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Response to the OHCHR questionnaire on Human Rights Council resolution 40/5

Introduction

We would like to thank the Office of the High Commissioner for Human Rights for conducting this inquiry and inviting responses to your questionnaire on Human Rights Council resolution 40/5 (Birga 2019).

This response has been drafted by Morgan Carpenter, M.Bioeth (Sydney), in consultation with the board of Intersex Human Rights Australia (IHRA). IHRA is a national charitable organisation established in 2009 and incorporated in 2010. We are run by and for people born with intersex variations to promote the human rights and health of people born with variations of sex characteristics. We were formerly known as Organisation Intersex International Australia.

In considering our responses, we respect the focus of the inquiry on women and girls. We draw attention to the IAAF 'Eligibility Regulations for Female Classification (Athletes with Differences of Sexual Development)' (International Association of Athletics Federations 2019). These regulations directly impact a subset of women with intersex variations in certain competitive sports, including those with partial androgen insensitivity syndrome, ovotestes, 5 α -reductase type 2 deficiency (5 α -RD2), and 17 β -hydroxysteroid dehydrogenase type 3 deficiency (17 β -HSD3). Only a small subset of athletics events is directly impacted by these regulations. We note that the 2019 regulations are differentiated from 2018 regulations challenged by Caster Semenya before the Court of Arbitration for Sport (2019) by the omission of congenital adrenal hyperplasia.

We also draw attention to systemic issues of stigmatisation, discrimination and harmful practices. It is the view of IHRA that regulations governing the participation of women with intersex variations in sport are not only grounded in gender stereotypes but also racialised, with particular scrutiny of racialised women from low income regions, and racialised notions of femininity (Karkazis and Jordan-Young 2018; Carpenter 2019). At the same time, we note that children with intersex variations in high income countries like Australia are routinely subjected to harmful practices that impact on their participation in sport.

We respond on following pages to selected questions, in line with evidence available to us.

1. Laws and policies

Australia has a range of public programs, laws and initiatives promoting specific populations in sport.

We are aware of one single jurisdiction that has a public policy promoting the participation of women with intersex variations, in the Australian Capital Territory (ACT Human Rights Commission 2017). This policy is primarily aimed at promoting the inclusion of transgender people. This primary focus has adverse consequences for the inclusion of women with intersex variations because it fails to understand the diversity of intersex bodies, diversity in our understandings of our bodies, and homogenises both populations. People with intersex traits are presented in this material as occupying a naturalised third space between female or male, thus presupposing that people with intersex traits do not belong in female or male categories. The inclusion of people with intersex bodies is problematised above and beyond the traits and events impacted by IAAF regulations.

At federal level, the Sex Discrimination Act 1984 contains an exception permitting discrimination on grounds of intersex status in “any competitive sporting activity in which the strength, stamina or physique of competitors is relevant” in persons aged 12 or over (Federal Register of Legislation 2017, sec. 42). This was introduced into law in 2013. During a Senate inquiry on the amending Act, the Attorney General’s Department confused the position of our intersex organisation with the position of a leading transgender organisation, but nevertheless stated:

The drafting mirrors the approach taken in in the HRAD Bill and State and Territory anti-discrimination laws.

The Department understands the operation of the exemption in State and Territory law will often involve a case-by-case assessment of individual circumstances. That is, the exemption is not intended to operate to require sporting competitions to have policies which automatically exclude people who are intersex, or people with a gender identity which does not match their birth sex. Instead, it is to provide reassurance that organisers are able to make decisions to guarantee fair competition in sporting events. (Attorney General’s Department 2013a)

The legislation therefore appears to permit regulations of the type published by the IAAF.

2. Information and data on prevalence and types of inequality and discrimination

Unfortunately, we have no data on these matters. We are not aware of any national data collection on incidents.

c. What barriers impact women and girls with differences of sex development/intersex variations in particular?

Intersex people in Australia are assigned female or male at birth, and available clinical evidence suggests that most intersex people live with that sex assignment (Carpenter 2018b). However, popular stereotypes of intersex people in Australia presume that intersex people are a third sex. Popular stereotypes adversely impact women with intersex traits, limiting disclosure and limiting participation in events where disclosure may be risked.

Women and girls with intersex traits that are the subject of IAAF 2018 and 2019 guidelines are routinely subjected to forced medical practices during childhood, including genital surgeries to “enhance the appearance” of their genitals and gonadectomies (i.e. sterilisation). For example, *Re: Carla*, a 2016 Family Court judgment revealed that a 5-year old child with 17 β -HSD3 (one of the traits subject to IAAF restrictions) had been subjected to a clitorrectomy and labioplasty described by the judge as having “enhanced the appearance of her female genitalia” (Carpenter 2018a; Kelly and Smith 2017; M. Jones 2018). Research suggests that more than 70 such medical interventions take place in Australia each year (Intersex Human Rights Australia 2019a; Carpenter 2018b; Department of Health 2014). The Family Court case was taken to sterilise the child, and this decision was substantively based on obsolete medical data, and gender stereotypes.

These interventions are understood to impact upon participation in school (T. Jones 2016), and thus may impact on sporting participation and performance while at school. Such medical interventions may have an impact on sporting performance, as indicated in recent news regarding athletes allegedly subjected to sterilisation due to IAAF regulations (Brown 2019; Morgan 2019; Mebus et al. 2019).

Anecdotally, and in research on educational needs (T. Jones 2016), we are aware of multiple people who avoid participation in sport because of experiences of body shaming and developmental delays.

Caster Semenya has been subject to brutal scrutiny of her appearance and her physical traits, described in Australian media as a “gender bender” (Silkstone 2009) or transgender (for example, Walsh 2016), a “ticking time bomb” (McRae 2016), and someone who should be “forced” into being medicalised (Kelner and Rudd 2017). It is to our profound regret that media claims about Caster Semenya’s sex characteristics were first published in Australia. This public humiliation has helped to frame an often hostile media debate on the inclusion of people with intersex variations in sport, and particularly including women with intersex variations.

d. Do any of these barriers reinforce harmful stereotypes and discrimination, infringe bodily integrity and bodily autonomy

These barriers reinforce stigma and discrimination against girls and women with intersex variations. They help to construct a coercive legal and social environment, and violate their rights to bodily integrity and bodily autonomy.

Medical interventions of the type revealed in the 2016 Family Court case take place on children with intersex variations that are the subject of IAAF regulations. They have been condemned by multiple UN Treaty Bodies, including as harmful practices (CEDAW and CRC) and violations of the integrity of the person (CRPD) (Human Rights Committee 2017, paras 25–26; Committee on the Elimination of Discrimination against Women 2018, paras 25–26; Committee on the Rights of Persons with Disabilities 2019, paras 33–34; Committee on the Rights of the Child 2019, para. 31). Australia’s NHRI is currently conducting an inquiry on protecting the human rights of people born with variations of sex characteristics in the context of medical interventions (Australian Human Rights Commission 2018; Intersex Human Rights Australia 2018). No action has been taken by any Australian jurisdiction to end these interventions in line with recommendations by UN Treaty Bodies.

Public discourse that presumes intersex people cannot be female or male, or are not biologically the sex they were observed and assigned at birth, reinforce stigma, promote surgeries intended to avoid stigma, and causes harm to individuals. Such attitudes and stereotypes have broader consequences for all individuals born with intersex variations.

3. Domestic laws and practices intended to respond to discrimination and violations of bodily integrity

As discussed, the Sex Discrimination Act permits discrimination against girls and women with intersex variations aged over 12 in competitive sport (Federal Register of Legislation 2017).

As discussed, Australia has no effective protections of the bodily integrity or bodily autonomy of children with intersex variations including girls with intersex variations. Indeed, harmful practices and other violations of the integrity of the person occur routinely, including in public hospitals, and have been defended by clinical bodies (for example, Australasian Paediatric Endocrine Group et al. 2013) and government and judicial representatives (for example, before UN Treaty Bodies).

Legislation prohibiting female genital mutilation is claimed to protect girls and women from genital cutting except when medically necessary (High Court of Australia 2019; Higgins 2019). However, such laws contain an exemption where “sex is ambivalent” (Attorney General’s Department 2013b). such exemptions facilitate medical interventions of the type referred to in the 2016 Family Court of Australia case *Re: Carla*, including to “enhance genital appearance” (Carpenter 2018b).

Victoria has enacted human rights legislation that is claimed to ensure that individuals give informed consent to medical interventions. However, parents and carers are entitled to give substitute consent to unnecessary medical procedures where recommended in line with customary medical practices (Department of Health & Human Services 2019; Intersex Human Rights Australia 2019b).

In 2008, Queensland enacted legislation purported to restrict cosmetic surgery on children (Parliament of Queensland 2008). However, this failed to prevent surgery in the case *Re:*

Carla, where a judge described surgery that “enhanced the appearance of [Carla’s] female genitalia” (Intersex Human Rights Australia 2018, 44).

Programs exist that are designed to promote the participation of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in sport (for example, Sydney Convicts Rugby Club 2014). Intersex people are invisible in such programs. We believe this is due to the existence of misconceptions and stereotypes about intersex people, including assumptions that people with intersex variations are not female or male. For example, information shared by an Australian LGBTI sports group has inaccurately suggested that Caster Semenya was “born with indeterminate sex” leaving “women disadvantaged in their own events” (Pride in Sport 2019). Semenya was observed to be female at birth (Pape and Pielke Jr 2019).

4. Public and private organisations administering and regulating sport

With the exception of a flawed policy in the Australian Capital Territory, we are not aware of any policies and programs by organisations administering and regulating sport that protect against interference with the right to bodily integrity and bodily autonomy.

5. Development of eligibility criteria

We are not aware of no consultations on these issues that substantively involve intersex-led human rights, health or peer support organisations. Frequently, it appears that organisations led by LGBT people, without visible participation by intersex people, are seen as representatives of the needs of people born with intersex variations.

We note, however, that the president of the New South Wales Anti-Discrimination Board, Annabelle Bennett, participated in the panel adjudicating the decision of the Court for Arbitration in Sport in the case of Caster Semenya and the IAAF (Court of Arbitration for Sport 2019). The judgment by this panel determined that discrimination was “necessary, reasonable and proportionate”. The Court also determined that it was not able to examine the quality of contested statistical evidence put to it.

In this regard, we note that legislation enacted in 1996 in New South Wales refers to people of “indeterminate sex” as being transgender when identifying and living as “a particular sex”, and subject to particular forms of protection from discrimination when changing sex marker on the basis of irreversible “sexual reassignment surgery” (New South Wales 1996; Anti-Discrimination Board of New South Wales and NSW Department of Justice 2018). We have never been able to clearly ascertain from State institutions the relevance of such a framework to people with intersex variations who are invariably assigned female or male at birth in Australia, and in particular its relevance to individuals with intersex variations who do not wish to change sex marker. We believe that this legislation is not fit for purpose, and we have actively participated in discussions on changing this legislation since the founding of our organisation (see, for example, Carpenter and Organisation Intersex International Australia 2012). We believe that it may impede claims for protection from discrimination, and hope that this legislative confusion has not played a role in decision-making by CAS.

Australian clinicians including David Handelsman testified on behalf of the IAAF before the Court for Arbitration in Sport. Australian clinicians also participated in the development of earlier 2011 IAAF regulations (2011). Australian institutions including the University of Melbourne, Austin Health and Northern Health are listed as IAAF-approved specialist reference centres in those regulations. Those regulations were notable for an extraordinary list of intrusive examinations and gender stereotypes (Karkazis and Jordan-Young 2018; Karkazis and Carpenter 2018).

6. Gaps and challenges

Harmful practices on children with intersex variations are not regulated or prevented in Australia in sport or in other settings. Intersex-led organisations are not consulted by sports organisations or bodies. No meaningful good practice guidelines on participation by girls and women with intersex variations exist in Australia.

References

- ACT Human Rights Commission. 2017. 'Everyone Can Play'.
<https://hrc.act.gov.au/project/everyone-can-play-guidelines-for-local-clubs-on-best-practice-inclusion-of-transgender-and-intersex-participants/>.
- Anti-Discrimination Board of New South Wales, and NSW Department of Justice. 2018. 'Transgender Discrimination'.
- Attorney General's Department. 2013a. 'Questions on Notice, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013'.
<http://www.aph.gov.au/DocumentStore.ashx?id=3755e19e-0d14-471d-af28-a4cd54acc770>.
- . 2013b. 'Review of Australia's Female Genital Mutilation Legal Framework - Final Report'.
<http://www.ag.gov.au/Publications/Pages/ReviewofAustraliasFemaleGenitalMutilationlegalframework-FinalReportPublicationandforms.aspx>.
- Australasian Paediatric Endocrine Group, Jacqueline Hewitt, Garry Warne, Paul Hofman, and Andrew Cotterill. 2013. 'Submission of the Australasian Paediatric Endocrine Group to the Senate Inquiry into the Involuntary or Coerced Sterilization of People with Disabilities in Australia: Regarding the Management of Children with Disorders of Sex Development'. Submission.
<http://www.aph.gov.au/DocumentStore.ashx?id=aafe43f3-c6a2-4525-ad16-15e4210ee0ac&subId=16191>.
- Australian Human Rights Commission. 2018. *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the Context of Medical Interventions Consultation Paper*. <https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/projects/protecting-human-rights-people>.
- Birga, Veronica. 2019. 'Questionnaire on Elimination of Discrimination Against Women and Girls in Sport-Resolution 40/5', October 3.
- Brown, Andy. 2019. 'IAAF Used Medically Damaged Athletes to Prop up DSD Regulations'. *Sports Integrity Initiative*. October 8. <https://www.sportsintegrityinitiative.com/iaaf-used-medically-damaged-athletes-to-prop-up-dsd-regulations/>.

- Carpenter, Morgan. 2018a. 'Intersex Variations, Human Rights, and the International Classification of Diseases'. *Health and Human Rights* 20 (2): 205–14.
- . 2018b. 'The "Normalisation" of Intersex Bodies and "Othering" of Intersex Identities'. In *The Legal Status of Intersex Persons*, edited by Jens Scherpe, Anatol Dutta, and Tobias Helms, 445–514. Cambridge, England: Intersentia. doi:10.1017/9781780687704.028.
- . 2019. 'Intersex People and Sport'. *Intersex Human Rights Australia*. January 16. <https://ihra.org.au/sport/>.
- Carpenter, Morgan, and Organisation Intersex International Australia. 2012. 'Submission on the Proposed Federal Human Rights and Anti-Discrimination Bill'. Sydney: Organisation Intersex International Australia. <http://oii.org.au/21433/submission-human-rights-anti-discrimination/>.
- Committee on the Elimination of Discrimination against Women. 2018. 'Concluding Observations on the Eighth Periodic Report of Australia'. CEDAW/C/AUS/CO/8.
- Committee on the Rights of Persons with Disabilities. 2019. 'Concluding Observations on the Combined Second and Third Reports of Australia'. CRPD/C/AUS/CO/2-3. Geneva: United Nations.
- Committee on the Rights of the Child. 2019. 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia'. CRC/C/AUS/CO/5-6. Geneva: United Nations.
- Court of Arbitration for Sport. 2019. CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations & CAS 2018/O/5798 Athletics South Africa v. International Association of Athletics Federations.
- Department of Health. 2014. 'MBS Reviews Vulvoplasty Report'. Department of Health. [http://www.health.gov.au/internet/main/publishing.nsf/content/E393B5FFC5978400CA257EB9001EEC59/\\$File/Vulvoplasty_Review_Report.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/E393B5FFC5978400CA257EB9001EEC59/$File/Vulvoplasty_Review_Report.pdf).
- Department of Health & Human Services. 2019. 'Health and Wellbeing of People with Intersex Variations Information and Resource Paper'.
- Federal Register of Legislation. 2017. *Sex Discrimination Act 1984*. <https://www.legislation.gov.au/Details/C2017C00383/Html/Text>, <http://www.legislation.gov.au/Details/C2017C00383>.
- Higgins, Hannah. 2019. 'NSW Genital Mutilation Convictions Stand'. *7NEWS.Com.Au*, October 16. <https://7news.com.au/news/crime/nsw-genital-mutilation-convictions-stand-c-506898>.
- High Court of Australia. 2019. *The Queen v A2* [2019] HCA 35.
- Human Rights Committee. 2017. 'Concluding Observations on the Sixth Periodic Report of Australia'. CCPR/C/AUS/CO/6.
- International Association of Athletics Federations. 2011. 'IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition - In Force as from 1st May 2011'. IAAF.
- . 2019. 'Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development) Version 2.0'. IAAF.
- Intersex Human Rights Australia. 2018. 'Submission to the Australian Human Rights Commission: Protecting the Human Rights of People Born with Variations in Sex Characteristics'. <https://ihra.org.au/32490/ahrc-submission-2018/>.
- . 2019a. 'Shadow Report Submission to the Committee on the Rights of Persons with Disabilities: Australia'.

- https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fAUS%2f35480&Lang=en.
- . 2019b. 'Response to the Victorian Paper on the Health and Wellbeing of People with Intersex Variations'. <https://ihra.org.au/35611/response-to-the-victorian-paper-on-the-health-and-wellbeing-of-people-with-intersex-variations/>.
- Jones, Melinda. 2018. 'Children's Health Rights and Gender Issues'. *Children's Rights in Health Care*, November, 382–424. doi:10.1163/9789004327573_017.
- Jones, Tiffany. 2016. 'The Needs of Students with Intersex Variations'. *Sex Education* 16 (6): 602–18. doi:10.1080/14681811.2016.1149808.
- Karkazis, Katrina, and Morgan Carpenter. 2018. 'Impossible "Choices": The Inherent Harms of Regulating Women's Testosterone in Sport'. *Journal of Bioethical Inquiry* 15 (4): 579–87. doi:10.1007/s11673-018-9876-3.
- Karkazis, Katrina, and Rebecca M. Jordan-Young. 2018. 'The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes'. *Feminist Formations* 30 (2): 1–39. doi:10.1353/ff.2018.0017.
- Kelly, Fiona, and Malcolm K Smith. 2017. 'Should Court Authorisation Be Required for Surgery on Intersex Children? A Critique of the Family Court Decision in Re Carla'. *Australian Journal of Family Law* 31 (2): 118–33.
- Kelner, Martha, and James Rudd. 2017. 'Caster Semenya Could Be Forced to Undertake Hormone Therapy for Future Olympics'. *The Guardian*, July 4, sec. Sport. <https://www.theguardian.com/sport/2017/jul/03/caster-semenya-could-be-forced-to-undertake-hormone-therapy-for-future-olympics>.
- McRae, Donald. 2016. 'The Return of Caster Semenya: Olympic Favourite and Ticking Timebomb'. *The Guardian*, July 29, sec. Sport. <https://www.theguardian.com/sport/2016/jul/29/the-return-of-caster-semenya-olympic-favourite-and-ticking-timebomb>.
- Mebus, Jörg, Olga Sviridenko, Edmund Willison, and Hajo Seppelt. 2019. 'Ex-Athletinnen Leiden Unter Massiven Folgen von Hormon-Operationen (Ex-Athletes Suffer from Massive Consequences of Hormone Surgery)'. *Sportschau*, September 27. <https://www.sportschau.de/hintergrund/schwere-vorwuerfe-gegen-iaaf-arzt-100.html>.
- Morgan, Tom. 2019. 'Female Athletes Claim Careers Ruined after Being "coerced" into Surgery to Curb Testosterone Levels'. *The Telegraph*, September 27. <https://www.telegraph.co.uk/athletics/2019/09/27/female-athletes-claim-careers-ruined-coerced-surgery-curb-testosterone/>.
- New South Wales. 1996. *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 No 22*. http://www.austlii.edu.au/au/legis/nsw/num_act/taoaaa1996n22541.pdf.
- Pape, Madeleine, and Roger Pielke Jr. 2019. 'Science, Sport, Sex, and the Case of Caster Semenya | Issues in Science and Technology'. *Issues in Science and Technology* 36 (1): 56–63.
- Parliament of Queensland. 2008. 'Health Legislation (Restriction on Use of Cosmetic Surgery for Children and Another Measure) Amendment Bill 2008 Explanatory Notes'. <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2008-1380>.
- Pride in Sport. 2019. 'April E-News'. April. <https://mailchi.mp/prideindiversity/april-e-news?e=59775562e1>.

- Silkstone, Dan. 2009. 'Gender Bender on IAAF Agenda'. *Sydney Morning Herald*, August 19, sec. Sport. <http://www.smh.com.au/news/sport/gender-bender-on-iaaf-agenda/2009/08/18/1250362074978.html>.
- Sydney Convicts Rugby Club. 2014. 'Anti-Homophobia & Inclusion Framework For Australian Sports'.
- Walsh, David. 2016. 'Rio Olympics: Transgender Debate Shows How Sport Officials Have Got It All Wrong'. *The Australian*, May 29. <http://www.theaustralian.com.au/news/world/the-times/rio-olympics-transgender-debate--shows-how-sport-officials-have-got-it-all-wrong/news-story/378f094f3ac851310e3eefe869fееeff>.