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Sex Discrimination in Sport

1 Introduction

1.1 Sport and sexism have been bedfellows for years. Remember former Wimbledon champions, Richard Krajicek and Pat Cash, respectively describing women tennis players as “lazy fat pigs” who play “two sets of rubbish”?[1] Oh well, *sticks and stones* and all that: name-calling is not pleasant, but it won’t affect anything important like someone’s income, job prospects or access to facilities. However, there is a more serious manifestation of sexism in sport which really can have a profound effect on the lives of individuals: sex discrimination.

1.2 Of course, when sex discrimination occurs in any field of activity, its impact can be damaging to all the parties concerned. But when it appears in a sporting context, where typically emotions and media interest are high, and where notions of fair play and a level playing field are ingrained, it can do much more than affect the individuals most directly concerned. Sex discrimination in sport can hold a mirror up to society, and the unedifying reflection can have us all asking some hard questions about the way we conduct ourselves and interact with others.

1.3 But the moral issues are not always clear-cut when it comes to sex discrimination, and the legislators and judiciary often have to make difficult decisions against a backdrop of mixed and shifting public opinion. Men-only golf clubs? Women-only gyms? Equal prize money? Mixed-sex contact sports? Women boxers? Pregnant netballers? Bans on transsexuals? Not everyone has the same views as to what is right and wrong. And the prevailing views today will no doubt be different from those 30 years ago, and those 30 years from now.

1.4 Set out in this chapter is an overview of the law on discrimination generally, and then a more detailed analysis of the law on sex discrimination in sport. The emphasis is on the position under New Zealand law, although there is considerable analysis of the statutes and case-law from Australia, where in recent years issues of sex discrimination in sport have enjoyed greater exposure than they have in New Zealand.

1.5 More particularly, the following subjects are covered:

Section 2	*Discrimination*
Section 3	*Sex discrimination in sport*
Section 4	*The prohibition of sex discrimination in New Zealand sport*
Section 5	*The prohibition of sex discrimination in Australian*

[1] See http://www.timesonline.co.uk/article/0,,2641-1162996,00.html

	sport
Section 6	*The 'relevance' of strength, stamina and physique*
Section 7	*The purpose of discrimination*
Section 8	*Discrimination against pregnant women*
Section 9	*Preventing women from competing with women*
Section 10	*Discrimination against men*
Section 11	*Discrimination against transsexuals.*

2 Discrimination

2.1 Discrimination is essentially distinguishing between individuals or groups of individuals so that some are treated better, and others worse.

2.2 Discrimination is typically classified as being either direct or indirect.

(a) Direct discrimination is relatively straightforward: it is treating a person or a group of people less favourably because of their particular status (for example, if a hotelier refuses entry to all homosexuals).

(b) Indirect discrimination is where a rule or arrangement appears to be neutral as between people of differing status, but in practice its effect (which might be unintentional) is to disadvantage people with a particular status. An example of indirect discrimination is an employer stipulating that candidates for promotion must have completed a specified period of unbroken service. On its face this is neutral as between men and women, but in practice it will disadvantage women, who are more likely than men to take a career break to have children.[2]

2.3 In New Zealand and Australia, legislation makes direct discrimination unlawful where it is on the basis of one of the prohibited grounds and is in one of the specified fields of activity.[3] Indirect discrimination is also unlawful where it is on the basis of one of the prohibited grounds and is in one of the specified fields of activity, although indirect discrimination may not be unlawful where there is "good reason" for it, see paragraph [7.6] below. The prohibited grounds include sex, race, colour, sexual orientation, disability, marital status, age, religion and political opinion. The specified fields of activity include employment, education, accommodation, the activities of clubs and associations, and the provision of goods or services. So, for example, under the New Zealand legislation, it is prima facie unlawful for a school to refuse to

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2 See, for example, the decision of the Equal Opportunity Tribunal in Western Australia: *Kemp v Minister for Education & Another* (1991) EOC ¶92-340.

3 See, for example, section 65 *Human Rights Act 1993* (NZ).

admit a person as a student on one or more of the prohibited grounds (ie by reason of that person's sex, race, political opinion etc).[4]

2.4 The relevant legislation then provides a number of exceptions to the prohibitions, effectively allowing discrimination in certain specified circumstances. Continuing the example in the previous paragraph, under an exception in the New Zealand statute, it will not be unlawful for a school to refuse to admit a disabled person as a student where the disability is such that special facilities are required, and in the circumstances those facilities cannot reasonably be made available.[5]

3 Sex discrimination in sport

3.1 Set out above is the general framework of the relevant Australian and New Zealand legislation dealing with discrimination. Sex is merely one of many grounds on which discrimination is prohibited, but it is probably the ground of discrimination that crops up most frequently in sport, and it is this that will be the focus of this chapter.[6]

3.2 First, some examples of sex discrimination issues that arise in sport around the world:

(a) For years controversy has surrounded the US Masters golf tournament, played at the Augusta National Golf Club in Georgia. The issue is that women cannot become members of that club, a fact that has prompted the National Council of Women's Organizations to protest at the event, calling for women to be allowed to join the club.[7]

(b) The disparity between men's and women's prize money causes much debate in a number of sports, including tennis. When Roger Federer won the Men's Singles title at the 2004 Wimbledon Championships, he took home £602,500 (NZ$1.75 million), whereas Maria Sharapova, the Women's Singles champion, earned only £560,500 (NZ$1.63 million).[8] Calls for equality are frequently made by high-profile players and former players such as Jana Novotna, Virginia Wade and Billie-Jean King.

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4 Section 57(1)(a) *Human Rights Act 1993* (NZ).

5 Section 60 *Human Rights Act 1993* (NZ).

6 The issue of sexual harassment in sport will not be covered in this chapter, although that is one issue that continues to hit the headlines all over the world (consider, for example, the accusations of sexual assault and rape that dogged English soccer, Australian Rules football and Australian rugby league in 2003 and 2004).

7 No protest was held at the 2004 US Masters due to a local county ordinance (passed shortly before the tournament), which regulated public demonstrations and allowed the sheriff to move protesters away from the venue. Interestingly, shortly after the tournament, the 11th US Circuit Court of Appeals ruled that the ordinance violated the guarantee of free speech contained in the First Amendment to the US Constitution.

8 Women also win less prize money then the men at the French Open; at the Australian and US Opens, the prize money is equal as between men and women.

(c) In 1998, English boxer Jane Couch (aka *The Fleetwood Assassin*) was Women's Welterweight Boxing Champion of the World but was refused a licence to fight in the UK by the British Boxing Board of Control. The Board's policy was not to grant licences to any female boxers on the basis that boxing was, in the Board's view, not safe for women. So Miss Couch's application was refused on medical grounds, albeit without her having undergone a medical examination. Miss Couch brought proceedings in the UK's employment tribunal and successfully argued that the Board had discriminated against her on the basis of her sex because no male boxer would have had his licence application refused on medical grounds without first undergoing a medical examination.[9]

(d) In March 2004, Mianne Bagger, a male-to-female transsexual, made history by competing in the Women's Australian Golf Open in Sydney.[10]

(e) In February 2004, a junior Australian Rules football league in the Melbourne suburbs was sued by three girls who were prevented by the league's rules from playing with and against boys in the under-14 and older competitions. The youngest of the girls was successful, establishing that the league's rule unlawfully excluded girls from sporting competition.[11]

4 The prohibition of sex discrimination in New Zealand sport

4.1 In New Zealand, there is no specific prohibition on sex discrimination in sport. Rather, sex discrimination is statutorily prohibited in a number of more general fields of activity, which may or may not cover sport, subject to the circumstances of any particular case. There are then some exceptions which might apply in a sporting context.

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[9] See http://www.eoc.org.uk/cseng/advice/recruitment_and_selection__decisions.asp. See also the Australian case involving Holly Ferneley, a female professional boxer who was refused registration by the Boxing Authority of New South Wales: *Ferneley v Boxing Authority of New South Wales and Another* (2001) 191 ALR 739, and discussed in section [9] below.

[10] See http://news.bbc.co.uk/sport1/hi/golf/3489701.stm. There have been other well-publicised examples of male-to-female transsexuals competing alongside women at an elite level in sport. For example, American tennis player, Reneé Richards (formerly Richard Raskin), who sued the United States Tennis Association to establish her right to compete; Canadian mountain biker, Michelle Dumaresq (formerly Michael Dumaresq), who finished 24th in the 2002 Women's World Championships downhill event; and Polish-American track athlete, Stella Walsh, who won gold in the Women's 100 metres at the 1932 Summer Olympics in Los Angeles (she competed under her Polish name, Stanislawa Walasiewicz), and was later inducted into the US Track and Field Hall of Fame (after her death in 1980, an autopsy revealed that she had male genitals). See *Sport and Law Journal* (2004) Volume 12, Issue 1. The law on discrimination of transsexuals in sport is covered in section [11] below.

[11] *Taylor and Others v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158, discussed in more detail in section [6] below.

The prohibitions

4.2 *The Human Rights Act 1993* (NZ) makes it unlawful for a person to discriminate against another on the grounds of his or her sex in a number of fields of activity, the following of which might be relevant in a sporting context:

(a) *Employment* (eg by refusing to employ members of one sex or offering less favourable conditions to them).[12] Clearly this will have an impact on professional athletes, and also on the employment of all those that administer, coach, officiate or otherwise support sporting activity at all levels.

(b) *Professional associations and qualifying bodies* (eg by refusing to accept people of one sex as members, or refusing to confer certain qualifications or approval onto them).[13] This might apply to membership of athletes' associations or sports governing bodies, and to the various coaching certificates and other licences and qualifications that associations, governing bodies and others administer.[14]

(c) *The provision of goods, facilities and services* (eg by refusing to supply services to members of one sex or by supplying services to them on less favourable conditions).[15]

4.3 With regard to the issue of sex discrimination in sport, the prohibition in relation to the provision of goods, facilities and services is arguably the most important of the prohibitions. This is because the provision of goods, facilities and services ought in most circumstances include the provision of the key elements in organised sport, such as teams, structured competition, coaches, officials, pitches and equipment. So discriminating between the sexes when providing these elements will prima facie be prohibited under the legislation.

4.4 That said, the question of what is a *service* has troubled the courts and tribunals. In the unreported case of *R v U*, brought before the New Zealand Human Rights Commission in December 2000, the Commissioners accepted that the exclusion of boys from junior netball

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[12] Section 22 *Human Rights Act 1993* (NZ).

[13] Sections 37 and 38 *Human Rights Act 1993* (NZ).

[14] For example, where a boxer seeks a licence from the relevant governing body to perform as a professional, see *Ferneley v Boxing Authority of New South Wales and Another* (2001) 191 ALR 739 and section [9] below.

[15] Section 44 *Human Rights Act 1993* (NZ). Among others, the prohibitions in respect of professional associations and qualifying bodies, and the provision of goods, facilities and services do not apply directly to the New Zealand government, or to individuals or bodies in the performance of any public function, power or duty (section 21A *Human Rights Act 1993* (NZ)). However, the *New Zealand Bill of Rights Act 1990* (NZ) does apply to those entities, and provides at section 19(1) that "everyone has the right to freedom from discrimination on the grounds of discrimination in the *Human Rights Act 1993*." If the New Zealand government (or an individual or body in the performance of any public function, power or duty) performs an act or omission that is inconsistent with the right to freedom from discrimination in section 19, that act or omission will, for most purposes, constitute a breach of Part 1A of the *Human Rights Act 1993* (NZ).

teams was discrimination in the provision of a *service* in accordance with section 44 *Human Rights Act 1993* (NZ).[16] Similarly, in *Jernakoff v WA Softball Association (Inc)*,[17] the Western Australian Equal Opportunity Tribunal had no difficulty finding that a state softball association (which played a supervisory role in the conduct of competitions, provided coaching and playing facilities, collected fees and arranged insurance) provided a *service* in accordance with the relevant statue. And in *Ross and Others v University of Melbourne*,[18] the Victorian Equal Opportunity Board found that the university's provision of a weight training room was a *service*.

4.5 In contrast, in a South Australian case, Justice Jacobs expressed doubt as to whether the organiser of a tennis tournament provided a *service* to a competitor.[19] And in New South Wales, the Equal Opportunity Tribunal ruled that excluding men from a women-only swimming pool was merely the restriction of access to a place, and did not relate to the provision of a *service*.[20]

4.6 In examining what is a *service* for the purposes of the legislation, one must always consider the specific terms of the applicable legislation. In particular, it will be necessary to take into account other provisions in the legislation (eg those relating to employment), because any overlap in the application of the provisions might require *service* to be afforded a narrower definition than would otherwise be the case.[21]

The exceptions

4.7 *The Human Rights Act 1993* (NZ) provides a number of exceptions to the prohibitions on discrimination. Those most relevant to sport appear as exceptions to the prohibitions in relation to, respectively, employment and the provision of goods, facilities and services.

Employment

4.8 There are many exceptions to the employment prohibition. The exception that is particularly relevant to sport is that which relates to 'authenticity'. This provides that it will not be a breach of the employment prohibition to treat men differently from women where "for reasons of authenticity, being of a particular sex … is a genuine occupational qualification for the position or employment."[22]

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16 See http://www.hrc.co.nz/index.php?p=13684&id=79&. However, the discrimination was not unlawful as one of the exceptions applied. See paragraph [4.14] below.

17 (1999) EOC ¶92-981.

18 (1990) EOC ¶92-290.

19 *Commissioner for Equal Opportunity v Parsons* (1990) EOC ¶92-978.

20 *Wolk v Randwick City Council* (1995) EOC ¶92-721.

21 See *Ferneley v Boxing Authority of New South Wales and Another* (2001) 191 ALR 739, at paragraph 65.

22 Section 27(1) *Human Rights Act 1993* (NZ).

4.9 Imagine a sport in which (as is common) the international governing body has a rule that only men may compete in the men's competitions. If a female competitor in that sport sought to challenge a refusal by the New Zealand national governing body to employ her as a player in the men's national team, the governing body might try to rely on the authenticity exception, and argue that the reasons of authenticity derive from the international governing body's rule, as well as the accepted practice among the national teams of other countries.

The provision of goods, facilities and services

4.10 There are two exceptions to the goods, facilities and services prohibition that are critical in terms of how the statute affects sex discrimination in sport. The first relates to the activities of clubs and the second relates specifically to participation in sport.

The first exception: clubs

4.11 With one rather marginal caveat, the prohibition in relation to the provision of goods, facilities and services does not apply to access to membership of a club, or to the provision of services or facilities to members of a club.[23] This means that all-male clubs can refuse to allow women to be members, and clubs generally (ie those that do allow men and women members) can restrict women members' access to certain facilities (like Saturday tee-times at a golf club, or the best courts at a tennis club) and this will not fall foul of the goods, facilities and services prohibition.[24]

4.12 The caveat to the *clubs exception* prevents a club that has reciprocal arrangements with another club from treating, say, the women members of the other club less favourably than the male members of the club itself.[25] More particularly, it provides that "where any club, or branch or affiliate of any club, that grants privileges to members of any other club, branch or affiliate refuses or fails on demand to provide those privileges to any of those members, or treats any of those members less favourably in connection with the provision of those privileges than would otherwise be the case, by reason of any of the prohibited grounds of discrimination [including sex], that club, branch or affiliate shall be deemed to have committed a breach of this section." This is clearly of limited application.

4.13 So, essentially, a club is not subject to the legislative prohibition on discrimination in respect of its provision of facilities and services to its own members or would-be members. Given the important role that is played by clubs in the structure of organised sport, this exception is a

[23] Section 44(4) *Human Rights Act 1993* (NZ).

[24] Although it is possible that in some circumstances a club's discriminatory activities will be caught by other prohibitions in the *Human Rights Act 1993* (NZ) where the *clubs exception* does not apply, for example in employing staff or in providing accommodation, see sections 22 and 53 *Human Rights Act 1993* (NZ).

[25] Section 44(3) *Human Rights Act 1993* (NZ).

significant limitation to the statutory protections against sex discrimination in New Zealand sport.

4.14 In the case of *R v U*,[26] the New Zealand Human Rights Commissioners considered a complaint that a netball club's rules were unlawfully discriminatory under section 44 *Human Rights Act 1993* (NZ) because they limited the number of boys that were allowed to play in each of the junior netball teams that were organised by the club. The commissioners found that the relevant rules appeared to breach the prohibition in section 44(1) but that, in accordance with section 44(4), that prohibition did not apply to the provision of services or facilities to members of a club, and so the complaint was dismissed.[27]

The second exception: sport

4.15 There is another exception to the goods, facilities and services prohibition that further limits the effectiveness of the statutory protections against sex discrimination in New Zealand sport. Section 49 *Human Rights Act 1993* (NZ) reads in relevant part as follows:

(1) *Subject to subsection (2) of this section, nothing in section 44 of this Act [ie. the goods, facilities and services prohibition] shall prevent the exclusion of persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.*

(2) *Subsection (1) of this section does not apply in relation to the exclusion of persons from participation in –*

(a) *the coaching of persons engaged in any sporting activity; or*

(b) *the umpiring or refereeing of any sporting activity; or*

(c) *the administration of any sporting activity; or*

(d) *sporting activities by persons who have not attained the age of 12 years.*

4.16 This exception effectively allows any sporting organisation to restrict members of one sex from competing in its events so long as it can demonstrate that "the strength, stamina or physique of competitors is relevant" in such events.[28] The restriction can only be of competitors, not coaches, umpires/referees or administrators. So, for example, the organisers of a rugby union tournament might legitimately disallow women competitors from playing in the tournament (so long as the organisers could demonstrate that the strength, stamina or physique of

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[26] See http://www.hrc.co.nz/index.php?p=13684&id=79&.

[27] See paragraphs [5.9-5.17] below for analysis of how statutory prohibitions on discrimination apply to clubs in Australia.

[28] More accurately, such restriction will not contravene the prohibition of discrimination in respect of the provision of goods, facilities and services. If the restriction contravenes another prohibition (eg that which relates to employment), it will not be saved by the *sports exception*. This contrasts with the position in Victoria, see paragraph [5.8] below.

competitors is relevant in rugby union). But the organisers could not legitimately disallow women from coaching a team competing in the tournament, or refereeing matches in the tournament (at least not on the basis of their sex).

4.17 Further, it is clear from section 49(2)(d) that the restriction cannot be applied to sporting activities of children aged under 12, and this effectively safeguards mixed-sex sport up to that age.[29]

4.18 However, a vexed question arises from section 49 *Human Rights Act 1993* (NZ): what is meant by the phrase "competitive sporting activity in which the strength, stamina or physique of competitors is relevant"? There are no reported decisions in New Zealand that help to answer this. However, the legislation in most Australian jurisdictions contains similar wording and there are reported decisions from Australia that will be (or ought to be) instructive when considering how the courts in New Zealand would interpret the New Zealand provision. The analysis of how this issue has been dealt with in the Australian jurisprudence is set out below in section [6].

5 The prohibition of sex discrimination in Australian sport

5.1 As in New Zealand, in the majority of the Australian jurisdictions, there is no specific prohibition on sex discrimination in sport, but such discrimination is prohibited in more general fields of activity, which might in certain circumstances be relevant in a sporting context. Only in the state of Victoria does the legislation set out a specific prohibition on discrimination in sport.

The prohibitions

5.2 The federal legislation, and the legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Western Australia, adopts a similar approach to that of the *Human Rights Act 1993* in New Zealand.[30] In these jurisdictions, there is no specific prohibition on sex discrimination in sport, but it is unlawful to discriminate on the ground of sex in a number of specified fields, such as employment, education, the provision of goods, facilities and services, and (except in South Australia) in the activities of registered clubs and societies.[31] So, for

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[29] Although not where it is organised by a club for its members, since the club can exclude or restrict people of one sex - even if under 12 - and not fall foul of the section 44 prohibition, see *R v U* and paragraphs [4.4 and 4.14] above.

[30] However, the prohibitions on discrimination contained in the federal legislation only apply to "trading or financial corporation[s] formed within the limits of the Commonwealth" or officers or employees of such corporations when acting in that capacity and in the course of the corporation's trading or financial activities. See sections 9(13) and (14) *Sex Discrimination Act 1984* (Cth) and *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club* [1995] HREOCA 25.

[31] Sections 14-27 *Sex Discrimination Act 1984* (Cth);
sections 10-23 *Discrimination Act 1991* (ACT);

example, under the New South Wales *Anti-Discrimination Act 1977*, it is prima facie unlawful for an employer to offer men more favourable employment terms than those offered to women; for an educational authority to refuse to admit men (and not women) as students; and for a provider of goods or services to provide such goods or services to women on less favourable terms than they are provided to men.[32]

The exceptions

5.3 In all of the Australian jurisdictions, there are various exceptions that apply to one or more of the prohibitions. Of most interest for the purposes of this chapter is the exception that applies to sex discrimination in sport, ie that which (as with section 49 *Human Rights Act 1993* in New Zealand) effectively allows the exclusion of one sex from competitive sporting activity.[33] By way of a summary, Western Australia, South Australia, Australian Capital Territory and the Commonwealth use a formula that allows exclusion from a sporting activity in which 'strength, stamina or physique is relevant'. In most of these jurisdictions, this is limited to participants aged 12 and over, although in South Australia and the Australian Capital Territory, the exception is not limited to participants aged 12 and over, and so, say, girls under 12 could in theory be excluded from a boys sport if it was shown that strength, stamina or physique of competitors is relevant in that sport.[34]

5.4 In Queensland and Northern Territory, a slightly different formula is adopted. It is not unlawful to exclude participants of one sex (aged 12 and over) from a sporting activity where that is "*reasonable* having regard to the strength, stamina or physique requirements [sic] of the activity" (emphasis added). In New South Wales and Tasmania the exception is extremely wide and allows participants of one sex to be

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sections 25-34A *Anti-Discrimination Act 1977* (NSW);
sections 29, 31-34, 38, 39, 41, 46 and 48 *Anti-Discrimination Act 1992* (NT);
sections 13-23, 37-39, 45, 46, 52-57, 66-71, 76, 77, 81-85 and 93-95 *Anti-Discrimination Act 1991* (Qld);
sections 30-33, 35-43 *Equal Opportunity Act 1984* (SA);
section 22 *Anti-Discrimination Act 1998* (Tas); and
sections 8, 11-23 *Equal Opportunity Act 1984* (WA).

[32] Sections 25, 31A and 33 *Anti-Discrimination Act 1977* (NSW).

[33] Section 42(1) *Sex Discrimination Act 1984* (Cth);
section 35 *Equal Opportunity Act 1984* (WA);
section 48 *Equal Opportunity Act 1984* (SA);
section 38 *Anti-Discrimination Act 1977* (NSW);
section 111 *Anti-Discrimination Act 1991* (Qld);
section 29 *Anti-Discrimination Act 1998* (Tas);
section 41(1) *Discrimination Act 1991* (ACT); and
section 56 *Anti-Discrimination Act 1992* (NT).

[34] This raises an interesting question under the Australian constitution, ie whether an exclusion of girls aged under 12 under South Australian or ACT law would be inconsistent with the federal statue (which allows such exclusions only for those aged 12 and over) and therefore potentially invalid under the federal constitution. See the comments of Wilcox J in *Ferneley v Boxing Authority of New South Wales and Another* (2001) 191 ALR 739 at paragraph 25.

excluded in any circumstances (ie whether or not it is reasonable, and whether or not strength, stamina or physique of competitors is relevant), although in Tasmania this is limited to those aged 12 and over.[35]

Victoria

5.5 In Victoria, in addition to the prohibitions on discrimination in various general fields of activity, there is a specific prohibition on discrimination in sport. Section 65 *Equal Opportunity Act 1995* (Vic) reads:

> *A person must not discriminate against another person –*
>
> *(a) by refusing or failing to select the other person in a sporting team;*
>
> *(b) by excluding the other person from participating in a sporting activity.*

5.6 If there is any doubt in other jurisdictions that excluding one sex from selection or participation is prohibited under the more general prohibitions (eg the prohibition relating to the provision of goods, facilities and services), there can be no doubt in Victoria since it is set out in clear terms in this stand-alone prohibition.

5.7 As in New Zealand and the other Australian jurisdictions, the Victorian statute provides for an exception to the prohibitions to allow the exclusion of one sex from a sporting activity. Section 66 *Equal Opportunity Act 1995* (Vic) reads:

> *(1) A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.*
>
> *(2) A person may restrict participation in a competitive sporting activity –*
> *(a) to people who can effectively compete;*
> *(b) to people of a specified age or age group;*
> *(c) to people with a general or particular impairment.*
>
> *(3) Sub-section (1) does not apply to a sporting activity for children under the age of 12 years.*[36]

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[35] The same constitutional question would arise again here (see footnote [34]). If one sex was excluded from a sport in New South Wales or Tasmania, where such exclusion was not based on the strength, stamina or physique of competitors, while this would be lawful under the local legislation, in certain circumstances it might be unlawful under the federal statute, and therefore potentially invalid under the Australian constitution.

[36] The reference in section 66(1) to "people … with a gender identity" allows the exclusion of transsexuals, see paragraph [11.9] below.

5.8 Whereas the New Zealand exception has a limited application (in that it only exempts what would otherwise be prohibited under the section of the legislation dealing with the provision of goods, facilities and services), the Victorian exception applies without limitation – ie it is a positive affirmation that such exclusion can take place without fear of infringing any statutory prohibitions. The position is similar in the other Australian jurisdictions. So, if it could be established, for example, that strength, stamina or physique was relevant in adult soccer, one might find that excluding women from men's soccer tournaments in Victoria could be done with impunity, since it would be permitted under section 66(1) *Equal Opportunity Act 1995* (Vic). However, the same exclusion in New Zealand would not enjoy the same certainty: although there would be no question of infringing the goods, facilities and services prohibition (as a result of section 49(1) *Human Rights Act 1993* (NZ)), in certain circumstances such an exclusion might infringe other prohibitions, such as that which relates to employment.

Clubs

5.9 The application of anti-discrimination legislation to clubs in Australia is quite different from the application of the corresponding legislation in New Zealand. As set out in paragraphs [4.11 – 4.14] above, in New Zealand clubs enjoy the benefit of a specific exception to the prohibition on sex discrimination in the provision of goods, facilities and services,[37] which gives clubs relative freedom to discriminate between the sexes. In contrast, in Australia not only is there no exception for clubs in respect of the goods, facilities and services prohibition, but (in most jurisdictions) the activities of clubs are a specified field of activity in which sex discrimination is outlawed.

5.10 So, in the legislation enacted in the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania, Victoria and Western Australia, aside from the more general prohibitions relating to the provision of goods, facilities and services, there are specific prohibitions relating to the activities of clubs. These prohibitions make it unlawful for a club to discriminate, for example, against a person on the basis of that person's sex when considering his or her application for membership, in the terms or conditions of his or her membership, or in allowing him or her access to the club's facilities. But, inevitably, there are exceptions to these prohibitions.

5.11 In many of the jurisdictions (ie in the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Western Australia) there are exceptions for same-sex clubs, effectively allowing such clubs to exclude members of one sex.

5.12 In Queensland there is no exception for same-sex clubs although the relevant prohibition only applies to clubs that have a profit-making

[37] Section 44(4) *Human Rights Act 1993* (NZ).

purpose, so not-for-profit same-sex clubs can and do exist in Queensland. However, in July 2004 there were comments in the press, attributed to the Queensland Anti-Discrimination Commissioner, that suggest the days of same-sex clubs in Queensland may be numbered.[38]

5.13 In Victoria, a distinction is drawn between clubs that enjoy municipal facilities or funding (which must not discriminate) and private clubs (which may exclude people of one sex from membership or restrict such people to specified activities or facilities).[39]

5.14 In South Australia, clubs' activities are not a specific field in which discrimination is made unlawful (although they might be caught if they fall within the definition of "association").

5.15 Further, in a number of Australian jurisdictions, there are statutory provisions that allow a club, in certain circumstances, to discriminate between men and women when providing benefits to members. In *Corry and Others v Keperra Country Golf Club and Others,*[40] the respondent golf club limited the number of highly-sought after Saturday tee-times that were to be available for women members, while no such limit applied to male members.[41] The women member applicants complained to the Human Rights Commission that this constituted unlawful sex discrimination under the prohibition in section 25(2)(c) *Sex Discrimination Act 1984* (Cth) because it limited the women members' "access to any benefit provided by the club". The club relied on an exception to the prohibition in section 25(4), which provides that such discrimination is not unlawful if (a) it is not practicable for the benefit to be used or enjoyed to the same extent by both men and women, and (b) *either* the same or an equivalent benefit is provided for the use of men and women separately from each other, *or* men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit.

5.16 The commission found that the opportunity to play the golf course on a Saturday was a *benefit* under the statute, and that the women members' access to this benefit had been limited. Further, the commission was not persuaded by the club's argument that it would be impracticable to have more than two women tee-times on a Saturday because the men were on that day participating in a separate competition. The commission found that it was practicable for the benefit to have been used by men and women to the same extent, and that the question of practicability is different from "whether it is desirable, or whether the committee may think it desirable, that the men members should have a greater use of the course on the Saturday."

5.17 Because the first limb of the section 25(4) exception was not made out, the discrimination was unlawful and the commission was not required

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[38] See '*Male-bias clubs targeted*', *The Sunday Mail*, page 23, 18 July 2004.

[39] See section 78 *Equal Opportunity Act 1995* (Vic).

[40] (1985) 64 ALR 556.

[41] Only two Saturday tee-times were available to be booked by women members.

to rule on the second limb, in particular whether men and women members were each entitled to "a fair and reasonable proportion of the use and enjoyment of the benefit". The club had argued that the availability of two tee-times was a fair and reasonable proportion given the respective numbers of men and women that were likely to wish to play the course on a Saturday. However, the chairman of the commission, albeit obiter, expressed doubt that the club's arrangements met the 'fair and reasonable proportion' test in the second limb of section 25(4).

Exemptions

5.18 In Australia it is possible to apply for a temporary exemption from the legislation for what would otherwise be an unlawful act of discrimination,[42] although the New Zealand legislation does not provide for a similar process. Such exemptions have been granted in the sporting context. For example, in 2000 the Australian Olympic Committee successfully applied for an exemption from the Victorian Civil and Administrative Tribunal to allow it to have quotas for the number of women serving on its Athletes' Commission (which might otherwise have been unlawful discrimination under the prohibition relating to clubs).[43] In granting the exemption, the tribunal said it was relevant that the quotas promoted the objective of the legislation (because they sought to redress gender imbalance in key decision-making bodies) and were consistent with the spirit of the statutory exceptions.

5.19 Similarly, in 1998, the owner of a fitness centre successfully applied for an exemption from the then Victorian Anti-Discrimination Tribunal to allow the centre to operate exclusively for women. The tribunal considered that the women-only fitness centre would promote the objectives of the legislation because it would address "a disadvantage that women perceive in not otherwise being able to exercise in safe surroundings and in not being able to do so free from what is regarded as the intimidatory presence of men." The tribunal went on to say that "pregnant women, older women and those with what they would regard as unsatisfactory body shapes would be able to do exercise [sic] in an environment that accepted them uncritically."[44] In the spirit of equality,

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[42] For example, section 83 *Equal Opportunity Act 1995* (Vic) (under which the application is made to the Victorian Civil and Administrative Tribunal) and section 126 *Anti-Discrimination Act 1977* (NSW) (under which the application is made to the appropriate Minister).

[43] *Australian Olympic Committee – Exemption* [2000] VCAT 661.

[44] *Beach House Fitness Centre Pty Ltd* [1998] VADT 9. See also *Calesthenics Victoria Inc* [1998] VADT 13, in which an exemption was granted allowing the temporary exclusion of all males (including those under 12) from the sport of calesthenics (which was described as "choreographed movement to music … [involving] gymnastics, dance, singing, marching … sometimes done in make-up or costume"). The exemption was granted to allow the sport's organisers time to make changes that would allow males to participate more readily in the future. And also *City of Moonee Valley* [1999] VCAT 655, in which an exemption was granted to allow the operators of a swimming pool to open for women-only between 8pm and 10pm on Saturday evenings. In 2003, the same pool was permitted to open for men-only swimming sessions so as to benefit, among others, male

it should be noted that this case was preceded by a decision of the same tribunal that granted an exemption for a health and recreation complex for men-only because it promoted “the psychological well-being” of men “who have difficulties in coming to terms with their own sexual orientation or who feel embarrassed to show their own sexual orientation in mixed company.”[45]

6 The ‘relevance’ of strength, stamina and physique [46]

6.1 As seen above, the question of when strength, stamina and physique will be relevant in a given sporting activity is important in both New Zealand and Australian law. The issue was considered by Justice Morris in the Victorian Civil and Administrative Tribunal (VCAT) in February 2004 in the case of *Taylor and Others v Moorabbin Saints Junior Football League and Football Victoria Ltd*.[47]

6.2 Miss Taylor, aged 13, played in the Moorabbin Saints Junior Football League, which was a member of the state governing body, Football Victoria Ltd. Football Victoria had what it called a Female Participation Regulation, which was something of a misnomer because it effectively excluded all girls aged 12 or over from competing alongside boys in Football Victoria’s sanctioned competitions. The league, applying the Female Participation Regulation, ordered that Miss Taylor and two other girls (aged 14 and 15, respectively) could no longer play in the boys competitions. The three girls challenged this decision, claiming it constituted unlawful discrimination. The exclusion of the girls was prima facie unlawful under section 65 *Equal Opportunity Act 1995* (Vic),[48] but Justice Morris of VCAT had to consider whether the exception in section 66(1) applied,[49] ie whether strength, stamina or physique were relevant. In doing so, the judge had to determine, among other things:

(a) what is meant by strength, stamina or physique being *relevant* in a competitive sporting activity; and

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Muslims whose religious doctrine forbids mixed bathing, see *Moonee Valley City Council (Exemption)* [2003] VCAT 2026. For the granting of exemptions generally, see *Re Fernwood Fitness Centre* [1996] EOC ¶92-782.

45 *In the matter of Soreni Holdings Pty Ltd*, unreported, 5 September 1996, Victorian Anti-Discrimination Tribunal (referred to in the 1996 ANZSLA Newsletter 6(4) at page 7).

46 In sections [6-10] below, some of the key decisions of the Australian courts and tribunals on the various issues that relate to sex discrimination in sport are considered. While none of those decisions will be directly *binding* in New Zealand, the reasoning in many of them might well be adopted by the New Zealand judicial bodies that are faced with similar issues, within a similar statutory framework, and with relatively few directly relevant New Zealand decisions to assist them.

47 [2004] VCAT 158. For a more detailed analysis of the decision in *Taylor*, see the author’s article, *Aussie Rules? It’s a girls game*, on the Freehills website, www.freehills.com.

48 See paragraph [5.5] above.

49 See paragraph [5.7] above.

(b) whether strength, stamina or physique are relevant in Australian Rules football, and if so, at what age they become relevant.

6.3 The parties disagreed about how the language in section 66(1) should be construed. The league and Football Victoria argued that the mere *use* of strength, stamina or physique when participating in a given sport would make such an attribute *relevant* in that sport, and therefore allow the exclusion of girls aged 12 and over from that sport. A similar argument had been made many years earlier when the Trotting Control Board in South Australia sought an exemption from the provisions of the *Sex Discrimination Act 1975* (SA) that would allow the board to refuse any woman a licence to drive in trotting races. In that case, the board had argued, among other things, that an exemption should be granted to allow the exclusion of women from the sport because driving in such races required strength.[50]

6.4 Of course, this interpretation of section 66(1) would catch all sports - you need to use some element of strength, stamina and physique to throw a dart at a board, roll a marble or lift a chess piece. But the legislators could not have intended the exception to apply to all sports, and Justice Morris found that, in this context, mere *use* of strength, stamina or physique when participating in a sport does not make that attribute *relevant* in that sport.

6.5 The league and Football Victoria argued in the alternative that strength, stamina or physique would be relevant in a given sporting event when one or more of such attributes would have a bearing on the outcome of that event, which had been the test adopted by the South Australian Equal Opportunity Tribunal in *Commissioner for Equal Opportunity v Parsons*.[51] But, again, the outcome of contests in most, if not all sports is determined at least in part by the respective strength, stamina and physique of the competitors, and so the judge also rejected this proposition.

6.6 Rather, the judge decided that to allow exclusion from a given sport, what has to be relevant is the *relative* strength, stamina and physique of participants from each sex when competing. More particularly, the judge ruled that exclusion of one sex will be permitted in sports where, if the two sexes were to compete against one another, there would be a disparity between the males' strength, stamina or physique and the females' strength, stamina or physique, and that disparity would be of such a magnitude that it would have an appreciable effect on the ability of one sex to compete with the other, making the competition uneven.[52]

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[50] *Application by the Trotting Control Board for Exemption*, unreported, Sex Discrimination Board (SA), 1978. The Sex Discrimination Board refused to grant the exemption.

[51] EOC ¶92-978.

[52] In coming to this conclusion, Justice Morris took a purposive approach to the interpretation of section 66 (ie he looked for an interpretation that reflected the principal purpose of the legislation: the promotion of equal opportunity). He also relied on previous authority on the same issue, in particular the decisions of the Victorian Anti-Discrimination Tribunal in *Robertson v Australian Ice Hockey Federation* [1998] VADT 112 and the Victorian Civil and Administrative Tribunal in *Re*

6.7 The judge then had to apply this test to the case before him, ie he had to consider whether in certain age groups, there was a disparity between the strength, stamina or physique of males as against females, and if so whether such disparity had an appreciable effect on the ability of the participants to compete *in the sport of Australian Rules football*. Evidence was heard from experts in human movement, safety science and exercise sciences and the judge considered survey data collected from over 70,000 Australian children, in particular the figures showing, at certain ages, the mean weight of boys as against the mean weight of girls.

6.8 In considering the question of the strength, stamina and physique of competitors, Justice Morris was concerned with boys and girls *generally*, not with the applicants themselves. This is consistent with the reference to "competitors" (and the other wording) in section 66(1) *Equal Opportunity Act 1995* (Vic),[53] and had been the approach adopted by the Western Australia Equal Opportunity Tribunal in *Jernakoff v WA Softball Association (Inc)*.[54] So, for example, elite girl athletes who have levels of strength, stamina or physique well outside the 'normal' range for girls their age will not be able to rely on their individual attributes to challenge an otherwise lawful exclusion that is based on the average attributes of girls and boys.[55]

6.9 As one might expect, the figures for mean weight that the judge considered in *Taylor* revealed a disparity between girls and boys from a certain age. The judge accepted evidence that lean body mass is a better indicator of strength, stamina and physique than merely weight,[56] and adjusted the data before him to determine at what age the mean lean body mass of girls departed from that of boys. He found that before the age of 13 the mean lean body mass of girls is similar to (in fact slightly higher than) that of boys; that at the age of 13 the boys' mean becomes greater than that of the girls'; and that the disparity between the boys' mean and the girls' mean grows from the age of 13 onwards throughout the remaining childhood years.

6.10 So the judge had taken an indicator of strength, stamina and physique (lean body mass) and identified a growing disparity between the girls' and boys' mean figures. He then had to decide at what age the disparity becomes of such a magnitude that it has an appreciable effect on the ability of girls to compete with boys at Australian Rules football. The

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Somers and Mountain District Netball Association (1998) 14 VAR 235 and *South v Royal Victorian Bowls Association Incorporated* [2001] VCAT 207.

[53] And section 49(1) *Human Rights Act 1993* (NZ).

[54] (1995) EOC ¶92-981.

[55] However, in an earlier case, the South Australian Sex Discrimination Board preferred that the strength of women who wanted to compete with men at trotting be assessed on an individual basis (by trials) rather than by taking the average of the population as a whole. See *Application by the Trotting Control Board for Exemption*, unreported, Sex Discrimination Board (SA), 1978.

[56] Lean body mass is the total weight of the non-fat parts of the body (eg bones, blood, muscle, organs and water).

judge found that strength, stamina and physique are all attributes that are important in determining the success of a player and a team in Australian Rules football. He noted that success in that sport is also influenced by other attributes, such as skill, courage and dedication (and he might have added others like speed, vision, selflessness, injury-resistance and even luck).

6.11 He determined that the disparity between boys' and girls' mean lean body masses becomes of such a magnitude that it has an appreciable effect on the ability of girls to compete with boys at Australian Rules football at about the age of 14-and-a-half. He came to this view because at that age the difference between the mean male figure and the mean female figure becomes greater than one standard deviation of the male figure. So the judge concluded that the disparity between the strength, stamina and physique of males as against females in Australian Rules football *is not* sufficiently significant (in that it does not have an appreciable effect on the ability of the participants to compete) in the under-14 age group, but that the disparity *is* sufficiently significant in the under-15 age group. So, it had been unlawful for the league to exclude Miss Taylor from playing in the under-14 competition.[57]

6.12 Will the reasoning of *Taylor* be applicable in New Zealand, and to sports other than Australian Rules football? Certainly the virtually identical wording of the relevant provisions in the Victorian and New Zealand statutes suggest the judgment would have some resonance in New Zealand. But before a judge in New Zealand were to consider applying the reasoning in *Taylor*, he or she would need to examine at least two significant questions.

6.13 The first question is: why is it that when the disparity between mean boys' and girls' body masses reaches one standard deviation of the male figure, it is then (and only then) so pronounced that girls cannot compete with boys in Australian Rules football? It is clear, as a mathematical or statistical observation, that one standard deviation is a good indicator of there being a disparity between the sexes (it effectively means that at the age of 14-and-a-half, over 80% of boys have a lean body mass that is greater than the lean body mass of the 'average' girl). But what is not clear is why that particular degree of disparity should be regarded as having an appreciable effect on the ability of girls to compete with boys *in the particular sport of Australian Rules football*. Aside from the judge's rather general observations about the importance of strength, stamina and physique in determining success in that sport, there is nothing at all to link the one-standard-deviation test to the particular characteristics of the sport of Australian Rules football.

[57] However, it had been lawful for the league to exclude the other two girls from the under-15 competition (but even so, the judge urged Football Victoria not to exclude girls from the under-15 competition but, rather, to give girls the choice of whether or not to participate).

6.14 The second question, which follows from the first, is: can other sports in jurisdictions that have similar legislative provisions (eg New Zealand) apply the analysis and statistics from *Taylor*? In other words can, say, the New Zealand Boxing Association, or the New Zealand Badminton Federation, take the mean body mass figures from this case (or figures from New Zealand which, one assumes, would be similar) and exclude girls at the under-15 level in those sports because that is where the disparity between the sexes amounts to one standard deviation?

6.15 Because there is little in the *Taylor* judgment to explain why a difference of one standard deviation in the average figures was sufficient to conclude that competition between sexes would be uneven *in the sport of Australian Rules football*, this makes it difficult to apply the decision to sports in which strength, stamina and physique might influence the ability to compete to a greater or lesser extent than they do in Australian Rules football.

6.16 In his judgment in *Taylor*, Justice Morris found that "the application of the provisions of section 66(1) to Australian Rules football is not substantially different than [sic] its application to sports such as softball or tennis."[58] But this is a strange conclusion. Surely it cannot be supposed that all sports should be treated the same for the purposes of determining when strength, stamina and physique is relevant? The contrary position is set out in the earlier case of *Jernakoff v WA Softball Association (Inc)*, in which it was held that the governing body's decision to exclude girls aged 13 and over from mixed softball competitions was not unlawful. In *Jernakoff*, the Equal Opportunity Tribunal stated that the application of the relevant statutory provision will "vary from sport to sport".[59] Notably, it has been ruled that the disparity between the respective strength, stamina and physique of men and women is not relevant (at any age) in the sport of lawn bowls.[60] And however perverse it may now appear to be in light of *Taylor*, in netball the disparity between the respective strengths of girls and boys was ruled to be relevant at the age of 12, ie two-and-a-half years earlier than in Australian Rules football (albeit following a rather less scientific approach than that which was subsequently adopted by Justice Morris in *Taylor*).[61]

6.17 One imagines that while strength, stamina and physique still influence the success of a netball player or a badminton player, such attributes are less important in those sports than they are in Australian Rules

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[58] [2004] VCAT 158, at paragraph 79.

[59] (1995) EOC ¶92-981.

[60] See *South v Royal Victorian Bowls Association Incorporated* [2001] VCAT 207. The ruling in that case (that men-only bowls competitions were unlawfully discriminatory) prompted a series of applications for exemptions under the Victorian legislation, so as to allow a certain number of men-only and women-only competitions to continue. See, for example, *Royal Victorian Bowls Association Inc and Victorian Ladies Bowling Association Inc* [2003] VCAT 1301.

[61] See *Re Somers and Mountain District Netball Association* (1998) 14 VAR 235.

football. And so mean figures for lean body mass should be less relevant in netball or badminton than they are in Australian Rules football. This ought to mean that, in order for the disparities in the boys' and girls' averages to be significant in such sports, those disparities would have to be greater than they were in *Taylor* (and the disparities would have to be smaller in sports where strength, stamina and physique are more relevant than they are in Australian Rules football, eg perhaps in power lifting or boxing). But if that is so, there is no telling how greater or smaller the disparities must be.[62]

7 The purpose of discrimination

7.1 Will well-meaning discrimination still be discrimination? The answer is yes. For example, in Victoria, the statute clearly provides that the purpose or rationale of a discriminatory act or omission will not affect whether or not it is discrimination.[63] In *Taylor*, the tribunal in Victoria considered the rationale for the league's Female Participation Regulation. Evidence was heard that the motives for formulating and applying the regulation were first to protect the safety of the players (presumably the girls), and second to avoid the boys from modifying their playing behaviour when playing alongside or against the girls. Justice Morris was scathing about this approach. He considered that there was no evidence that the regulation protected player safety, and that in any event, a female player ought to be allowed to choose to take the risks of playing football with boys who might be bigger, stronger and fitter. He described the approach of Football Victoria and the league in this respect as misguided, misplaced, sexist and belonging in another age. He was equally dismissive of the idea that boys should be discouraged from modifying their behaviour when playing with girls. But, although in this case the judge did not consider the discrimination to have been well-motivated, because the motive behind a discriminatory practice is irrelevant to the question of whether or not there has been discrimination, even if the discrimination had been well-motivated it would not have affected the decision.

7.2 So in Victoria, well-meaning discrimination is still discrimination, as it almost certainly would be in New Zealand, although there is no equivalent to section 10 *Equal Opportunity Act 1995* (Vic). The question then becomes whether the motive or purpose behind the discrimination will be relevant to the *lawfulness* of the discrimination. In most Australian jurisdictions (and in New Zealand), the answer is that the purpose *can* be relevant in determining lawfulness. For

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[62] It is possible (although not particularly desirable) that the courts would allow exclusions of one sex from competing in a given team sport but only in certain positions, and not others. For example, in *Robertson v Australian Ice Hockey Federation* [1998] VADT 112, the Victorian Anti-Discrimination Tribunal was satisfied that at a certain age the strength, stamina or physique of girls (relative to boys) were *relevant* in ice hockey, except in the non-contact position of goalkeeper, where the tribunal found such attributes not to be *relevant*.

[63] Section 10 *Equal Opportunity Act 1995* (Vic).

example, under the Australian federal statute, the purpose of an otherwise unlawful act of discrimination might render it lawful. The federal legislation has an exception to its prohibitions (the so-called "special measures provision") that allows a person to "take special measures for the purpose of achieving substantive equality between … men and women …".[64]

7.3 The predecessor to this provision, before its repeal in 1995, effectively allowed discrimination "a purpose of which is to ensure that persons of a particular sex … have equal opportunities with other persons in circumstances in relation to which provision is made by this Act."[65] The McLeod Country Golf Club relied on this section (when it was in force) when defending the club's regulations that permitted only women to take part in the management and administration of the club. The challenge to these regulations (brought by eleven male members of the club) would have failed in any event because the club was not a trading corporation and therefore its activities were outside the application of the statute.[66] However, the Human Rights and Equal Opportunity Commission considered whether the "special measures" provision applied, and in doing so heard evidence about the difficulties faced by women golfers in Brisbane (in terms of access to courses, fee structures and the availability of facilities) and the alleviation of such difficulties that the McLeod Country Golf Club presented to its members. The commission ruled that the club's seemingly discriminatory regulations were a justifiable special measure "designed to ensure that an equal opportunity is afforded to women to participate in golf in a manner equivalent to that enjoyed by men …".[67]

7.4 In New Zealand, section 73 *Human Rights Act 1993* (NZ) serves a similar role to the provision in the Australian federal legislation. Section 73 provides, in relevant part:

> *Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of the Act [ie. the prohibitions on discrimination] shall not constitute such a breach if –*
>
> *(a) it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of the Act; and*
>
> *(b) those persons or groups need or may reasonably be supposed to need assistance or advancement*

[64] Section 7D *Sex Discrimination Act 1984* (Cth).

[65] Section 33 *Sex Discrimination Act 1984* (Cth) (now repealed).

[66] See footnote [30] above.

[67] *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club* [1995] HREOCA 25.

in order to achieve an equal place with other members of the community.

7.5 It seems logical that, in certain circumstances, analysis similar to that which took place in *McLeod Golf Club* could be applied to in New Zealand so as to allow seemingly discriminatory measures to enjoy exemption from the statutory prohibitions. This would be on the basis that they, for example, promoted women's participation in sports in which there is currently inequality.

7.6 Further, in New Zealand (as in Australia), indirect discrimination can be excused where the person discriminating "establishes good reason for it".[68]

7.7 As a final note on the issue of purpose: in New Zealand, if the discrimination is perpetrated by a public body, it will not be unlawful so long as that body can show that the discrimination is a measure "taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of [sex] discrimination …".[69]

8 Discrimination against pregnant women

8.1 Discrimination on the basis of pregnancy is prohibited throughout Australia and New Zealand, either as a specific ground of discrimination, or (as it is in New Zealand) as a characteristic of discrimination on the ground of sex.[70] Further, the legislation in Australia and New Zealand allows for privileges or preferential treatment to be provided to pregnant women without that constituting unlawful discrimination (against men).[71]

8.2 The question of discrimination on the basis of pregnancy may arise in a sporting context when, say, an event organiser or governing body seeks to exclude pregnant women (or potentially pregnant women) from participating in the competitions it organises.

8.3 In 1997, the Victorian Anti-Discrimination Tribunal considered an application for an exemption made by the governing body for taekwondo in Australia, which would have allowed the governing body to require each female competitor aged over 15 to submit, prior to each competition, a medical certificate demonstrating that she was not pregnant.[72] Under the Victorian statute (and unlike in New Zealand), pregnancy is a discrete attribute on the basis of which discrimination is

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[68] Section 65 *Human Rights Act 1993* (NZ).

[69] Section 19(2) *New Zealand Bill of Rights Act 1990* (NZ).

[70] For example, section 21 *Human Rights Act 1993* (NZ), which lists among the prohibited grounds of discrimination, "sex, which includes pregnancy".

[71] For example, section 73 *Human Rights Act 1993* (NZ), which provides that "preferential treatment granted by reason of … a woman's pregnancy … shall not constitute [unlawful discrimination]".

[72] *TKD Australian Taekwondo Inc* [1997] VADT 68.

prohibited.[73] The tribunal heard that the sport of taekwondo involves punching and kicking to the stomach area, and the exemption was granted because the purpose of requiring the certificate was to protect the health and safety (of the competitors and the unborn children), which was a general concern of the legislation. However, the tribunal thought it possible that the discrimination would have been lawful in any event (ie without the exemption), due to the operation of Victorian legislative provisions which (unlike those in New Zealand)[74] allow discrimination on the basis of physical features or pregnancy where that is necessary to protect the health and safety of any person (including the person discriminated against).[75]

8.4 Australia then saw the well-publicised case involving netball player, Trudy Gardner. Ms Gardner played as a professional in the Australian national netball league. In June 2001, shortly after Ms Gardner discovered that she was pregnant, the national netball association imposed a ban on pregnant women competing in the national league, so Ms Gardner was prevented from competing. This was despite Ms Gardner having been advised by her obstetrician that there was no medical reason preventing her from playing netball during the early stages of her pregnancy. She complained to the Human Rights and Equal Opportunity Commission that this was unlawful discrimination under the federal legislation, and successfully applied to the Federal Magistrates Court for an interim injunction lifting the ban.[76]

8.5 The Federal Magistrates Court considered the case in full in March 2003.[77] The federal legislation prohibits discrimination on the ground of sex, which includes treating a woman less favourably than a man would be treated by reason of "a characteristic that appertains generally to [women]".[78] That provision would cover pregnancy, but there is also a specific prohibition on discrimination on the ground of pregnancy, which includes treating a woman less favourably *than other women* because that woman is pregnant or potentially pregnant.[79] The national association, which had replaced the league as respondent, accepted that the ban discriminated against Ms Gardner on the ground of her pregnancy. The association's defence (which was ultimately unsuccessful) was that (a) Ms Gardner should be treated as a member of the association, and (b) as the association was a voluntary body it

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73 Section 6(h) *Equal Opportunity Act 1995* (Vic).

74 See paragraph [8.8] below.

75 Section 80 *Equal Opportunity Act 1995* (Vic).

76 *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408.

77 *Gardner v AANA Ltd* [2003] FMCA 81.

78 Sections 5(1) and 22 *Sex Discrimination Act 1984* (Cth).

79 Sections 7 and 22 *Sex Discrimination Act 1984* (Cth). The language is far more explicit than it is in New Zealand, see paragraphs [8.9-8.11] below.

was entitled to discriminate on the ground of pregnancy in connection with the provision of benefits to members.[80]

8.6 While it was a significant victory for pregnant sportswomen, some issues still remain unresolved in the aftermath of *Gardner*. One such issue is whether it will *ever* be possible to legitimately ban pregnant women from competing, for example, even women at a late stage in pregnancy.[81] At the injunction hearing in *Gardner*, the court heard medical evidence from the league to the effect that playing netball was potentially dangerous to the health of the unborn child even during the early stages of the pregnancy (although contrary evidence was preferred). But what if a pregnant woman insisted on participating in a contact sport well into the last few weeks or days of pregnancy? Even if there was uncontested medical opinion to the effect that such competition was potentially hazardous to the health of the woman or the unborn child, under Australia's federal legislation there is no provision to allow for a ban in these circumstances, and so such a ban would constitute unlawful discrimination.

8.7 As seen in *TKD Australian Taekwondo*, the Victorian legislation does have a provision allowing discrimination to protect health and safety, and so in Victoria and other jurisdictions where such legislation is in place, the courts would be able to decide whether, on the evidence before them, bans of all women past a certain stage of pregnancy would be justified under the statutory provisions.

8.8 In New Zealand, there is no specific statutory provision allowing pregnancy-discrimination on the basis of health and safety. It might be argued that such discrimination would be exempted under the disability provisions in sections 29(1)(b) or 49(3) *Human Rights Act 1993* (NZ), but realistically it is doubtful that those provisions could extend to pregnancy. This means that, save for the application of any statutory exceptions, a ban on pregnant women competing in sport in New Zealand, even a ban that only applied to women in the last few weeks of pregnancy, would probably constitute unlawful discrimination under the *Human Rights Act 1993* (NZ).

8.9 However, the position is not all plaintiff-friendly. The other issue that remains unresolved after *Gardner* concerns the law in jurisdictions (such as New Zealand)[82] where there is no specific prohibition on discrimination on the ground of pregnancy, but rather there is simply a prohibition on discrimination on the ground of "sex", and pregnancy is

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[80] Section 39 *Sex Discrimination Act 1984* (Cth). In fact, the association's members were regional associations, not individuals. Ms Gardner was a member of a club, which was a member of a regional association (South Australian Netball Association Incorporated), which in turn was a member of the national association. Notwithstanding the association's arguments that a liberal construction ought to be given to the question of membership, the court concluded that since Ms Gardner was not (and could not have been) a member of the national association, the voluntary body exemption did not apply to her and the discrimination had therefore been unlawful.

[81] Ms Gardner had been about 15 weeks pregnant at the time of her purported ban.

[82] Section 21(1)(a) *Human Rights Act 1993* (NZ).

included as a characteristic of sex discrimination. This question is whether in some cases a ban on pregnant women would be found to be unlawful discrimination at all.

8.10 The problem is that sex discrimination is about treating women differently from men. And this means that discriminating against women because they are pregnant is all about treating women differently from men (because only women get pregnant). But what if men are removed from the analysis? Imagine if the governing body for netball in New Zealand legitimately ran women-only netball competitions,[83] and imposed a ban on any pregnant women from participating in those competitions. This might be challenged by a pregnant woman, as it was in *Gardner*, on the basis that it was unlawful discrimination (in respect of the provision of goods, facilities and services).[84] For the challenge to be successful, the pregnant woman would have to show that she was being denied the relevant service by reason of one or more of the prohibited grounds of discrimination.

8.11 Because there is no specific ground of ‘pregnancy’, the ground on which she would have to rely would be ‘sex’. But would she be suffering discrimination on the ground of her sex? She would not be being treated worse than any man, because all men would be (legitimately) excluded from the competition anyway. And so, the argument might run, the discrimination would not be on the basis of her sex at all. In other words, in the sport-specific situations where discriminating against a pregnant women is not about treating women differently from men (but is, rather, about treating pregnant women differently than other women), the application of the prohibition on sex discrimination is not absolutely clear. If the New Zealand statute contained an express prohibition on discrimination on the ground of pregnancy, as the Victorian and Australian federal statutes do, this area of doubt would not exist.

9 Preventing women from competing with women

9.1 In *Ferneley v Boxing Authority of New South Wales and Another*,[85] the Australian federal court considered the application of the sporting exception in the Commonwealth statute, ie that which allows (as in New Zealand) the exclusion of one sex from a sport in which the strength, stamina or physique of competitors is relevant.[86] In particular, Justice Wilcox assessed whether that exception was concerned simply with both sexes competing together, or whether it could be invoked to legitimately exclude women from competing against women in a given sport (in that case, boxing).

[83] Assuming that men could be excluded under section 49 *Human Rights Act 1993* (NZ).

[84] Section 44 *Human Rights Act 1993* (NZ).

[85] (2001) 191 ALR 739.

[86] Section 42 *Sex Discrimination Act 1984* (Cth).

9.2 Albeit as an *obiter* statement, the judge stated that the legislators' intention was to confine the application of the sporting exception to mixed-sex competition, and that therefore if a woman was prevented from competing against another woman in a sporting encounter (eg in a boxing match), and that prevention was unlawful discrimination under the statutory prohibitions, it could not be rendered lawful by demonstrating that strength, stamina or physique is relevant in boxing. This ought to be the case in New Zealand as well, although there is no reported decision to confirm this.

10 Discrimination against men

10.1 It was argued in *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club* that the Australian federal legislation only prohibits discrimination against women and not discrimination against men.[87] This was based on a provision of the statute that states that the prohibitions "have effect in relation to discrimination against women, to the extent that the provisions give effect to the [Convention on the Elimination of All Forms of Discrimination Against Women]."[88] The argument was unconvincing and the Human Rights and Equal Opportunity Commission found it to have no substance. The Commission ruled that the statute proscribed discrimination against members of either sex, and relied on one of the stated objects of the legislation, which was "to eliminate, so far as is possible, discrimination against *persons* on the ground of sex" (emphasis added).[89]

10.2 In *Taylor*, it was argued by the female footballers that the exception in section 66(1) *Equal Opportunity Act 1995* (Vic) (ie that which allows the exclusion of one sex from sports in which strength, stamina or physique is relevant) should be limited in its application in that it should only allow the exclusion of one sex where this was necessary to ensure that the other sex (the non-excluded sex) was not disadvantaged. Put bluntly, in practical terms this reading of the exception (what Justice Morris called the 'one-way interpretation') would prohibit discrimination against women but permit discrimination against men: it would mean that excluding girls from football would be unlawful, but excluding boys from netball would not.

10.3 The judge was attracted by the argument, but found that it was inconsistent with the words of section 66(1) and therefore declined to accept that the one-way interpretation was applicable. However, he did suggest that such an interpretation might more readily apply in Queensland and the Northern Territory, where the sporting exception

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87 [1995] HREOCA 25.

88 Section 9(10) *Sex Discrimination Act 1984* (Cth).

89 Section 3(b) *Sex Discrimination Act 1984* (Cth).

in the statutes refers to what is *reasonable* having regard to the strength, stamina or physique required in the activity.[90]

10.4 The New Zealand statute does not refer to *reasonableness*, and therefore it is unlikely that the courts in New Zealand would come to an interpretation that allowed discrimination against men (but not women) in this way.

11 Discrimination against transsexuals

11.1 Discrimination against transsexuals (ie treating, say, a male-to-female transsexual differently from a woman) is a difficult area of the law on discrimination and one which often provokes heated debate.[91] This is not just in criminal law, family law and social security law, but also when it comes to sport, typically where there is concern that male-to-female transsexuals will compete against women and enjoy a competitive advantage. It is risible to think that a man would go through a complicated anatomical, psychological and social transformation, and live out the rest of his life as a woman, purely in order to compete against (and enjoy an advantage over) women in sport. But the intentions of the transsexual are not the point; the real question is whether women will be unfairly disadvantaged when competing against male-to-female transsexuals.

11.2 Those who promote the exclusion of transsexuals argue that a male-to-female transsexual will have an advantage over women due to (a) the physical development that the transsexual will have gone through as a male, and (b) the continuing sporting benefits of having been born a male (high levels of testosterone, high muscle-to-fat ratio, and high heart and lung capacities). The counter-argument, among others, is that male-to-female transsexuals typically take high does of oestrogen (which decreases strength) and often no longer produce testosterone.

11.3 Interestingly, in 2004 the International Olympic Committee advisory group recommended that transsexuals may compete in the Olympic Games in their adopted sex. However, before doing so, they must have had corrective surgery and appropriate hormone therapy.[92]

11.4 In 1993 an International Bill of Gender Rights was adopted at a meeting of the International Conference on Transgender Law and Employment Policy Inc in Texas. That Bill of Gender Rights recognised, among other things, that "no individual should be … denied participation in an activity by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia,

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[90] See paragraph [5.4] above.

[91] Broadly speaking, a transsexual is a person who was born as a member of one sex but who wishes to be identified as a member of the other sex (whether or not that person has had 'sex change' surgery or other treatment). Some legislation refers to a 'transgender' rather than a transsexual, although the terms are interchangeable.

[92] See http://www.cnn.com/2004/SPORT/05/17/olympics.transsexual/.

assigned birth sex, or initial gender role." On its face, that "right" would prohibit any attempt to exclude a male-to-female transsexual from competing against women in, say, netball or tennis (and, unlike with the IOC's position, this would not be limited to transsexuals who have had surgery and other therapy).

11.5 But that Bill of Gender Rights is not a part of New Zealand law, and so the question remains: is discriminating against transsexuals in sport unlawful in New Zealand? The answer is not clear. New Zealand's legislature may boast the world's first transsexual Member of Parliament (Georgina Beyer), but it has not enacted any specific prohibition of discrimination against transsexuals. In 1995, the New Zealand Human Rights Commission acknowledged that discrimination on the basis of a person being a transsexual is not of itself unlawful, but it gave an opinion that discrimination complaints from transsexuals would be upheld by the Commission if in each case it could be shown that the discrimination was in fact on the basis of one of the prohibited grounds, eg the imputed sex, imputed sexual orientation, or imputed 'disability' of the transsexual person.[93]

11.6 In fact, it seems unlikely (and it might conceivably be offensive to suggest) that these attributes are appropriate to cover discrimination against transsexuals. In reality, without specific amendment to the legislation, it remains unclear the extent to which transsexuals can rely on the *Human Rights Act 1993* (NZ) to protect them from discrimination. Certainly it is not clear whether the exception that relates to sport will allow, for example, the organisers of a women's netball tournament to legitimately exclude a male-to-female transsexual from competing.[94]

11.7 One view, based on the persuasive submissions of an *Amicus Curiae* in a case concerning transsexuals and the 'right' to marry, is that the exclusion of male-to-female transsexuals from women's sport should be permitted. In *Attorney-General* v *Otahuha Family Court*,[95] the New Zealand High Court recognised that a post-operative transsexual should have no impediment to marrying as a member of his/her adopted sex. The judgment in that case contains many extracts from the submissions of Ms Vivienne Ullrich (now a judge, but who was then appearing as *Amicus Curiae*). Ms Ullrich's view was that a transsexual should have the right to marry as a member of his/her adopted sex, but she saw this as wholly different from a transsexual having the right to compete in a sporting contest as a member of his/her adopted sex, where that was to be to the disadvantage of other competitors. In particular, Ms Ullrich considered that excluding a male-to-female transsexual from participating as a woman in a competitive sporting activity was justifiable (as it would avoid the transsexual enjoying an unfair

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[93] *C261/94*, unreported, Human Rights Commission, 2 March 1995, see http://www.hrc.co.nz/index.php?p=13684&/id=13982&wd0=transsexual&format=.

[94] Section 49 *Human Rights Act* 1993 (NZ), see paragraphs [4.15-4.18] below.

[95] [1995] 1 NZLR 603.

advantage and depriving the women athletes of prize money and other earnings), whereas she thought it unjustifiable to prevent such a transsexual from lawfully marrying as a woman (because that concerned a private contract between two individuals where there was no potential for disadvantaging third parties).

11.8 In Australia some of the states and territories have specific legislation prohibiting discrimination against transsexuals. For example in New South Wales, there is such a prohibition, but also an exception to that prohibition which allows the "exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies".[96] So in that state the position is clear: a male-to-female transsexual can legitimately be excluded from competing against women at sport (and in New South Wales that means *any* sport: there is no need for strength, stamina or physique to be relevant). But, for what it is worth, in New South Wales a male-to-female transsexual will ordinarily remain free to compete against men.

11.9 However, in Victoria, the provision in the legislation that allows, in certain circumstances, the exclusion of one sex from sporting activity, also allows the exclusion of transgenders, or more specifically any person of one sex who identifies "on a bona fide basis … as a member of the other sex" (or any person of an "indeterminate sex" who identifies "on a bona fide basis … as a member of a particular sex").[97] This would allow sports organisers to stop male-to-female transsexuals from competing against women, but it would also allow sports organisers to stop male-to-female transsexuals from competing against men, which would be an unusual and unfortunate consequence. That said, this does not apply to all sports: in order for such an exclusion to be lawful, the sport must be one in which strength, stamina or physique is relevant. However, applying this analysis (of when strength, stamina or physique is relevant) to transsexuals will be challenging: it is difficult enough when considering the exclusion of men or women;[98] it will be more so when assessing the lawfulness of excluding, say, a male-to-female transsexual from a women's tennis tournament.

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[96] Sections 38B and 38P *Anti-Discrimination Act 1977* (NSW).

[97] Sections 4(1) and 66(1) *Equal Opportunity Act 1995* (Vic) and footnote [36] below.

[98] See section [6] above.