex and trans women wishing to compete in the women's category. The Consensus Statement reflected a shift away from the IOC's earlier statements which focused on the medical model of gender, rather than the social model. For example, the 2003 Stockholm Consensus Statement on Sex Reassignment required athletes to have surgical anatomical changes. See International Olympic Committee, *Statement of the Stockholm consensus on sex reassignment in sports* (28 October 2003) <https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf>.

² International Association of Athletics Federations, *Eligibility regulations for the female classification (athletes with differences of sex development)* (23 April 2018) <<https://www.iaaf.org/download/download?filename=0c7ef23c-10e1-4025-bd0c-e9f3b8f9b158.pdf&urlslug=IAAF%20Eligibility%20Regulations%20for%20the%20Female%20Classification%20%5BAthletes%20with%20Differences%20of%20Sex%20Development%5D%20in%20force%20as%20from%201st%20November%202018>>; International Association of Athletics Federations, *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition* (May 2011) <<http://www.iaaf.org/download/download?filename=58438613-aaa7-4bcd-b730-70296abab70c.pdf&urlslug=IAAF%20>>; and International Association of Athletics Federations, *Regulations governing eligibility of athletes who have undergone sex reassignment to compete in women's competition* (May 2011) <<https://www.iaaf.org/about-iaaf/documents/medical#hyperandrogenism-and-sex-reassignment>>

³ ACT Human Rights Commission, *Everyone can play: guidelines for local clubs on best practice for inclusion of transgender and intersex participants* (2017) <http://hrc.act.gov.au/wp-content/uploads/2017/04/WEB_ACTHRC_Everyone_Can_Play.pdf>; Victorian Equal Opportunity and Human Rights Commission, *Guideline: Trans and gender diverse inclusion in sport: Complying with the Equal Opportunity Act 2010* (2017) <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/eaop-practice-guidelines/item/download/8817_b9c166dd65c527dbc296259c5bb2acdc>.

⁴ Victorian Equal Opportunity and Human Rights Commission, above n 3, 6.

⁵ Intersex variations are sometimes referred to as 'disorders of sex development'. This reflects a medical rather than social model (as adopted by the Act) of sex and gender. These variations rarely result in health or medical issues. See Chapter 1, 'Being Intersex is not an illness' in Asia Pacific Forum of National Human Rights Institutions and the United Nations Development Programme, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions* (2016) 31 – 32 <<http://www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/>>

⁶ The Act also protects people from unlawful discrimination on the basis of sexual orientation, marital or relationship status, family responsibilities, pregnancy or potential pregnancy, and breastfeeding.

⁷ Sections 5(1), 5B(1) and 5C(1) of the Act.

⁸ Sections 5(2), 5B(2) and 5C(2) of the Act.

⁹ Section 7B of the Act.

¹⁰ Section 7B(2) of the Act.

¹¹ Section 22 of the Act.

¹² Section 25 of the Act.

¹³ Section 7D of the Act.

¹⁴ Section 42 of the Act.

¹⁵ Section 42(2) of the Act

¹⁶ Section 44(1) of the Act.

¹⁷ Section 44(3) of the Act.

¹⁸ Section 44(3) of the Act.

¹⁹ Australian Human Rights Commission, *Temporary exemptions under the Sex Discrimination Act 1984 (Cth): Commission Guidelines* <<https://www.humanrights.gov.au/temporary-exemptions-under-sex-discrimination-act-1984-cth>>.

²⁰ Sections 28B, 28G and 28K of the Act.

²¹ Section 28A of the Act.

²² Section 28A(1A) of the Act.

²³ See Kristina Karkazis et al, 'Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes' (2012) 12(7) *The American Journal of Bioethics* 3 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5152729/pdf/emss-70625.pdf>>. See Bethany Jones et al, 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies' (2017) 47.4 *Sports Medicine (Auckland, N.z.)* 701. See also CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* in which the scientific evidence regarding the role of testosterone in sporting performance is discussed <http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL_REDACTED_FOR_PUBLICATION_.pdf>.

²⁴ In Bethany Jones et al, above n 25, the authors note that the 'most invasive policies ask players to provide a birth certificate to verify gender. Additionally, female players may be asked to provide a gender certificate or submit themselves to a medical examination if the medical evidence is not sufficient'. However, note that athletes competing at the international level are often required to submit to medical examinations in order to determine eligibility.

²⁵ Victorian Equal Opportunity and Human Rights Commission, above n 3, 13–14.

²⁶ The definition of 'elite' itself is contested. See Christian Swann et al 'Defining elite athletes: Issues in the study of expert performance in sport psychology' (2015) 16 (Part 1), *Psychology of Sport and Exercise* 3 <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=3417&context=sspapers>>.

²⁷ Daryl Adair 'Athlete health and fair play: Kristen Worley case puts women's sport policy in the dock', *The Conversation*, 21 July 2017 <<https://theconversation.com/athlete-health-and-fair-play-kristen-worley-case-puts-womens-sport-policy-in-the-dock-81361>>.

²⁸ International Olympic Committee, above n 1.

²⁹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 32nd sess, Agenda Item 3, UN Doc A/HRC/32/33, 61 (4 April 2016) <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/33>.

³⁰ Canadian Centre for Ethics in Sport, *Creating Inclusive Environments for Trans Participants in Canadian Sport: Guidance for Sports Organizations* (2016) 32 <<https://cces.ca/news/cces-releases-guide-creating-inclusive-environments-trans-participants-canadian-sport>>.

³¹ The Commission acknowledges the work of Intersex Human Rights Australia in articulating the barriers that members of the intersex community face in relation to participating in sport. See Morgan Carpenter 'Including Intersex people in sport' (8 April 2017) <https://ihra.org.au/31310/intersex-inclusion-sport/>. Note no international sports body has ever introduced exclusions for men born with intersex variations.

³² See Morgan Carpenter, above n 33. This depends on the particular intersex variation. It is also important to understand that some intersex variations (eg Androgen Insensitivity Syndrome) may result in a woman having a high naturally occurring level of androgens (eg testosterone) but is resistant to the effects of these androgens.

³³ International Association of Athletics Federations, *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition* (May 2011) <<https://www.iaaf.org/about-iaaf/documents/rules-regulations#collapse-regulations>>.

³⁴ CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* 547 <http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL_REDACTED_FOR_PUBLICATION_.pdf>.

³⁵ International Association of Athletic Federations (2018), *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* in force as from 1 November 2018.

³⁶ These terms have been sourced from various Guides. See APF and UNDP, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions* (2016), above n 5; Victorian Equal Opportunity and Human Rights Commission, above n 3.