

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
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Dear Mr. Coe,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 33/9, 34/19 and 32/4.

Special Rapporteurs and the Working Group are part of what is known as the Special Procedures of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights system, is the general name of the Council's independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special Procedures experts are independent from any government or organization and serve in their individual capacity. As part of their activities, they act on cases of concerns of a broad, structural nature, by sending communications to States and others actors, including sporting organizations.

In this connection, we would like to bring to your attention serious concerns related to the Eligibility regulations for the female classification (athletes with differences of sex development) recently published by the International Association of Athletics Federations (IAAF). We understand that the regulations set eligibility criteria which, inter alia, require women athletes with specific differences in sex development, androgen sensitivity and natural levels of testosterone above 5nmol/L to medically reduce their blood testosterone level, 6 months before the competition and continuously thereafter, to below 5nmol/L, to maintain eligibility to compete in the female classification in restricted events¹ at international competitions.

The eligibility criteria and the procedures for their implementation set forth in these regulations appear to contravene international human rights norms and standards including the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to physical and bodily integrity and the right to freedom from torture, and other cruel, inhuman or degrading treatment and harmful practices.

Discrimination

¹ Restricted events comprising events from 400m to the mile, including 400m, hurdles races, 800m, 1500m, one mile races and combined events over the same distances.

The regulations as drafted specifically target women athletes with specific differences of sex development based on their natural physical traits, in this case, their naturally occurring levels of testosterone. However, humans are different, with a wide range of natural traits. Intersex people, also referred to as people with differences of sex development, or people with a subset of intersex variations, are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty. The population of women affected by the IAAF regulations were assigned female at birth, and have social and legal identities as women. Indeed, many athletes subject to the regulations might never be aware of their intersex traits were it not for the regulations.

The IAAF has asserted that there is a substantial performance advantage bestowed on women with naturally high testosterone levels, and thus these regulations appear to restrict women with specific differences of sex development, androgen sensitivity and levels of naturally occurring testosterone that are higher than 5nmol/L from competition in the female category based on their natural physical traits/sex characteristics. This decreases their chances to participate in the sports competition category in line with their gender, as well as the enjoyment and exercise of their human rights, including the right to health (including the freedom to make choices in relation to their health), the right to employment, and to their livelihoods. Given their legal and social identity as women, regulations that exclude them from the female category call into question their very sense of self and of human dignity.

Section 1.1(d) of the IAAF regulations refer to a “broad medical and scientific consensus” in support of the regulations. However, a number of scientific articles² have reached contradictory conclusions, including that there is no demonstrated relationship of causality between high levels of natural testosterone in women and their sports performance. Further, there are methodological flaws in studies presented as evidence by the IAAF, and that even if there were a causal relationship between high levels of natural testosterone in women and their sports performance. There is no evidence that the performance of elite women athletes with high levels of natural testosterone exceeds the performance of other elite women athletes in a manner comparable to the way that performance of elite men athletes exceeds that of elite women athletes, or that the targeted elite women athletes have performance in the same range as that of elite men athletes. The Court of Arbitration for Sport referenced a threshold of a performance advantage of 10-12% in its interim award in the case of Dutee Chand. The existence of a number of scientific articles that challenge the assumptions of the IAAF regulations – and the absence of

² Sönksen et al 2018. Hyperandrogenism controversy in elite women’s sport: An examination and critique of recent evidence. *British Journal of Sports Medicine*; Franklin et al 2018. What statistical data of observational performance can tell us and what they cannot: The case of Dutee Chand v. AFI & IAAF. *British Journal of Sports Medicine*; Sönksen et al 2018. Why do endocrine profiles in elite athletes differ between sports? *Clinical Diabetes and Endocrinology*; Karkazis et al 2012. Out of bounds? A critique of the new policies on hyperandrogenism in elite female athletes. *The American Journal of Bioethics*; Healy et al 2014. Endocrine profiles in 693 elite athletes in the postcompetition setting. *Clinical Endocrinology* 81(2): 294–305.

evidence meeting the threshold set by the Court of Arbitration for Sport in its earlier ruling - give rise to concerns that the justification for the current IAAF regulations may not be legitimate to the extent that they may not be reasonable, objective and proportional.

For three years, since the interim award by the Court of Arbitration for Sports in the case filed by Dutee Chand, which suspended the IAAF's Hyperandrogenism Regulation, competition in the disciplines targeted by the current regulations has not been subject to the proposed restrictions. The IAAF regulations do not appear to refer to evidence that during this period there was unfair competition or that during this period athletes did not have a fair opportunity to succeed, or that during this period there was a lack of incentive for athletes to join sport or aspire to excellence. Indeed, people with differences of sex development have existed throughout human history, and women with differences of sex development are likely to have competed in sports in the female category for as long as sports have existed. The IAAF has allegedly firmly claimed that without the regulation competition would be unfair or lack meaning, but the absence of evidence to support this claim leads to the suggestion that the justification for the current IAAF regulations is non-legitimate to the extent that it may not be reasonable, objective and proportional.

The IAAF regulations seem to have specifically singled out women with a specific set of differences of sex development, androgen sensitivity and natural testosterone levels that are higher than 5nmol/L. However, as recognised by the Court of Arbitration for Sport, a range of natural physical and biological traits are associated with performance in sports. These traits include height, lean body mass and specific genes that influence muscle composition, strength and endurance, in addition to social and economic factors and availability of economic resources. While the IAAF regulations section 1.1. refers to the importance of creating a level playing field to ensure fair and meaningful competition in sports, the regulations seem to have focused on only one group of people – women with a specific set of differences of sex development, androgen sensitivity and natural testosterone levels higher than 5nmol/L. The regulations (endnote 4) explicitly exempt women with other conditions that may cause blood testosterone levels above the normal female range, though the regulations do not explain the reasoning for the exemption. The regulations also appear to have ignored all other natural physical and biological traits as well as social and economic factors that affect sports performance. The lack of evidence that explicitly compares and addresses the impacts of these different factors leads to the conclusion that this may be a targeted and non-objective approach in contravention of non-discrimination standards. It further appears to be counter to the IAAF's goals to pursue fair and meaningful competition.

Moreover, scientific concerns cannot take precedence over concerns about enjoyment of human rights or human rights violations. While the regulations state that they are not intended “as any kind of judgment on or questioning of the sex or the gender identity of any athlete”, the reality is that they specifically exclude a category of women from competing as women in specific IAAF regulated sports events based on their natural physical and biological traits. The regulations reinforce negative stereotypes and stigma that women in the targeted category are not women – and that they either need to be “fixed” through medically unnecessary treatment with negative health impacts – or compete with

men, or compete in “any applicable intersex or similar classification” (regulations section 2.6), which can call into question their very definition of self. Should a woman athlete be excluded from competitions for women as an outcome of the process stipulated in the regulations, this will most likely be interpreted as a judgment or questioning of their sex or gender identity. This is evident from the public discourse that has accompanied specific athletes that have been targeted by the current (and previous iterations) of these regulations.

While allegedly claiming the contrary, the IAAF regulations seem to ignore the real stigmatizing and discriminatory impact of the processes and outcomes of the regulations on the dignity and privacy of the targeted group of women. The assessment for ‘exclusion or treatment’ based on the IAAF regulations relies on suspicion and speculation, based on stereotypes about femininity. This effectively legitimizes widespread surveillance of all women athletes by requesting national federations as well as doctors, doping officials, and other official personnel to scrutinize women athletes’ perceived femininity, which can include appearance, gender expression, and sexuality. Women who are understood to be “suspicious” about their natural physical traits are tied to subjective and cultural expectations regarding which bodies and modes of gender expression are “appropriate,” or even valorised by adherence to traditional or normative aesthetics of femininity. Gender and sex-based stereotyping and stigma have a long history, not only of causing psychological harm to women and gender minorities, but also of increasing the possibility of violence against them. Women who do not conform to culturally constructed notions of womanhood are particularly at risk of discrimination, violence, and criminalization. By singling out a certain group of athletes and denying them membership in the “female” category, the IAAF puts these women at risk of repercussions far beyond the inability to compete, as well as subjecting them to shame, ridicule, and intrusion upon their personal and private life.

Furthermore, as stipulated in the title and throughout the regulations, the IAAF regulations appear to specifically target women. No similar regulations are reported to have been applied or been sought to be applied by the IAAF to men athletes. Natural physical and biological traits as well as social and economic factors also influence the performance of men athletes. Natural physical traits associated with above-average performance by elite male athletes are applauded and admired. There appears to have been no suggestion by the IAAF that the natural physical characteristics that are associated with extraordinary and unprecedented performance by some elite men athletes make competition between men athletes unfair or lacking in meaning. The IAAF regulation is reported to explicitly justify the threshold of 5nmol/L in the regulations based on an approximate “midpoint” between the natural ranges of testosterone among the majority of women and men. However, scientific studies³, including studies cited by the IAAF, demonstrate that there is a significant overlap in levels of natural testosterone between women and men elite athletes in a number of disciplines, including track and field – with a number of elite men athletes displaying lower than average natural testosterone, levels that overlap with those of elite women athletes. Such studies lead to serious questions regarding the justification of the IAAF for the threshold of 5nmol/L. The pursuit of a “level playing field” should not apply only to women athletes, but to all athletes, without discrimination. Moreover, this cannot

³ Sönksen et al 2018. Why do endocrine profiles in elite athletes differ between sports? Clinical Diabetes and Endocrinology

be the only consideration: the human rights implications of any measures taken to reach this goal must also be taken into account. The proposed regulations do not seem to meet the requirement of proportionality and appear to be discriminatory on the basis of sex and gender.

Physical and bodily integrity

The regulations require women athletes with differences in sex development who have natural testosterone levels that are higher than 5nmol/L to lower their testosterone level for a period of 6 months prior to a competition and continuously thereafter so as to be eligible to compete. Testosterone levels can be lowered either surgically or pharmacologically.⁴ While the regulations state that the athlete will not be forced to undergo any assessment or treatment under the regulations, the regulations leave no real choice to the athlete, who has to choose between undergoing these intrusive medically unnecessary assessments and treatments with negative impacts on their health and well-being. They also affect their livelihood and sporting career by excluding them from competing at restricted events for women athletes. The decision to undergo an intrusive medical treatment is therefore expected to be made by the concerned athlete; however such a decision would be made under pressure vis-à-vis the alternative of being excluded from competition which does not leave the concerned individuals with a viable choice. In this connection, the regulations appear to impose a regime which must be regarded as discriminatory and disproportionate.

It is a reality that women with differences in sex development are regularly subject to medically unnecessary surgical interventions including gonadectomies and clitoridectomies. Indeed, young women athletes from some countries have already been subjected to such surgeries in order to comply with prior IAAF regulations, despite statements from IAAF-affiliated officials and doctors that they were healthy and had no medical requirement of treatment or surgery. These surgeries can cause irreversible harms to women, including compromising bone and muscle strength and risking chronic weakness, depression, sleep disturbance, poor libido, and adverse effects on lipid profile, diabetes, and fatigue⁵. These procedures necessitate long term hormone replacement and may also sterilize women. By pressuring women athletes with differences of sex development to undergo medical assessment and treatment in relation to their sex characteristics, they are at increased risk of being coerced to agreeing to the medically unnecessary surgical procedures with lifelong negative impacts on their physical and mental health and well-being.

Lowering testosterone levels is also possible through the use of, i.e.: hormonal contraceptives. Hormonal treatment to lower testosterone levels has adverse side effects including: diuretic effects that cause excessive thirst, urination and electrolyte imbalances, disruption of carbohydrate metabolism (such as glucose intolerance or insulin resistance), headaches, fatigue, nausea, hot flashes and liver toxicity⁶. Forcing persons to undergo any

⁴ Karkazis and Carpenter 2018. Impossible “Choices”: The Inherent Harms of Regulating Women’s Testosterone in Sport, *Journal of Bioethical Inquiry* 2018

⁵ Jordan-Young and Others 2014. Sex Health and Athletes, *British Medical Journal* 348:g29264.

⁶ Ibid.

medically unnecessary treatment may amount to violations of the rights to be free from interference and from non-consensual medical treatment, and to informed consent, which is further aggravated by the negative impacts of these treatments on the health and well-being of the persons concerned.

The regulations further require targeted athletes to undergo medically unnecessary intrusive specialist medical investigations. Such examinations may be requested by the IAAF Medical Manager and include examinations of the most intimate details of a person's body and physiology, including genital exams, chromosomal testing, and imaging of sex organs, as well as assessment of behaviour. Such tests are invasive and, especially when not medically necessary, may be felt as deeply shameful, humiliating and abusive, with lasting negative psychological impacts. The tests and the entire process are in fact deeply degrading and stigmatizing for the targeted women, by leaving them no choice but to be subjects of tests and examinations solely on the basis of suspicions about their natural physical traits and harmful assumptions about their sexuality and physical competence. This is particularly troubling given the long history of subjecting women with differences of sex development to abusive exhibition and medical treatments and may potentially contravene the rights to informed consent, to be free from interference, from non-consensual medical treatment, and may amount to violations of the right to be free from cruel, inhuman or degrading treatment or punishment and even torture

International human rights standards

While acknowledging that the regulations state that they are necessary to create fair and meaningful competition within the female classification for the broad benefit of women athletes, we express strong concern that the IAAF regulations are not compatible with international human rights norms and standards, including the rights of women with differences of sex development to equality and non-discrimination, to physical and mental health, and to physical and bodily integrity. We express further concern that there is an absence of evidence that the justification for the regulations are legitimate, to the extent that they may not be reasonable and objective, and that there is no clear and reasonable relationship of proportionality between the aim of the regulations and the proposed measures and their effects.

The right to equality and non-discrimination is established in a number of human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women, among others. All persons, without exception, are entitled to freedom from discrimination and sporting bodies also have taken on the responsibility to respect international standards and prohibit discrimination within sport. The fourth fundamental principle of the Olympic Movement, of which the IAAF is a part, indicates that “the practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”

Equality and non-discrimination are fundamental principles of international human rights law and are an essential element of human dignity. Discrimination constitutes any

distinction, exclusion, restriction or preference or other differential treatment that is directly, or indirectly based on prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights. Differential treatment based on prohibited grounds will be considered as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with human rights standards and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

In his report on sport and healthy lifestyles, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/32/33) highlighted that “sporting organizations must implement policies in accordance with human rights norms and refrain from introducing policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical procedures in order to participate as women in competitive sport.” (para 57)

Indeed, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as enshrined in article 12 of the Covenant on Economic, Social and Cultural rights, includes freedoms and entitlements; the freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, and other ill-treatment, non-consensual medical treatment and experimentation.⁷

In this connection, the right to bodily integrity refers to the right to control all aspects of one's health, to respect bodily autonomy and integrity and to decide freely in matters relating to one's sexuality and reproduction, free of discrimination, coercion and violence. In a report on sexual and reproductive health rights, the former Special Rapporteur on the right to health (A/66/254) highlighted that barriers arising from laws, regulations or policies that interfere with individual decision-making on health-related issues, and which particularly affect sexual and reproductive health rights, must be removed in order to ensure full enjoyment of the right to health. Additionally, in its report on discrimination against women with regard to health and safety (A/HRC/32/44), the Working Group on the issue of discrimination against women in law and in practice emphasized that unlawful discrimination is manifested in making women undergo humiliating treatment in the context of health services (paras. 30-31), and deplored the negation of women's autonomy in decision-making related to their health (para. 63) and stigmatization and pathologization of women's health (paras. 67-75).

The right to informed consent is also a fundamental feature of the right to health. In his report on informed consent, the former Special Rapporteur on the right to health (A/64/272) stressed that informed consent is not the mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 14, para. 8

person to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers. Informed consent's ethical and legal normative justifications stem from its promotion of the person's autonomy, self-determination, bodily integrity and well-being.

Guaranteeing informed consent is a fundamental aspect of respecting an individual's autonomy, self-determination and human dignity. It invokes the rights to health, to self-determination, to be free from discrimination and non-consensual experimentation, the security and dignity of the human person, as well as the rights to recognition before the law, to freedom of thought and expression and to reproductive self-determination. Intersex persons are recognized in this report as a group deserving special consideration regarding the protection of informed consent, due to elements of vulnerabilities stemming from economic, social and cultural circumstances which significantly overlap and exacerbate inequalities.

The United Nations human rights bodies including the Committee against Torture (CAT), the Committee on the Rights of People with Disabilities (CRPD), the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on violence against women have expressed serious concerns about human rights abuses against intersex people. In particular, they have stated that intersex adults should be the only ones who decide whether they wish to modify the appearance of their own bodies, that they should have access to support as well as to medical services that respond to their specific health needs and that are based on non-discrimination, informed consent and respect for their fundamental rights. These UN bodies have highlighted that it is critical to strengthen the integration of human rights principles in standards and protocols issued by regulatory and professional bodies, to protect intersex people from these abuses and from discrimination, including in sports, and to combat root causes of these abuses including harmful stereotypes, stigma and pathologization.

Taking into consideration the above mentioned concerns and international human rights standards, we would like to urge the IAAF to withdraw its Eligibility regulations for the female classification (athletes with differences of sex development). In this connection we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on steps taken by the IAAF to uphold the rights of all athletes, including women athletes with differences of sex development, to informed consent, to physical and bodily integrity, and to be free from discrimination, from non-consensual medical treatment, and from torture and other cruel, inhuman or degrading treatment

3. Please provide information on steps taken by the IAAF before issuing these regulations to analyse and ensure the compatibility of the proposed measures with international human rights norms and standards, including on the above mentioned rights.
4. Please provide information on the steps taken by the IAAF prior to issuing these regulations to assess and address the concerns about the multiple negative impacts of the regulations on the dignity, health, physical and bodily integrity of elite women athletes with differences of sex development and discriminatory impact on women athletes.
5. Please provide information on measures taken by the IAAF to ensure that elite women athletes with differences of sex development who compete in the events targeted by these regulations will not be coerced as a result of these regulations into undergoing stigmatising and intrusive examinations, being subjected to medically unnecessary treatment with harmful impacts on their physical and mental well-being, or abandoning the possibility to compete in line with their gender in restricted events.
6. Please provide information on the evidence collected by the IAAF on whether the regulations are non-discriminatory, namely, that the measures are reasonable and objective, and that there is proportionality between the aim sought to be realized and the measures adopted, taking into consideration concerns of the possible negative impacts of the regulations on the rights and well-being of women athletes with differences of sex development.
7. Please provide information on the evidence collected by the IAAF that in absence of the regulations, competition between elite women athletes in the targeted events has been unfair or lacked meaning, or discouraged athletes to join the sport, in the periods of time when these or similar regulations were not in force.
8. Please provide information on measures taken by the IAAF to ensure fair and meaningful competition in regulated sports events in relation to the broad range of diverse traits and factors that influence sporting performance and to ensure that it does not discriminate on the basis of sex by exclusively focusing on women or discriminate on the basis of sex characteristics by exclusively focusing on people with differences in sex development.

We would appreciate receiving a response ahead of the entry into effect of the Eligibility regulations on 1 November 2018.

We would like to inform you that this communication will be made available to the public on the website of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the website of the Working Group on the issue of discrimination against women in law and in practice. Any

correspondence from the IAAF related to this letter will also be made known in the same way.

Please accept, Mr. Coe, the assurances of our highest consideration.

Dainius Pūras

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standard of physical and mental health

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