

THE INNER CIRCLE OF THE WINNER'S CIRCLE: EXCLUSIONARY TREATMENT OF TRANSGENDER AND GENDER DIVERSE ATHLETES IN ELITE SPORTS

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Transgender and gender diverse athletes' participation in elite sports has been a controversial topic of debate in mainstream media following several high-profile cases. Testosterone testing for female athletes can be discriminatory and exclusionary, particularly for transgender and gender diverse athletes, and is an area of ambiguity given the lack of consensus internationally on accepted testosterone levels for female athletes. This article intends to examine this issue from a social and theoretical perspective and use this to analyse the relevant Australian legislation governing the issue. An examination of the cases of Caster Semenya, Hannan Mouncey and Laurel Hubbard will be used to demonstrate the current attitude towards transgender and gender-diverse athletes in elite sports, and of the use of queer and gender theories will aid in analysis of the law and policy on gender diversity in elite sports in Australia.

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I INTRODUCTION

In the current social and political climate, public discourse on allowing transgender and gender-diverse athletes to compete in elite sports is varied and complex. For transgender athletes, controversy arises from the change in policy by the International Olympic Committee ('IOC') allowing not only surgically transitioned athletes, but also those who have undergone hormonal transitioning.¹ Whilst there is limited research as to the effects of transitioning in athletes, researchers have found a rise in discriminatory sentiments towards non-cisgender athletes.²

Those against allowing transgender or gender diverse athletes in elite sports contend it is necessary to protect the sanctity of women's athletic experiences, given the biological advantage afforded to men.³ Where transgender and gender-diverse athletes are allowed to compete, concerns arise as to the 'slippery slope' of excluding cisgender female athletes in sport altogether, as they are unable to keep up with those who have higher testosterone levels.⁴ Naysayers thereby claim this will be the end of cisgender women

¹ Richard Ewart, 'Transgender athlete's controversy swirls after Laurel Hubbard wins gold at Pacific Games', *ABC News* (online, 30 July 2019) <<https://www.abc.net.au/news/2019-07-30/transgender-athletes-in-the-pacific-under-fire/11360854>>.

² Cisgender Can Be Defined as 'a Person Whose Gender Identity Matches Their Sex Assigned at Birth': Sam Winter et al, 'Transgender People: Health at the Margins of Society' (2016) 388 *The Lancet* 390, 391.

³ Joanna Harper, 'Sport's transgender debate needs compromise not conflict', *The Guardian* (online, 1 April 2019) <<https://www.theguardian.com/sport/blog/2019/apr/01/sports-transgender-debate-compromise-not-conflict>>.

⁴ Julian Savulescu, 'Ten ethical flaws in the Caster Semenya decision on intersex in sport', *The Conversation* (Web Page, 9 May 2019) <<http://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>>.

competing in elite sports, as all contestants will have the advantages of male athletes with the ability to 'out-perform' their female counterparts.

This attitude excludes an already marginalised group of society to maintain the status quo by disadvantaging transgender and gender diverse athletes. These concerns also do not take into account the effect of hormone therapy on transgender individuals transitioning from male to female, as maintaining high testosterone levels is not beneficial in the transition process. Further, a limited study found that athletes who had transitioned from male to female had slower race times,⁵ mitigating some of the concern as to the potential exclusion of cisgender women in elite sports. Several famous cases have shed light on the issue that is testosterone testing in elite sports.

A Case Studies

Caster Semenya is a South African runner who identifies as a woman. At just 18 years old, her gold-medal win at the world championships in Berlin sparked suspicion over her gender, leading to testing by the International Association of Athletics Federation ('IAAF') to determine if she is allowed to continue to race as a woman.⁶ Semenya was found to have higher testosterone levels than most women, and while she was allowed to continue to compete, Semenya was on the receiving end of discrimination.⁷ Although her sex test results were not officially published, Semenya's gender was widely discussed in the media due to claims she was intersex. Despite support from her home country and the president of South African athletics,⁸ one female elite runner stated of Semenya: '[f]or me, she is not a woman. She is a man'.⁹ Despite gold medal wins in the 2012 and 2016 Olympics, in 2018 the IAAF ruled that runners with high testosterone levels would need

⁵ Joanna Harper, 'Race Times for Transgender Athletes' (2015) 6(1) *Journal of Sporting Cultures and Identities* 1.

⁶ Anna North, "I am a woman and I am fast": what Caster Semenya's story says about gender and race in sports', *Vox* (Web Page, 3 May 2019) <<https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>>.

⁷ Rick Maese, 'Court rules Olympic runner Caster Semenya must use hormone-suppressing drugs to compete', *Washington Post* (online, 1 May 2019) <<https://www.washingtonpost.com/sports/2019/05/01/court-decides-against-caster-semenyas-appeal-controversial-rule/>>.

⁸ Tavia Nyong'o, 'The Unforgivable Transgression of Being Caster Semenya' (2010) 20(1) *Women & Performance* 95.

⁹ North (n 6).

to take medication to lower their hormones in order to compete.¹⁰ Whilst Semenya appealed the discriminatory and restrictive rules, the Court of Arbitration for Sport denied this before it was temporarily suspended by the Swiss Federal Supreme Court.¹¹

Hannah Mouncey is an Australian transgender AFL player who was ruled ineligible for selection in the 2018 AFLW draft.¹² Mouncey had previously competed in sports as an elite athlete at an international level prior to transitioning, and despite maintaining testosterone levels below the required threshold, she was subject to discrimination.¹³ Whilst the AFL had contended Mouncey may be eligible for future drafts, she withdrew from selection in 2018 due to the poor treatment she received on the part of the AFL.¹⁴

Laurel Hubbard is a transgender weightlifter from New Zealand who has been subject to criticism following her transition from male to female,¹⁵ and her decision to continue to compete at an elite level.¹⁶ For 15 years, Hubbard held the New Zealand weightlifting record and has continued to excel in female categories, recently winning gold at the Pacific Games in 2019. This win was controversial, with Samoan Prime Minister condemning her participation, stating, 'No matter how we look at it, he's a man and it's shocking this was allowed in the first place'.¹⁷

These cases demonstrate that the current status of elite sports is not conducive to a supportive and gender diverse environment. Athletes face difficulty, uncertainty and

¹⁰ *Semenya, ASA and IAAF: Executive Summary* (Court of Arbitration for Sport, Case No 2018/O/5794, 1 May 2019) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary_5794_.pdf>.

¹¹ 'Caster Semenya can run without testosterone restriction', *DW News* (online, 3 June 2019) <<https://www.dw.com/en/caster-semenya-can-run-without-testosterone-restriction/a-49040851>>.

¹² Salvatore Monaco, 'Sports Beyond Genders. Sociological Analysis on the Participation of Transgender Women in Female Sport Competitions' (2020) *Comunicación y género* 3(2) 105, 112; 'Transgender footballer Hannah Mouncey ineligible for AFL Women's draft', *SBS News* (online, 17 October 2017) <<https://www.sbs.com.au/news/transgender-footballer-hannah-mouncey-ineligible-for-afl-women-s-draft>>.

¹³ 'Transgender footballer Hannah Mouncey ruled ineligible for 2018 AFLW draft', *ABC News* (online, 18 October 2017) <<https://www.abc.net.au/news/2017-10-17/transgender-footballer-ruled-ineligible-for-aflw-draft/9059108>>.

¹⁴ Dan Harrison, 'Transgender footballer Hannah Mouncey withdraws from AFLW draft', *ABC News* (online, 10 September 2018) <<https://www.abc.net.au/news/2018-09-10/transgender-footballer-hannah-mouncey-withdraws-from-aflw-draft/10221730>>.

¹⁵ Sharon West-Sell, John Mark VanNess and Margaret Ciccolella, 'Law, Policy, and Physiology as Determinants of Fairness for Transgender Athletes' (2019) 22(2) *Professionalization of Exercise Physiology* 1.

¹⁶ University of Otago, 'Gender binary in elite sports should be abandoned, researchers urge', *ScienceDaily* (Web Page, 23 July 2019) <<https://www.sciencedaily.com/releases/2019/07/190723092111.htm>>.

¹⁷ Ewart (n 1).

adversity about their future in elite sports when identifying as transgender or gender diverse. Despite the purportedly feminist argument that trans and gender diverse inclusion will deprive cisgender women of opportunity, it is not the case that all people assigned male at birth have advantages in every sport or will make an impact so as to deprive cisgender women of sporting opportunities. More needs to be done to accommodate all athletes at a professional level and ensure inclusion of non-cisgender participants. In discerning whether transgender and gender-diverse women can compete in sports at an elite level, they are subjected to hormone testing to examine their testosterone levels.

B Testosterone Testing

Testosterone testing is used to determine whether transgender or gender diverse athletes can compete at an elite level in female categories based on their levels of the hormone testosterone. This testing is controversial, particularly due to the fact that different sporting authorities have differing requirements for serum testosterone limits. This lack of uniformity is particularly evidenced in the policies of the IAAF,¹⁸ IOC,¹⁹ and Cricket Australia,²⁰ all of which have been featured in the media due to their stance on testosterone levels in female athletes.

The IAAF's newly instituted regulations, which posed issues for Caster Semenya, stipulate that any athlete with a difference in sexual development must have circulating testosterone levels below 5nmol/L for a continuous period of six months.²¹ Further, IAAF regulations stipulate that male-to-female athletes must have proof of gender reassignment surgery, details of treatments and an assessment of hormones before being allowed to compete;²² although, it should be noted that the transgender and gender-

¹⁸ International Association of Athletics Federation, 'New Eligibility Regulations for Female Classification' (Media Release, 26 April 2018) <<https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>>.

¹⁹ International Olympic Committee, IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism (at November 2015).

²⁰ "Discrimination has no place in the game": CA brings in transgender diversity policy', *SBS News* (online, 8 August 2019) SBS <<https://www.sbs.com.au/news/discrimination-has-no-place-in-the-game-ca-brings-in-transgender-diversity-policy>>.

²¹ International Association of Athletics Federation (n 18).

²² International Association of Athletics Federation, 'IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations' (Press Release, 7 May 2019) <<https://www.iaaf.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>>.

diverse population includes individuals who have not undergone and may never use or embrace the risks of hormone therapy and/or undergo gender-affirming surgeries. These limitations are extremely restrictive, especially when compared to those of the IOC, which allows transgender athletes to compete once they have undergone hormonal transitioning, so long as individuals maintain testosterone levels below 10nmol/L over the course of 12 months.²³ Cricket Australia has also adopted a more inclusive policy, allowing transgender players to compete in line with their gender identity, rather than the sex they were born with. These requirements reflect the IOC regulations, as transgender players must also demonstrate a testosterone level of less than 10nmol/L for 12 months or longer.²⁴

Whilst testosterone is an anabolic steroid naturally occurring in both men and women, levels of testosterone in athletes are contentious due to the beneficial anabolic effects. These include increased muscle mass, bone density and maturation, which ultimately results in greater strength and physiological advantages for those with higher levels.²⁵ As the primary male sex hormone, testosterone is far more prevalent in men with normal endogenous production, ranging from approximately 8nmol/L to 33nmol/L.²⁶ For women, these parameters are lessened and often occur between 0.2nmol/L to 2.7nmol/L.²⁷ Despite this, cisgender female athletes can exceed these limits naturally, with one study finding a small percentage of female athletes with over 8nmol/L of testosterone.²⁸

For those transitioning from male to female, clinical guidelines prescribe hormone medication with the intent of achieving hormone levels within the accepted female range. This is often achieved through anti-androgen drugs which act by competitively binding

²³ International Olympic Committee (n 19).

²⁴ Australian Associated Press, 'Cricket Australia launches inclusion policy for transgender and gender diverse players', *The Guardian* (online, 8 August 2019) <<https://www.theguardian.com/sport/2019/aug/08/cricket-australia-launches-inclusion-policy-for-transgender-and-gender-diverse-players>>.

²⁵ Vineet Tyagi et al, 'Revisiting the Role of Testosterone: Are we Missing Something?' (2017) 19(1) *Reviews in Urology* 16.

²⁶ Thomas Travison et al, 'Harmonised Reference Ranges for Circulating Testosterone Levels in Men of Four Cohort Studies in the United States and Europe' (2017) 102(4) *The Journal of Clinical Endocrinology and Metabolism* 1161.

²⁷ *Ibid.*

²⁸ Marie-Louise Healy et al, 'Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting' (2014) 81(2) *Clinical Endocrinology* 294, 295-6.

to androgen receptors and suppressing the production of androgens in the body.²⁹ It can take patients over nine months to reach a steady state of lowered testosterone, with diverse fluctuation occurring during this time.³⁰ Further, these levels are affected by extraneous factors such as weight, lifestyle, time of day,³¹ season,³² where you live, and how wealthy you are.³³ The effects can vary in individuals, with one medication plan achieving testosterone levels in the female range at all times in only the highest suppressing quartile of participants.³⁴ Once commencing hormone treatment, transgender women may have to experiment with different combinations of medication to achieve lowered testosterone levels.

Given the natural fluctuations that can occur, hormone testing has been criticised as an inadequate measure for determining whether female athletes should be allowed to compete in elite sports,³⁵ and as a questionable practice. The varying natural levels of testosterone in cisgender women demonstrate the increased difficulty for those that are transgender or gender diverse and have higher natural levels as a result. Furthermore, the differing regulations by sporting authorities complicates matters, as transgender and gender diverse athletes struggle to know where they stand among different competitive bodies and are subject to changing rules. This policing of women's bodies is particularly harsh when considering that male athletes are not subject to the same levels of testing or restrictive requirements.

II THEORETICAL ANALYSIS OF GENDER IN SPORTS

Whilst definitions of gender are unfixed and variable, theorists often define gender as predicated on attitudes associated with sex category, as a social development based on normative conceptions associated with men or women.³⁶ Gender theorist Judith Butler

²⁹ Cor W Kuil and Eppo Mulder, 'Mechanism of Antiandrogen Action: Conformational Changes of the Receptor' (1994) 102(1-2) *Molecular and Cellular Endocrinology* 1.

³⁰ Jennifer Liang et al, 'Testosterone Levels Achieved by Medically Treated Transgender Women in a United States Endocrinology Clinic Cohort' (2018) 24(2) *Endocrine Practice* 135, 136.

³¹ Juan Mario Barberia et al, 'Diurnal Variations of Plasma Testosterone in Men' (1973) 22(5) *Steroids* 615.

³² Daniel Moskovic et al, 'Seasonal Fluctuations in Testosterone-Estrogen Ratio in Men from the Southwest United States' (2012) 33(6) *Journal of Andrology* 1298, 1299-1300.

³³ Kesson Magid et al, 'Childhood Ecology Influences Salivary Testosterone, Pubertal Age and Stature of Bangladeshi UK migrant men' (2018) 2(7) *Nature Ecology & Evolution* 1146.

³⁴ Liang (n 30) 148-9.

³⁵ University of Otago (n 16).

³⁶ Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1(2) *Gender & Society* 125, 127.

identifies gender as a product of a regulatory and disciplinary regime that embraces gendered normative practices and punishes those who rebel against them.³⁷ She identifies this promotion and punishment regime as reinforcing the norm of 'man' and 'woman', which essentially relegates anybody outside the system to be considered 'other'. This application of gender is evident in the issue of transgender and gender diverse athlete treatment in elite sports, as hormone testing plays into this understanding by requiring all diverse individuals to be compared to an arbitrary set of standards by which their fitness for participation is to be judged. Whilst many deem it necessary to abide by rigid standards so as to regulate fair participation in sport, the difference in regulations across sporting bodies, such as the IAAF, IOC and Cricket Australia, demonstrate the subjectivity of testing. On this model, transgender and gender diverse individuals are evaluated for acceptable hormone levels against the norm that is 'man' or 'woman'.

This is further reflected in the way transgender and gender diverse female athletes are discussed in the media. As aforementioned, the struggles of Caster Semenya, Hannah Mouncey and Laurel Hubbard were not without controversy, and this can be noted in online literature and media, as evidenced by fellow athletes and journalists regarding these situations. Such commentary and regulations set by the sporting bodies reinforces and forms the subject and brings it into being seen as a subject in this sense, according to Butler.³⁸ Consequently, the way sporting authorities deal with transgender and gender diverse athletes by comparing them to the norm of cisgender male and female hormone levels, reinforces their difference and causes these individuals to be seen as 'other'.

This problematisation of gender boundaries is further considered in the application of queer theory. Law as a static entity considers male/female as the dyad to informing the law and its processes, and only accepts or allows the 'other' upon condition.³⁹ This is no different from the testosterone testing that transgender and gender diverse women are subject to. Their bodies must be acceptable within the framework of the relevant sporting authority, in comparison to male and female set values, in order to be deemed acceptable and allowed to participate. Sharpe states that 'the policing of category boundaries

³⁷ Judith Butler, *Undoing Gender* (Routledge, 2004), 41-42.

³⁸ *Ibid* 41.

³⁹ Linnéa Wegerstad and Niklas Selberg, "Law's Outsiders": An Interview with Alex Sharpe' (2012) 138(3) *Retfærd Nordisk juridisk tidsskrift* 85, 88.

whereby some individuals who locate themselves within a group are legally positioned outside it...'⁴⁰ and recognises that views of transgender people are tied to biological factors at birth,⁴¹ in that policy and law is always informed by what is considered self-evident and natural within wider culture.

Understandings of gender are (and continue to play) a defining role in law and policy, which is no different when considering the treatment of transgender and gender diverse athletes. With regard to hormone testing for elite athletes, those who are considered the 'norm' are not subjected to the same level of scrutiny, and the same can be said for male athletes. Although sporting institutions no longer conduct visual examinations of female competitors' genitals, there are concerns that rigorous policing of women's bodies is essentially a modern form of this sex testing.⁴² For MacKinnon, this reinforces a male leviathan state that monitors women and polices their bodies.⁴³ It reinforces a system of power to allow the norm of seeing women as a consumable object, and subjects them to gendered harm through invasive testing procedures.⁴⁴ When considering an already marginalised female population, such as transgender and gender diverse individuals, the monitoring and approval of their bodies is already a concept they are subjected to by society in the form of judgment and criticism. Having these practices embedded into the culture of elite sports further exemplifies and informs individuals that their bodies need to be monitored and considered acceptable before they can perform or demonstrate their own gender identity or live their life in an authentic way.

III LEGAL ANALYSIS OF GENDER IN SPORTS IN AUSTRALIA

Anti-discrimination legislation in Australia comprises of international, federal and state regulation. At an international level, individuals are afforded protections under the *International Covenant on Civil and Political Rights*, which Australia ratified in 1980.⁴⁵

⁴⁰ Ibid 90.

⁴¹ Ibid 92.

⁴² Amanda Shalala, 'IAAF female classification rules slammed as "blatantly racist"', *ABC News* (online, 28 April 2018) <<https://www.abc.net.au/news/2018-04-28/critics-say-iaaf-testosterone-rules-blatantly-racist/9706744>>.

⁴³ Catherine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) *Signs* 8(4) 635.

⁴⁴ Ibid.

⁴⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

This treaty stipulates the need to respect all persons 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.⁴⁶ Whilst it does not specify protections for gender orientation, it can be encompassed under this provision and signatories must take necessary steps to adopt laws or measures which give effect to this.⁴⁷ Further, this treaty ensures all persons are equal before the law and that law should prohibit any form of discrimination.⁴⁸ Consequently, Australian legislation needs to ensure it protects the rights of transgender and gender diverse individuals and take steps to prevent discrimination against such persons.

Additionally, participation in sport is a human right under the *International Charter of Physical Education, Physical Activity and Sport*, which extends to include a right to sport without discrimination on the basis of gender, as well as inclusive and safe opportunities to participate.⁴⁹ The Australian Human Rights Commission recently published guidelines to this effect, seeking to expand on the legislation in dealing with discrimination and harassment and promoting inclusivity in sports.⁵⁰ Whilst this publication is beneficial in promoting participation in sport for all within sporting clubs in Australia, issues remain for transgender and gender diverse athletes at an elite level.

Although international law is clear in that it recognises the right to participate in sport and to not be subject to discriminatory practices on the basis of gender, there is no requirement or specification regarding elite sports. This is further demonstrated in Australia's national law, the *Sex Discrimination Act 1984* (Cth), which is the primary federal legislation in eliminating discrimination against persons on the ground of sex, sexual orientation, gender identity and intersex status.⁵¹ This legislation stipulates where circumstances of discrimination occur on the grounds of gender identity and intersex status.⁵² Despite this, it specifically states it is not unlawful to 'discriminate on

⁴⁶ Ibid art 2(1).

⁴⁷ Ibid art 2(2).

⁴⁸ Ibid art 26.

⁴⁹ United Nations Educational, Scientific and Cultural Organization, *International Charter of Physical Education, Physical Activity and Sport* (21 November 1978) art 1.1-3.

⁵⁰ Australian Human Rights Commission, 'Guidelines for the inclusion of transgender and gender diverse people in sport' (at June 2019).

⁵¹ Sex Discrimination Act 1984 (Cth) s 3(b).

⁵² Ibid s 5B-5C.

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 the competitors is relevant'.⁵³ While the law fails to clarify the strength, stamina and physique of the competitors, the *Guidelines for the inclusion of transgender and gender diverse people in sport* indicate this exemption is likely to apply to people of different gender identities, as this exclusion has been found to operate where the competition would be uneven due to disparity by the Victorian Civil and Administrative Tribunal in their equivalent legislation.⁵⁴ Further, such an interpretation has been supported by the Federal Court of Australia in the case of *Ferneley v Boxing Authority of New South Wales*.⁵⁵ Consequently, transgender and gender diverse athletes are essentially unprotected in seeking to participate at an elite level and subject to the regulations of the individual sporting organisation.

As such, the protections against discrimination in the national legislation fail to adequately consider the needs of transgender and gender diverse athletes in elite sportsmanship. Therefore, despite protections enshrined in international law, Australian legislation fails to properly cater to transgender and gender diverse individuals seeking to take part in elite sports, instead leaving authority to sporting bodies with varying regulations regarding participation for non-cisgender individuals.

IV CONCLUSION

The cases of Caster Semenya, Hannah Mouncey and Laurel Hubbard demonstrate the adversity transgender and gender diverse athletes face in elite sports from peers, the general public and institutions. Testosterone testing and regulations in elite sports are discriminatory, in that transgender and gender diverse women are subject to the varying policies of different sporting authorities, whose non-uniformity and fluctuating guidelines create difficulty in fair and equal participation. These rigid guidelines that dictate determinations of gender, further marginalise minority groups, as supported by gender and queer theory. The use of male and female set values as the norm fails to properly encompass those who are not cisgender. In reference to Semenya, Nyong'o

⁵³ *Ibid* s 42.

⁵⁴ *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158, [19]-[20].

⁵⁵ (2001) 115 FCR 306, 323-4.

questions, 'instead of insisting upon the naturalness of her gender, how about turning the question around and denaturalizing the world of gender segregated, performance-obsessed, commercially-driven sports, a world that can neither seem to do with or without excessive bodies like Semenya's and their virtuosic performances?'⁵⁶

Ultimately, the solution to exclusionary practices in elite sports is the abolition of binary gender division and testosterone testing. Monaco notes: 'if the aim of the exclusion of transgender women by female sports activities is to ensure fairness in the competition, it should check the levels of testosterone present in all athletes ... However, reducing everything to a DNA or hormone levels question is disqualifying for the professionalism of these people and belittles the sport of its value and aggregator of social device, exchange, debate and mutual enrichment'.⁵⁷ However, such a proposal is impractical in that a complete restructure of competitive sports is an unlikely outcome. Whilst testosterone testing is more problematic for transgender and gender diverse women than any other category, at the bare minimum testosterone regulations should treat non-cisgender women under the same standards by maintaining consistency in testosterone levels across international sporting authorities. Such an outcome would provide the basis for a more uniform approach and clarify the unpredictability which plagues non-cisgender athletes in elite sports.

Whilst there is a need for international regulation and uniformity on hormone testing, Australian legislation needs to ensure its own laws and policies are non-discriminatory and supportive of transgender and gender-diverse athletes in elite sports. It is imperative that the law promotes inclusivity and prevents discrimination, as it seeks to achieve. Although reform may be necessary to ensure fair outcomes, education is essential, particularly as amending Australia's laws alone will have little to no effect on major international sporting events wherein elite athletes intend to compete. While it is not a perfect solution as it still portrays gender as a duality of men and women as the standard for comparison, there is a need to ensure uniformity and dignity in the way transgender and gender diverse elite athletes are treated in Australia. Such reform would ultimately reinforce the international covenants Australia has purportedly ratified and allow

⁵⁶ Tavia Nyong'o, 'The Unforgivable Transgression of Being Caster Semenya' (2010) 20(1) *Women & Performance* 95.

⁵⁷ Monaco (n 12) 112.

influence over national sporting bodies, allowing more permissive and inclusive policies as seen in recreational and amateur levels of sport (such as Cricket Australia's policy). Ultimately, non-cisgender athletes deserve certainty and impartiality in all aspects of their lives, let alone their chosen profession. Regulation and legislation must evolve to ensure inclusivity is a primary consideration in the future development of sporting practices for both amateur and elite athletes alike.

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