

Disability Discrimination in Children's Competitive Sport

A Human Rights Perspective¹

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2 See, eg, *International Charter of Physical Education, Physical Activity and Sport*, UN ESCOR, 38th mtg, Agenda Item 4.9, UN Doc SHS/2015/P1/H/14 REV (18 November 2015).

3 Nick Hodge and Katherine Runswick-Cole, 'They Never Pass Me the Ball': Exposing Ableism Through the Leisure Experiences of Disabled Children, Young People and Their Families' (2013) 11(3) *Children's Geographies* 311; Simon Darcy, Daniel Lock and Tracy Taylor, 'Enabling Inclusive Sport Participation: Effects of Disability and Support Needs on Constraints to Sport Participation' (2016) 39(1) *Leisure Sciences* 20; Simon Darcy and Leanne Dowse, 'In Search of a Level Playing Field – the Constraints and Benefits of Sport Participation for People with Intellectual Disability' (2013) 28(3) *Disability & Society* 393; Simon Darcy et al, *Getting Involved in Sport: Participation and Non-Participation of People with Disability in Sport and Active Recreation* (Report, 2011); Howard L Nixon, 'Constructing Diverse Sports Opportunities for People with Disabilities' (2007) 31(4) *Journal of Sport and Social Issues* 417.

4 See, eg, *Disability Discrimination Act 1992* (Cth) s 3 ('*Disability Discrimination Act*'). Note that the *Convention on the Rights of Persons with Disability* was ratified by Australia in 2008, and the *Disability Discrimination Act* was introduced in 1992. Changes to the *Disability Discrimination Act* have been made which might be said to be consequential upon the *Convention on the Rights of Persons with*

I Introduction

Children participate in sport for various reasons. Sport provides opportunities for health and wellbeing, teamwork, a sense of accomplishment and self-esteem, among other things.² However, for children with disability, their experience in competitive sport is different to that of children without disability, because they take part with a disability.³ At times, they may need extra support to take part, the rules may impact the contest being fair, they may be included physically without concern for their ability to 'keep up', they may be provided a separate sport from the mainstream, or they may be excluded from participating altogether. The nature of children's competitive sport is such that the rules are designed without recognising that a child with a disability may be at a disadvantage. The disadvantage that children with disability face in competitive sport raises significant issues. One of those issues is whether a child with disability is unfairly discriminated against on the basis of impairment if they are not provided a fair contest. Discrimination legislation aims to limit unfair discrimination for people with disability.⁴ Non-discrimination is also a fundamental human right.⁵ If a child is unfairly discriminated against on the basis of their impairment in their treatment and experience in sport, the law and/or human rights may provide a solution.

The *Disability Discrimination Act 1992* (Cth) ('*DDA*') provides that treating a person 'less favourably' because of their disability is discriminatory and unlawful; yet there are exceptions in a sporting context.⁶ The *DDA* requires sporting organisations to facilitate reasonable adjustments to sporting activities to provide for people with disabilities so they are treated no less favourably than those without disability in circumstances that are not materially different. However, it is not necessarily understood nor implemented, what it means to treat a person no less favourably than a person without disability in sport. And therefore, the *DDA*, whilst apparently reflecting the human right to non-discrimination, may not be implementing human rights as they relate to sport. The human right to non-discrimination includes being treated with equality in competitive sport, and it is only effective if it is implemented through domestic law. The realities of Australia's discrimination legislation are that children with disability can be treated less favourably than children without disability in competitive sport. Where children with disabilities are involved in competitive sport, it is often not done in a way which provides them the same opportunity for a fair contest as children without disability enjoy, or segregates them into 'lesser' or limited sporting opportunities. Sport is structured in such a way that it contravenes the human rights of children with disability to be free from discrimination. This article considers those issues drawing upon international and domestic frameworks governing disability discrimination for children.

II The Human Right to Sport

Sport is a fundamental social, health and community activity.⁷ While some commentary exists that sport itself, or participation in sport, is a human right,⁸ or that there is a human right 'to the practice of sport',⁹ there are difficulties and complexities in establishing these rights.¹⁰ Questions arise as to firstly, where that right is found, and secondly, whether the 'right' is simply to physical inclusion, without regard to impairment, or a 'right' to a fair contest. It is apparent that there is no human right to participate in sport. However, it is unassailable that sport is an activity to which human rights apply, such as the right not to be discriminated against; or that there are human rights which sport might facilitate. For example, because people have a right to 'health, participation in cultural life and development', sport may facilitate achieving that right.¹¹

Various conventions and other human rights instruments apply the human right to non-discrimination for children with disabilities in their treatment in sport. The *Convention on the Rights of People with Disability* ('CRPD') provides that all people are 'equal' and worthy of legal protection. Children with disabilities have been acknowledged to deserve 'all human rights and fundamental freedoms on an equal basis with other children'.¹² More specifically, the human rights instruments refer to the treatment of people with disability in sport. The CRPD provides:

5. With a view to enabling persons with disabilities to participate on an equal basis with others in ... sporting activities, States Parties shall take appropriate measures:
 - (a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels; ...
 - (d) ... in the school system.¹³

The *International Charter of Physical Education, Physical Activity and Sport* provides that 'inclusive, adapted and safe opportunities to participate' in sport should be available to all.¹⁴

'Discrimination' is not defined in the human rights instruments that initiate and declare it as a right to be free from, namely the *Universal Declaration of Human Rights*.¹⁵ However, the CRPD does define discrimination for a person with disability, to mean:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms ... including denial of reasonable accommodation.¹⁶

Making 'reasonable accommodation', means:

necessary and appropriate modification and adjustments not imposing disproportionate or undue burden ... to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹⁷

The *Convention on the Rights of the Child* declares that children should be free from 'discrimination of any kind' irrespective of their disability,¹⁸ and that governments should 'take all appropriate measures to ensure that the child is protected against all forms of discrimination'.¹⁹

III Equality and Non-discrimination in Sport

Equality and non-discrimination are challenging concepts when it comes to children with disability in competitive sport. When children with disability participate in sport, it does not necessarily mean they are involved in a fair contest.²⁰ For example, if a child with a disability is permitted to compete against a competitor without disability without adjustments being made to account for disadvantage, they are being allowed to participate. They may be taking part physically, but not in a way which is fair. They are at a disadvantage in the contest due to the failure to adjust the environment to account for disadvantage.

'Equality' is a term consistently applied across human rights instruments. Despite the acknowledged complexities of the term,²¹ it is relevant to children's sport.

Disability, but it has not been explicitly set out in the legislation. Cf *Racial Discrimination Act 1975* (Cth) which refers to human rights obligations.

- 5 *Convention on the Rights of Persons with Disability*, opened for signature 30 March 2007, 2515 UNTS 3, (entered into force 3 May 2008) art 3(b) ('CRPD').
- 6 *Disability Discrimination Act* (n 4) s 28(3).
- 7 Sarah Somerset and Derek J Hoare, 'Barriers to Voluntary Participation in Sport for Children: A Systematic Review' (2018) 18(1) *BMC Pediatrics* 47.
- 8 See, eg, Rachel McKinnon, 'Participation in Sport is a Human Right, Even for Trans Women', *Sports Integrity Initiative* (Web Page, 17 June 2019) <<https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/>>; Bruce Kidd and Peter Donnelly, 'Human Rights in Sports' (2000) 35(2) *International Review for the Sociology of Sport* 131; Paulo David, *Human Rights in Youth Sport: A Critical Review of Children's Rights in Competitive Sport* (Routledge, 2005).
- 9 See, eg, Genevieve Lim, 'A Right to Sport: Theory, Evidence and Implications' (2012)1–2 *The International Sports Law Journal* 120.
- 10 *Ibid.*
- 11 *Human Rights Council, Final Report of the Human Rights Council Advisory Committee on the Possibilities of Using Sport and the Olympic Ideal to Promote Human Rights for All and to Strengthen Universal Respect for Them*, UN Doc A/HRC/30/50 (17 August 2015) 4.
- 12 CRPD (n 5) art 7(1).
- 13 *Ibid* art 30.5(a), (d).
- 14 *International Charter of Physical Education, Physical Activity and Sport*, UN Doc SHS/2015/P1/H/14 REV (n 2) art 1.3.
- 15 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948).
- 16 CRPD (n 5) art 2.
- 17 *Ibid.*
- 18 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) art 2.1.
- 19 *Ibid* art 2.2.
- 20 Peter FitzSimons, 'Rethink Needed on Junior Football Club's Opposition to Marc Reichler-Stillhard', *Sydney Morning Herald* (online, 18 August 2017) <<https://www.smh.com.au/sport/peter-fitzsimons-a-rethink-needed-on-barred-down-syndrome-boy-20170818-gxz8u3.html>>; Simone Pearce, 'Disability Discrimination in Children's Sport' (2017) 42(2) *Alternative Law Journal* 143; Nixon (n 3); Jill M LeClair, 'Global Organizational Change in Sport and the Shifting Meaning of Disability' (2011) 14(9) *Sport in Society* 1072, 1077.
- 21 See, eg, Sandra Fredman, *Discrimination Law* (Oxford Press, 2nd ed, 2011) 25.

- 22 Ibid.
 23 Ibid.
 24 There are many instances where children with disability are provided different opportunities that are very different from those without disability, and not just to provide fairness, which is not always necessary.
 25 Note there are times when safety, or the impossibility of doing the activity, means that it is necessary to separate the children.
 26 *Disability Discrimination Act* (n 4) s 28.
 27 Ibid s 5.
 28 Ibid s 4.
 29 Ibid s 28(3).
 30 Pearce (n 20); Simone Pearce and Dominique Moritz, '#whataboutme: Can the Inclusion of Gender Diverse Children Pave the way for children with disability in sport?' *Australian and New Zealand Sports Law Journal* (forthcoming).
 31 *Disability Discrimination Act* (n 4) s 28(3).
 32 (1999) EOC ¶193-031.
 33 Ibid [1.2].
 34 Note that this case was decided before the *Disability Discrimination Act* amendment that required a reasonable adjustment in s 5.

When children with disability are included in a sporting competition, without any adjustments for disadvantage encountered, there may not be equality in the competition because all children are being treated the same. When the same circumstances are applied to all people equally, this is known as *formal equality*. Formal equality can produce injustices because treating people with disability the same as people without disability may leave them at a disadvantage.²² Substantive equality, comparatively, provides adjustments for a person based upon the whole of their differing circumstances and background, and allows them to compete in a way that accounts for the disadvantage they experience.²³ Substantive equality in children's sport provides all children with a fair contest, with reasonable adjustments made for children with disability to address the disadvantage created by the environment. Where children with disability are excluded, included without adjustment to recognise disadvantage, or segregated into a separate (or non-comparable)²⁴ competition unnecessarily,²⁵ substantive equality is not provided. Despite the 'equality' terminology being used in human rights instruments, children with disability are not always provided equality when it comes to competitive sport, and domestic legislation in Australia does not resolve that inequality.

iv Discrimination Legislation and Sport in Australia

The *DDA* provides that it is unlawful to exclude a person, including a child, from a sporting activity because of their disability.²⁶ The legislation imposes an obligation for 'reasonable adjustments' to be made to overcome disadvantage which a person with disability faces when their impairment interacts with the rules constructed by society.²⁷ The *DDA* provides 'an adjustment ... is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship ...'.²⁸ Whether, and how, an adjustment is to be made for children with disability in competitive sport, is not clear in the *DDA*. Statutory exceptions create further complications. Where a person is not 'reasonably capable of performing the actions reasonably required' in the sporting activity, it is not discriminatory to exclude them from participation.²⁹ Whether or not an accommodation is 'reasonable' will, in part, depend upon whether the person is reasonably capable of undertaking the activities of the sport in the first place. Reasonable capability is not defined in the legislation. The simple interpretation, and example, is that if a person is not ambulant and the sport requires the use of legs to run, then they can be excluded, as any adjustment would not be reasonable—requiring a change to the rules that might be considered a 'burden'. There is no compulsion to provide that person a sporting opportunity. Further, if a person can run, and is included, they do not have to be provided a fair contest. If the human rights instruments mean that a child with disability is to be included with fairness in a sporting competition, as people without disabilities are, this is not clear in the *DDA*.

In Australia, there are three outcomes where the *DDA* does not provide for inclusion of children with disability in competitive sport.³⁰ Firstly, children who are not 'reasonably capable', can be lawfully excluded from sporting activities.³¹ Where children with disability cannot undertake the activities reasonably required for the sport, they can be lawfully excluded from sport. In *Martin Wells v Queensland Cyclists Association*,³² reasonable capability was considered a question of fact, determined according to whether the person was 'reasonably capable of performing [sic] those actions reasonably which are required of one who wishes to engage competitively in road cycling'.³³ The reference made to 'competitiveness' suggests that if the person is not reasonably capable of *competing*, they can be lawfully excluded from the sport.³⁴ So, if a person with disability is not competitive, because they are at a disadvantage compared to their peers without disabilities, they can lawfully be excluded from the sport.

Secondly, children with disability may be deemed 'reasonably capable', resulting in them participating in sport without any adjustment to address disadvantage they face. Because a child may be deemed 'reasonably capable', they are not given reasonable adjustments to ensure fairness, because they are already 'included'. Consequently, if the required activity for the sport is running, a child with a disability who can run would likely be considered 'reasonably capable'. However, physically participating, without being competitive, does not engender fairness and does not align with substantive equality. Because children without disability do not share the disadvantage, they are at an advantage over those with disability. Reasonable



- 35 Pearce and Moritz (n 30).
- 36 See, eg, 'Multi-Class Athletes', *Little Athletics Queensland* (Web Page, 2020) <<https://laq.org.au/competition/multi-class/>>.
- 37 Danielle Peers, 'Interrogating Disability: The (De)composition of a Recovering Paralympian' (2012) 4(2) *Qualitative Research in Sport, Exercise and Health* 175.
- 38 *Ibid.*
- 39 For children in Australia, the classification system that is inherited from the International Paralympic system is not implemented in team sports. There are some team sports that have completely separate team opportunities in special sections, such as Victorian Football League for people with intellectual impairments: 'Home', *Victorian FIDA Football League* (Web Page) <https://websites.sportstg.com/assoc_page.cgi?client=1-8408-0-0-0>. Other sports have special teams that have limited opportunities, such as netball: 'People with a Disability', *Netball Australia* (Web Page, 2020) <<https://vic.netball.com.au/people-disability>>.
- 40 Kathy Cologon, *Inclusion in Education: Towards Equality for Students with Disability* (Issues Paper, 24 October 2013); Joanna Anderson and Christopher Boyle, 'Inclusive Education in Australia: Rhetoric, Reality and the Road Ahead' (2015) 30(1) *Support for Learning* 4.
- 41 *CRPD* (n 5) art 30.5(a), (d).

adjustments provided for in the *DDA* are not applied to address disadvantage in the sport. The law does *not* provide that once physically included, the contest is to be adjusted to take into account the disadvantage of a child with a disability.

That leads to the third outcome for a child with disability in sport. Children with disability are at times segregated in sporting competitions where the competition with children without disabilities is considered unfair to them.³⁵ While some sports like Little Athletics 'classify' children according to their disability to take part in a separate contest,³⁶ the classification system does not always provide suitable adjustments. Some children have a disability which cannot be classified;³⁷ some children are classified incorrectly;³⁸ some children compete in events alone because of low numbers in the category, classified opportunities are limited or less than the mainstream in many cases; and team sports have very limited classification opportunities.³⁹ When children with disability are segregated, they are not being included 'on an equal basis', nor 'in mainstream sport' as provided for in the *CRPD*. The *DDA* does not address this treatment of children with disability.⁴⁰

v Conclusion

Despite equality and non-discrimination being fundamental human rights, the *DDA* does not extend those rights to children with disabilities in competitive sport. The participation of children with disability, 'on an equal basis with others', in 'mainstream sport', 'at all levels', and in the 'school system' does not regularly occur in Australia.⁴¹ When children with disabilities in sport are excluded, included without reasonable adjustment, or segregated, the *DDA* does not provide a solution, and indeed facilitates exclusion. The *DDA* does not align with human rights that provide for reasonable adjustments to the environment of sport for children with disability to experience fair contests. Until the domestic legislation more closely aligns with human rights instruments, children with disability will remain at a disadvantage and experience discrimination in competitive sport.