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## Court and tribunal decisions

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When complaints of discrimination are unable to be resolved through conciliation, they sometimes end up in the courts. Information from previous Court cases is therefore very valuable when trying to interpret the law.

Here are a number of anti-discrimination cases involving sport:

### Sex discrimination

#### **Under 14 girl is allowed to play in boys' Australian Rules Football League but girls older than 14 banned**

*Taylor, Cula-Reid and Stanyar v Junior Football League and Football Victoria Ltd (2004)*

In 2004 three girls aged 14, 15 and 16 challenged a Football Victoria rule that banned females from playing beyond under-12 level in the Moorabbin Saints Junior Football League. Justice Stuart Morris noted that while Victorian law makes discrimination in sport unlawful there are certain qualifications. One qualification allows single sex competition and excludes (in this case) girls 12 years or older from playing in boys competitions in which the strength, stamina or physique of the competitors is relevant.

Justice Morris found that the relative differences between the strength, stamina and physique of boys and girls was not significant enough to be relevant in the participation in an Australian Rules football competition for under 14 year olds. He upheld the complaint by the 14-year-old player, Helen Taylor. He found that the relative differences between the sexes in the under 15-year-old age group were sufficiently significant to rule against participation and dismissed the complaints by the 15 and 16 year old players, Penny Cula-Reid and Emily Stanyer.

View the full decision: [www.austlii.edu.au/au/cases/vic/VCAT/2004/158.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2004/158.html)

#### **Victorian Ladies Bowling Association exemption application rejected**

*Exemption Application to the Victorian Civil and Administrative Appeals Tribunal (2001)*

In 2001 Emily South, a Victorian female Lawn Bowls bowler won her discrimination case against the Royal Victorian Bowls Association (RVBA) which had prohibited her from playing in the Saturday pennant competition because she was female. A requirement of competition in the Saturday competition was membership of the RVBA which was not open to women. A

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consequence of the decision was that the RVBA amended its constitution to allow women to join.

Following this decision the Victorian Ladies Bowling Association (VLBA) sought an exemption to preserve its status as a female only association.

The Victorian Civil and Administrative Tribunal refused their application for an exemption.

The decision related to membership of the association and does not affect the ability of the associations to conduct single sex competitions.

### **Strength/stamina/physique argument rejected**

*Emily South v Royal Victorian Bowls Association (RVBA) (2001)*

Ms Emily South a 19 year old keen bowler, had been a member of the St Kilda Bowling Club for about seven years. The club was an affiliated member of the Royal Victorian Bowls Association (RVBA).

The RVBA conducts a Metropolitan Pennant Bowls Competition on Saturday afternoons. Ms South wanted to play on Saturday afternoons because she was unable to play in the Women's Pennant Competition which was a mid week competition that clashed with her school and university commitments.

She wished to play at the highest level and her club considered her capable of competing in the Saturday afternoon RVBA competition. RVBA rules stated that only male members of affiliated clubs could then affiliate as individuals with the association. The request to register Ms South as an affiliated member was refused by the RVBA

Ms South lodged a complaint of Sex Discrimination with the Victorian Equal Opportunity Commission. The RVBA argued that strength, stamina and physique are involved in the playing of bowls. However, the Tribunal found that strength, stamina and physique were not significant in bowls and that discrimination had occurred. It ordered the RVBA to amend its rules so as not to prohibit women from registering as affiliated members and competing in the Saturday pennant bowls competition.

View the full decision: [www.austlii.edu.au/au/cases/vic/VCAT/2001/207.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2001/207.html)

### **Strength/stamina/physique argument upheld**

*Lisa Jernakoff v the Western Australian Softball Association (1998)*

Lisa Jernakoff was the only female member in a sub-junior (under 13 years) mixed softball competition team for the 1997 season. Prior to the commencement of the season the coach realised that three of the male members were due to turn 13 before the grand final and would therefore be ineligible to play. Instead of breaking up the team it was decided to enter the team in the junior team competition (13 to 16 years).

Two weeks into the competition an opposing team complained that Lisa was ineligible to play in the junior competition because of her sex. The Western Australian Softball Association (WASA) ruled Lisa out of the junior competition as it was for male players only.

Lisa's parents then lodged a complaint on behalf of their daughter with the Commissioner for Equal Opportunity in relation to her exclusion from the junior competition based on her sex. The matter was referred to the Equal Opportunity Tribunal of WA. The Tribunal decided that softball amongst 13-16 year olds was a competitive sporting situation in which the strength, stamina and physique of competitors is relevant. Therefore, it decided that it was lawful to

exclude members of one gender from such a competition (pursuant to the exemption in section 35 of the Act).

## **Strength/stamina/physique argument rejected**

*Exemption application by the Trotting Control Board of South Australia (1978)*

The South Australian Trotting Control Board sought an exemption from the *Sex Discrimination Act SA 1975* to issue licenses to male drivers only, arguing that the introduction of female drivers would have a detrimental affect on betting turnover and that driving requires strength, quick reaction and the resilience to take knocks and falls.

The application was refused by the then Sex Discrimination Board which said that women should be given the same opportunity as men to qualify as drivers, The Board noted that women were not seeking any special considerations as they must undertake the required tests and compete with male applicants on the basis of merit. The Board held that in granting licences, the TCB should have regard to the applicant's ability to drive, and not to his or her sex.

## **Pregnancy**

### **Netball pregnancy ban unlawful**

*Trudy Gardner v All Australia Netball Association (2003)*

In 2001 the All Australia Netball Association (AANA) decided that women who were pregnant could no longer play in competitions sanctioned by the AANA.

Adelaide Ravens netball player Trudy Gardner was pregnant at the time and was banned from playing for her team in the National Netball League. She subsequently lodged a complaint of sex discrimination with the Federal Human Rights and Equal Opportunity Commission and gained an injunction to allow her to continue to play pending the outcome of her complaint which was subsequently referred to the Federal Magistrates Court.

In March 2003, Trudy Gardner won her two-year Federal Magistrates Court when Magistrate Kenneth Raphael found Netball Australia discriminated against Gardner by banning her from playing three games in the 2001 season while she was 15 weeks pregnant.

He said the ban contravened the Sex Discrimination Act (1984), and ordered Netball Australia to pay Gardner \$6750 in compensation for lost match fees and damages, as well as costs.

## **Disability**

### **Individual ability vs prejudice and assumptions**

*Rigon v Confederation of Australian Motor Sport Ltd (CAMS) (2000)*

The expert medical witness for CAMS Ltd, the body that controls the motor racing sport, told a Human Rights and Equal Opportunity Commission (HREOC) hearing that more than 99% of people would think that people who only had one functional eye should not be allowed to compete.

But, in awarding a one-eyed man \$10,000 for hurt, humiliation and loss of enjoyment in the sport after CAMS refused his application for renewal of a general competition licence thereby excluding him from competitive motor racing, the HREOC noted this comment merely showed the witness had prejudged the issue rather than assessing the ability of the man himself. The man had lost his eye at age two and was fully adjusted to his monocular vision. The HREOC also heard that the man had driven safely in the sport for 12 months and other drivers vouched for his safe driving.

The case highlights the dangers in prejudging an individual's capacity based on one's own misconceptions. This is a fundamental principle of equal opportunity law. Driving a sports car with only one eye may appear obviously dangerous, but, as the HREOC heard, there is no comparison between monocular vision and a binocular person putting a hand over one eye.

### **HIV positive footballer allowed to play**

*Matthew Hall v Victorian Amateur Football Association (1999)*

Matthew Hall was a footballer playing in the Victorian Amateur Football Association (VAFA) Australian Rules Football competition. Matthew revealed to his club and the VAFA that he was HIV positive.

As a consequence the VAFA refused to register him as a player stating that the reason for their decision was to protect the health and safety of other players and officials. (Section 80, Victorian Equal Opportunity Act)

Matthew then lodged a complaint of discrimination with the Victorian Equal Opportunity Commission. The complaint was referred to the Victorian Civil and Administrative Tribunal (VCAT) for determination.

VCAT held that the VAFA had unlawfully discriminated against Matthew Hall.

In making the decision, VCAT found: .that the VAFA decision did not meet the requirements of the Section 80 exemption in relation to infectious diseases

- that there was no conclusive proof of HIV transmission as a consequence of playing football in any code of football in the world
- that rigorous and consistent application of VAFA's infectious diseases policy would reduce any risk of HIV transmission from HIV infected players in a way that banning Matthew Hall would not.

In resolution, the VAFA consented to immediately registering Matthew Hall as a player and the implementation of education programs for the VAFA and its member clubs.

View the full decision: [www.austlii.edu.au/au/cases/vic/VCAT/1999/627.html](http://www.austlii.edu.au/au/cases/vic/VCAT/1999/627.html)

### **Rules should be clear before competition starts**

*Kosmala v South Australian Smallbore Rifle Association (1996)*

Libby Kosmala has congenital spina bifida and as a consequence cannot stand or walk. She shoots in a sitting position from her wheelchair. In July 1994 she competed in the Champion of Club Champions competition organised by the South Australian Small Bore Rifle Association. She shot the highest score of all competitors but the Association refused to award her the championship trophy on the basis that she had not complied with the rules that required competitors shoot in various positions, including the standing position. She was

disqualified through the application of the international rules after the competition was finished.

Libby lodged a complaint of discrimination with the South Australian Equal Opportunity Commission, which was then referred to the Equal Opportunity Tribunal because agreement could not be reached. The matter was resolved before the Tribunal hearing concluded when the Association agreed:

1. that a public announcement be made that the association regrets that Mrs Kosmala was disqualified on the basis of the application of rules which had not been clearly communicated in advance;
2. to adopt certain procedures with a view to preventing a repetition of what occurred in 1994;
3. to the adoption of certain initiatives designed to improve communications between the Association and its members, including people with a disability.