

#IT ISN'T FAIR: THE NEED FOR GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT

SIMONE PEARCE*

Sport for people with disability is frequently referred to as 'Inclusion'. However, the anomaly around 'inclusion' for people with disability is that sport is not always genuinely, or truly, inclusive. Sporting opportunities for children with disability are not provided in the same way as mainstream opportunities for children, and are rarely provided to be with, and against, children without a disability in a way that is fair and meaningful. Sporting opportunities for children with disability are often provided in a way that is separate and segregated. They are often non-competitive. Many of these approaches are likely to be discriminatory, either unlawfully or wrongfully.

Human rights and domestic law provide the tools to prevent the discrimination of children with disability in sport. However, the law is not currently applied to influence the structure of sport and the resulting treatment of children with disability in a way that limits or prevents discrimination. This article argues that the current situation is not working, and that the law could be more effective through the use of Guidelines published by the Australian Human Rights Commission 'for the avoidance of discrimination', as provided for in the Disability and Discrimination Act 1992 (Cth).

Commented [LW1]: We kindly ask that you insert your preferred authors bio, our below draft is a filler only, but may be used if you wish.

*Ms Simone Pearce is a Lecturer at the University of the Sunshine Coast who has published extensively on sports law, governance, disability sport discrimination, and the equitable treatment of minorities or the underrepresented and excluded. Her doctorate was entitled 'Towards Guidelines for the Inclusion of Children with Disability in Sport'.

CONTENTS

I.	INTRODUCTION.....	2
II.	FAIR AND MEANINGFUL SPORT.....	6
III.	THERE IS A HUMAN RIGHT TO NON-DISCRIMINATION WHEN PARTICIPATING IN SPORT.....	8
IV.	THE LAW —DISABILITY DISCRIMINATION IN SPORT IS COMPLEX, AND INEFFECTIVE.....	12
V.	GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT.....	16
VI.	CONCLUSION.....	22

I. INTRODUCTION

In Australia, like many other places in the world, there are a variety of programs and opportunities for children with disability to take part in sport. Examples include the ‘Special Olympics’,¹ All Abilities football,² wheelchair tennis,³ basketball and rugby,⁴ and various come-and-try days.⁵ These programs and sport for people with disability are frequently referred to as ‘Inclusive’.⁶ However, these programs are not always genuinely, or truly, inclusive. Put simply, sporting opportunities for children with disability are not provided in the same way as the mainstream opportunities for children without a disability. Despite the best of intentions, sporting opportunities for children with disability are often provided in a way that is separate and segregated, and very often non-competitive.

Commented [LW2]: We have suggested the below phrasing, to avoid repetition of the same point.

Commented [LW3]: Unfortunately we were unable to open the webpage for Sporting Wheelies. Kindly provide the permalink if available, otherwise, we have located the calendar of events which notes several other ‘Come and Try’ day events.

Commented [SP3R2]: That will be fine.

¹ Special Olympics Australia (Web Page) <<https://www.specialolympics.com.au/>>; A Tint, K Thomson, and J A Weiss, ‘A Systematic Literature Review of the Physical and Psychosocial Correlates of Special Olympics Participation among Individuals with Intellectual Disability’ (2017) 61(4) *Journal of Intellectual Disability Research* 301; Stephanie Turgeon, Jessica Turgeon, and Diane Morin, ‘Coaching Special Olympics: a Scoping Review’ (2023) 18(1) *International Journal of Sports Science and Coaching* 304.

² Football Network, ‘All Abilities’, *Play Football* (Web Page) <<https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities/>>.

³ Disability Sports Australia, ‘Wheelchair Tennis’ (Web Page) <<https://www.sports.org.au/wheelchair-tennis/>>; Simon Holzapfel and Louisa Summers, ‘An Introduction to Wheelchair Tennis for Future Athletes and Coaches’ (2013) 27(4) *Palaestra* 25.

⁴ Disability Sports Australia, ‘Wheelchair Basketball’ (Web Page) <<https://www.sports.org.au/wcbasketball/>>; National Wheelchair Basketball Association, ‘History of Wheelchair Basketball’ (Web Page) <<https://www.nwba.org/history.html>>.

⁵ See New South Wales Government, ‘Athletics Come and Try days for Students with Disability’, *School Sport Unit* (Web Page) <<https://app.education.nsw.gov.au/sport/page/1343>>; Sporting Wheelies, ‘Calendar of Events’, (Web Page, 2025) <<https://www.sportingwheelies.org.au/sports/calendar-of-events/>>; Variety: The Children’s Charity, ‘Variety Active Kids Sports Days’ (Web Page) <<https://varietyactivekidssportsdays.com.au/>>.

⁶ Karen DePauw and Susan Gavron, *Disability Sport* (Human Kinetics, 2nd, 2005) 13; Florian Kiuppis, ‘Inclusion in Sport: Disability and Participation’ (2018) 21(1) *Sport in Society* 4.

Whilst there is some debate concerning whether competition is good for children,⁷ sport is traditionally structured to involve fair and meaningful contests. If children with disability are not provided fair and meaningful contests, just as in the mainstream sporting activities, then the provision of sport for children with disability may be discriminatory—either wrongfully or unlawfully. If children with disability are offered separate and segregated opportunities, that may also be discriminatory because children with disability are treated less favourably and/or are not given the same opportunities as other children, **due to their disability**,⁸ Whilst discrimination can be a daunting term, and indicate potential wrongdoing, identifying discriminatory structures and conduct provides an opportunity to address the treatment of people with disability, to provide true inclusion.

There is limited literature that considers the **treatment of children with disability through the discrimination lens**. It is often celebrated that there are *some* opportunities provided for children with disability to take part in sporting activities.⁹ It might be that the existence of sport for people with disability to participate in, such as the Paralympics, promotes the view that no real problem exists, and that children with disability can readily take part in sport. It might be that there is a widely held misconception of what discrimination in sport is for children with disability—that as long as they are given some sort of a go, it is enough.

In short, the way sport is provided for children with disability in Australia, rarely provides true inclusion. The claim that sporting organisations provide for children of 'all abilities' to play or take part in their sport, is commendable. However, it is often not the earnest reality that children with a disability can meaningfully take part in the activity. 'Compromises' such as standing next to an event, or turning up on a different day, is not taking part in the sporting activity on an equal basis with other in mainstream sporting activities. 'Multiclass' sport that is provided in some sports, is a separate and segregated experience. The inclusion of children with disability by separating and segregating them from their peers who do not have disability,

Commented [LW4]: We have suggested the following change to avoid repetitive use of the word 'because' in this sentence.

Commented [SP4R2]: I try not to use 'subjected to' language, which is accusatory for the person treating, and connotes a 'suffering' by the child. Prefer to have it remain 'because children with disability are treated less favourably'

Commented [LW5]: We suggest the following amendment to avoid the existential clause and to improve the flow when referring to notionally plural subjects.

Commented [SP5R2]: The sentence won't make sense with 'lens' deleted.

Commented [LW6]: We have suggested the following to avoid confusion between use of the plural/singular.

Commented [SP6R2]: Prefer to add 'some' perhaps italicised. The attitude is something is better than nothing—or 'at least we have given them something'.

⁷ Hannah Pandel, 'Healthy Competition is Good for Children' (2015) 67(1) *IPA Review* 31–33; Michael Bula, 'Competition for Children: The Real Issue' (2013) 42(7) *Journal for Health, Physical Education, Recreation* 40.

⁸ Whilst in Queensland the *Anti-Discrimination Act 1991* (Qld) s 111, permits discrimination on the basis of not being competitive, this section is invalid when read together with the *Disability Discrimination Act 1992* (Cth) ('DDA') which is the subject of this article; and the Queensland Act in section 111 does not implement the *Convention on the Rights of Person's with Disabilities*.

⁹Antonia O'Flaherty, 'New Inclusive Sport Program 'Exhilarating' for Queensland Students with Disability', *ABC News* (News, 10 June 2021) <<https://www.abc.net.au/news/2021-06-10/new-queensland-inclusive-sports-program-aims-to-address-barriers/100202856>>; Australian Government, 'Equity, Diversity and Inclusion', *Australian Sports Commission* (Web Page) <https://www.sportaus.gov.au/integrity_in_sport/inclusive-sport>.

is all too common and often lauded. Take for example, an ‘award-winning inclusion program’ from a rugby league club that involves a series of one-day skills sessions, only available to some children with disability and on a different day to the mainstream training and matches.¹⁰ Despite the efforts made by sporting organisations and schools, children with disability do not enjoy the same fair and meaningful contests in sport that children without a disability do in mainstream sporting activities. Many approaches to sport for children with disability are likely to be discriminatory, either unlawfully or wrongfully.

To assist people in understanding discrimination against people with disability, the *Disability and Discrimination Act 1992* (Cth) (*DDA*) contains a regulatory mechanism which allows for ‘Guidelines’ to be published by the Australian Human Rights Commission (AHRC) ‘for the avoidance of discrimination’.¹¹ There are currently no Guidelines in Australia for the inclusion of children with disability in sport. There is a need for Guidelines. While there may be genuine safety concerns that require reasonable adjustments,¹² often the way that sporting opportunities are provided and structured, for children with disability in sport, is unnecessarily different compared to sport provided for children without a disability. Disability-specific sport often separates and segregates children with disability, failing to provide fair and meaningful opportunities to children with, and at times leaves children with disability with no opportunity at all. Importantly, children with disability are often excluded from contests in sport, even when they are included in the physical activity of sport. Guidelines to avoid discrimination are a valuable tool to change the way children with disability are treated in sport and to promote truly inclusive opportunities. In Australia, the law could be put into practice through the use of Guidelines, as provided for in the DDA, designed and implemented in a similar way as those for gender-diverse people in sport.¹³ Perhaps more importantly, though, the Guidelines could assist people—coaches, administrators, volunteers, teachers and parents—to make appropriate accommodations so that children with disability can be included in mainstream events and competitions. This article argues that *Guidelines for the Inclusion of Children with*

Commented [LW7]: It appears that this is referring to a specific program, if this is the case, kindly provide the citation.

Commented [SP7R2]: <https://www.facebook.com/FalconsFootyLeague/>

Commented [LW8]: We have suggested the following amended sentence structure to assist in clarification.

¹⁰ Falconsfootykidz, ‘Falcons Footy - Rugby League for Children Of Different Abilities’ (Facebook, 2 April 2026) <<https://www.facebook.com/FalconsFootyLeague/>>.

¹¹ *DDA* (n 8) s 67(1)(k). This is not a regulatory law paper. However, it is important to point out that voluntary guidelines are an important part of the regulatory environment. For example, responsive regulation includes layers of international (eg. *Convention on the Rights of Persons with Disabilities*), and national law (eg. *Disability Discrimination Act 1992* (Cth)), and additional guides, such as voluntary guidelines that are flexible and do not have strict enforcement (eg. The Guidelines proposed in this article).

¹² See, eg., *USM Events Pty Ltd v James* [2023] QCA 71.

¹³ Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport* (Guideline, June 2019) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_transgender_and_gender_diverse_guidelines_2019.pdf>.

Disability in Sport, which could be published by the AHRC in accordance with s67(1)(k) of the *DDA*, could assist in improving the way children with disability experience sport.

This article argues that *Guidelines for the Inclusion of Children with Disability in Sport* should form a greater part of the solution to the problem—that the structures of sport currently fail to provide children with disability some fair and meaningful contests, on the same basis as children without a disability enjoy. To do so, this article has six parts. Part 2 briefly explains the necessity to consider the circumstances of a child with disability taking part in sport, particularly that the activity is not only a physical act of the sport, but also a contest. 'Inclusion' means inclusion in a fair and *meaningful* contest. It will then provide examples illustrating that current structures for the treatment of children with disability in sport fail to include them in fair and meaningful contests. Part 3 examines how the human right to non-discrimination means that children with disability are to be provided a fair and meaningful contest, together with children without a disability in mainstream sporting activities, or their sporting contests are to be as comparable as possible. The human right to non-discrimination applied to children with disability taking part in a contest, requires adjustments to the contest, to facilitate non-discrimination. The human right to non-discrimination is the foundation for the treatment of children with disability in competitive sport, and can be influential in the design and implementation of domestic legislation. For example, the way the *DDA* now provides for reasonable adjustments provisions came about in response to the Productivity Commission's recommendations that the Act *DDA* be amended to reflect the *The Convention for the Rights of People with Disability*¹⁴ ('*CRPD*'). The *DDA* was passed in 1991, and the *CRPD* in 2006.¹⁵ Part 4 of the article outlines that the domestic legislation in Australia is not necessarily clear, understood or effectively implemented to prevent discrimination against children with disability in competitive sport, and therefore the current circumstances experienced by children with disability in competitive sport are likely discriminatory. Part 5 of the article suggests that the law could be aided, and made more effective, through the use of *Guidelines* as provided for in the *DDA*, designed and implemented in a similar way as those for transgender

Commented [LW9]: We have suggested the following inclusion to frame your argument in line with the remainder of your article. Please confirm if the following suggestion is accepted or rejected.

Commented [SP9R2]: Accepted.

Commented [LW10]: We have suggested the following to remove the use of first person language and have done so for the remainder of the article.

Commented [SP10R2]: That is fine, and appropriate. Thank you.

¹⁴ Resolution / adopted by the General Assembly on 13 December 2006: *Convention on the Rights of Persons with Disabilities*, opened for signature on 13 December 2006, A/RES/61/106 (entered into force on 3 May 2008) ('*CRPD*').

¹⁵ House of Representatives, The Parliament of the Commonwealth of Australia, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth): Explanatory Memorandum*; Australian Government, 'Review of the Disability Discrimination Act 1992, Inquiry Report', *Productivity Commission* (Report, 12 July 2004) <<https://www.pc.gov.au/inquiries/completed/disability-discrimination/report>> ('Report').

and gender diverse people in sport;¹⁶ including two case study examples to demonstrate practical steps that would prevent potential discrimination. This article concludes with the argument for the need for *Guidelines* to provide a helpful framework for sporting organisations and administrators to decide how a child with a disability might be best provided a competitive sporting opportunity.

II. FAIR AND MEANINGFUL SPORT

A. SPORT INVOLVES A FAIR AND MEANINGFUL CONTEST

There are various arguments about what sport is and is not. The word 'sport' is defined in different ways, and has numerous elements or characteristics, depending on the source. Here, rather than complicating matters by considering the lengthy and philosophical debates about what sport is, this article will consider sport to be a physical activity with structured rules, that involves a fair and meaningful contest.¹⁷ If there is no contest in the activity, then the activity is recreation, exercise, or a pastime. It is not sport. The contest does not have to be elite, or formal sport, but organised in a way that the participants are attempting to follow a set of agreed rules. It is intended that the outcome of the activity is that there is a successful participant in the contest. A contest is the pitting of skills and/or prowess to be superior to another.¹⁸ Contests in sport are constructed with rules that isolate and identify the skills or processes being tested. The rules of sport are designed to create contests that are fair and meaningful.

Examples of a 'fair contest' are the age divisions in junior sport. Traditionally, age divisions have been thought to provide similar base levels of skill and capacity, and create fair contests. Other rules that are designed to create fair contests are gender divisions, weight divisions, handicap systems (such as golf, sailing and cycling) and the classification systems in paralympic sports. Not only are the rules of sport designed to be fair, but they are designed to be meaningful. Meaningful contests are those where each participant has a chance, there is a genuine contest,

¹⁶ Australian Human Rights Commission (n 132).

¹⁷ Others have grappled with technical and philosophical definitions of sport. See for example Henry T Greely, 'Disabilities, Enhancements, and the Meanings of Sports' (Research Paper No 82, Stanford Law School, February 2004); Gunnar Breivik, 'Sport as part of a meaningful life' (2022) 49(1) *Journal of Philosophy of Sport* 19–36; Kevin Krein, *Philosophy and Nature Sports* (Routledge, 1st, 2018); Lukas Mareš and Daniel Novotný, 'What is sport? A response to Jim Parry' (2022) 17(1) *Sport, Ethics and Philosophy* 34–48; Jim Parry, 'The concept of sport in Olympism' (2020) 4 *International Academic Journal on Olympic Studies* 131–148; Bernard Suits 'The Elements of Sport' (2007) *The Philosophy of Sport: A collection of original essays* Robert Osterhoudt (ed): 48-64 and Jim Parry, 'On the Definition of Sports' (2023) 17(1) *Sports, Ethics and Philosophy* 49–57.

¹⁸ Macquarie Dictionary (9th Edition) (2023) defines contest as a 'struggle for victory or superiority.'; Macquarie Dictionary defines compete as 'to contend with another for a prize, or profit.'; John Loy and W. Morford The Agon Motif: Redux. A Study of the Contest Element in Sport in *Physical Culture and Sport. Studies and Research* (2019)(82) 12 define a contest as, 'a competitive activity characterized by two or more sides, having agreed-upon-rules, criteria for determining the winner, with a zero sum outcome wherein the winner(s) takes all.'

and the contest and its outcome are not tokenistic or charitable. For example, it is not meaningful to a child, to be the only Multiclass swimmer in an event and to be provided a medal for winning. Another example of a contest not being meaningful to a child, is to run in a relay of two people over 70 metres, when their peers are running a 4x 100m relay, a 4x 200m relay and a medley relay.¹⁹ Fair and meaningful contests involve each participant having a prospect of demonstrating superiority at certain activities. A fair and meaningful contest is an important characteristic of sport. Therefore, this article argues that inclusion in sport is not limited to inclusion in physical activities, but should extend to inclusion in the fair and meaningful contests created by the rules.

B. SPORT FOR CHILDREN WITH DISABILITY FAILS TO PROVIDE A FAIR AND MEANINGFUL CONTEST

There are many ways a child with a disability is provided sporting opportunities. There are come-and-try days, to take part in a trial for sports; there are special 'all abilities' type days and events in some sports; at times children with disability will be able to take part in a game with their non-disabled peers, where they just join in. These events include disability categories such as 'Multiclass', and there are disability-specific sports, such as 'goalball'.²⁰ Some of these offerings provide a physical involvement, however do not provide a fair and meaningful contest: because, either, there is no contest element, or the sport is unfair to the child with a disability who is at a disadvantage. Disability categories and disability specific sports do not necessarily provide fair and meaningful contests for children with disability.

The several ways that the structure of sports will fail to provide a child with a disability a non-discriminatory fair and meaningful experience are:

1. When they are not provided an adjustment to the rules in a mainstream event to enjoy a fair and meaningful contest;
2. When they are not included within the mainstream event (and provided recognition of their disability in a category), provided they are capable of physically taking part;
3. When they are not provided with the opportunity in 1 or 2, and not provided a separate category or version of the sport, where their functional capacity is considered in competing against others with disability, and adjustments are made accordingly;

¹⁹ Queensland Little Athletics Multi class relays at State Championships, see Little Athletics Queensland, 'McDonald's State Relay Championships' (Web Page) <<https://laq.org.au/mcdonalds-state-relay-championships/>>.

²⁰ See Goalball Australia, 'About' (Web Page) <<https://www.goalballaustralia.org/about>>.

4. When they are not being provided with a classification to enter the disability-specific contest or category;
5. Where a separate event or events are provided for children with disability, but the event is unnecessarily different and not comparable to the event provided for children without disability;
6. Where a disability-specific sport is provided (because it is not possible to provide mainstream inclusion) and the sport only caters for some children with disability; and/or
7. When there is no opportunity for children with disability to have a fair and meaningful contest—one that reflects the disadvantage that they have as a result of the functional impact of their disability.

Commented [SP11]: This is too wide, and permits some adjustment other than mainstream. Please revert to the idea of inclusion in mainstream events. 'provide for inclusion in mainstream sporting activities'

In each of the above circumstances, children with disability are not provided with the same treatment as those without disability, in that they are not provided with a fair and meaningful contest on the same or equal basis as their peers. The majority of offerings of sport for children with disability in Australia will meet the descriptions above.²¹

To fail to provide a child with disability a fair and meaningful contest, could constitute discrimination. This discrimination might be unlawful, either pursuant to domestic law, or human rights obligations. There are times when discrimination might be lawful—in that it does not offend the domestic legislation—yet it is wrongful, and potentially offends the child's human rights. As explained in the introduction, non-discrimination is a human right. The next part explains the human right of non-discrimination applicable to sport, and how that applies to children with disability, before then explaining the challenges with the domestic legislation in implementing that right, and finally proposing a solution to discriminatory sport for children with disability, in the way of Guidelines.

III. THERE IS A HUMAN RIGHT TO NON-DISCRIMINATION WHEN PARTICIPATING IN SPORT

Human rights can be a significant influence on the treatment of children with disability in their experiences in sport. The human rights instruments—including the *Convention for the Rights or Persons with Disabilities* and the *Convention for the Rights or Children*²²—articulate how people with disability can use human rights to advocate for certain treatment. Despite the rhetoric and

²² *Conventions on the rights of the Child*, opened for signature 20 November 1989, GA 44/25 (entered into force 2 September 1990) ('*CRC*').

narrative around there being a human right to sport,²³ particularly for people with disability, the human rights instruments do not provide any such human right.²⁴ A human right to sport, or to participate in sport, is (in practice) meaningless. When sport involves a contest, what does the human right to sport, or to participate in sport mean? Although the human right to sport, or to participate in sport, is confusing, human rights do apply to any human endeavour, and sport, including the contest, is an activity included in the sphere of influence that human rights have. Human rights apply to sport and people's experiences in sport, just as they apply to any human endeavour.²⁵ Rather than the existence of a 'human right' to sport, or to participate in sport, when a person with a disability seeks to take part in sport, the human right that applies is that of non-discrimination.²⁶

Identifying that the relevant human right applicable to the inclusion of children with disability in sport as non-discrimination influences the perspective and approaches taken to implement that human right. The human right to non-discrimination in this context means that children with disability are provided treatment to experience sport on 'an equal basis' with others, and with reasonable adjustments to do so. The provision of reasonable adjustments is consistent with providing substantive equality;²⁷ which means that the structure and rules of sport are adjusted to provide children with disability, a fair and meaningful contest and an opportunity that is as much as possible, comparable to that of children without disability. Article 30.5 of *The Convention for the Rights of People with Disability*²⁸ ('CRPD') provides for the human right to non-discrimination in sport to take the form of adjustments to mainstream sports, provision of disability-specific sports, inclusion in the mainstream where possible, and for such opportunities to be provided in the school system, as well as the public sporting sector.²⁹ The

²³ Janet Lord and Michael Stein, 'Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play' (2009) 27 *Boston University International Law Journal* 249; *The Olympic Charter* (entered into force 30 January 2025) ('Olympic Charter') art 1.

²⁴ Simone Pearce and Jay Sanderson, 'The myth of a "human right to sport": how human rights can lead to true inclusion for children with disability' (2024) 24 *International Sports Law Journal* 1–24.

²⁵ Human Rights Council, United Nations General Assembly, *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*, A/HRC/30/50 (17 August 2015) at 6 "[a]s... any other human activity, sport is governed by human rights. The core human rights instruments therefore apply to sport like all other fields of human activity".

²⁶ Including equality and dignity, as discussed in Chapter 2, considered together in this thesis as a collective set of human rights to ensure that people with disability are provided adjustments to enjoy the same experiences as those without disability do.

²⁷ Report (n 14) 185.

²⁸ *Resolution / adopted by the General Assembly on 13 December 2006: Convention on the Rights of Persons with Disabilities*, opened for signature on 13 December 2006, A/RES/61/106 (entered into force on 3 May 2008) ('CRPD').

²⁹ *Ibid*, art 30.5.

Convention on the Rights of the Child ('CRC'),³⁰ the *International Charter for Physical Education, Physical Activity and Sport ('ICPEAS')*,³¹ and the *Olympic Charter*, all also contain provisions that assist in applying the human right to non-discrimination in sport. Each supports the interpretation of the *CRPD*, in so far as it provides for adjustments to be made to the rules and structure of sport, so children with disability are provided with a fair and meaningful contest, comparable to that provided to children without a disability in mainstream sporting activities.

This interpretation of the human right to non-discrimination in sport, challenges the current structure of sport in Australia for children with disability. Currently, in Australia, children with disability are not provided the opportunities that the human rights instruments envisage. The structure of sport in Australia currently provides some children with disability *some* fair opportunities in *some* sports: this is in the form of Multiclass offerings in track and field, swimming, cross country, and triathlon.³² These opportunities are often restricted to children who can obtain a *classification* akin to the Paralympic classification,³³ and often do not extend to the same events that are offered for children without a disability. Multiclass opportunities are often separate and segregated and lack meaningfulness, as children take part alone, or with others who are not their age, or classification.³⁴ There are also some team sports that provide certain competitive opportunities for children with disability.³⁵ However, these opportunities are usually restricted to intermittent offerings, offered only to some children with disability or in disability-specific groups in a way that segregates children with disability from the mainstream offerings of sport.³⁶

The human right to non-discrimination properly implemented would lead to sport being structured in a way that children with disability have an opportunity for a fair contest in and

³⁰ *CRC* (n21).

³¹ *International Charter of Physical Education, Physical Activity and Sport*, UNESCO (adopted by November 2015).

³² Queensland Government, 'Inclusion: Multi-class pathways', *Queensland Representative School Sport* (Web Page, 14 May 2024) <<https://queensland-schools-sport.education.qld.gov.au/inclusion/multi-class-pathways>>.

³³ Children are classified using the same system as Paralympians and national athletes. There are varying levels of classification depending on the sport. These include Provisional, State and National Level, and International Classification. The system, tests and criteria for classification is the same whether a person is eight or 38. Children are examined by medical practitioners, usually including a physiotherapist and a medical doctor, who consider the functional impact of their impairment on the activities required for the sport, and determine if they have the impairment as categorised by the classification system.

³⁴ Swimming Queensland, 'Multi-class Swimming' (Web Page) <<https://qld.swimming.org.au/multi-class-swimming>>.

³⁵ Football Victoria, 'All-Abilities Football' (Web Page) <<https://www.footballvictoria.com.au/community/programs/all-abilities>>; FIDA, 'Welcome to FIDA' (Web Page) <<https://fida.org.au/>>.

³⁶ Netball Queensland, 'The Queensland Gems' (Web Page, 2023) <<https://qld.netball.com.au/queensland-gems>>; Football Network, 'Play Football', *All Abilities* (Web Page) <<https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities>>; Football Queensland, 'All Abilities' (Web Page, 2023) <<https://footballqueensland.com.au/football-for-all/all-abilities/>>.

Commented [LW12]: The term 'Multiclass' has been used in hyphenated and non-hyphenated forms and also as a proper noun. We have amended the term to consistently be a non-hyphenated proper noun. Please confirm if this is to be differently referenced.

Commented [SP12R2]: It is used in varying ways in different contexts, and is a constructed word. I think it works as proposed.

within the mainstream if they wish, or in a disability-specific sport, if they so choose—with these opportunities being as comparable to those offered to children without disability as possible.

When considering the treatment of children with disability in sport, discrimination will occur if a child with a disability is not provided with substantive equality, which is the basis of reasonable adjustments.³⁷ Substantive equality is the appropriate way to provide non-discrimination to people with disability. For people with disability, the concept of discrimination is often different from other types of discrimination, such as in relation to sex, and race. Often, in matters of race and sex, the answer to discrimination is treating people the same, but for those with disability, there are times when they need to be treated differently, so that they may be afforded the same opportunities. More specifically, people with disability may start from a position of disadvantage and they may need to be distinguished—treated differently—to alleviate their disadvantage. Discrimination against a person with a disability involves failing to treat them differently to recognise and alleviate disadvantage, in circumstances that it does not cause unjustifiable hardship to do so.³⁸

The concept of substantive equality responds to the disadvantage created by social structures not accommodating or envisaging disability. Substantive equality considers the circumstances of a person with disability through the social model of disability.³⁹ Namely, the 'problem' or 'barrier' for a person with a disability is not their impairment, but the requirements or structures of the environment, whether that be the physical environment or the rules, laws and/or social attitudes. This perspective means that if the socially constructed environment imposes a barrier or challenge, then changes to that environment can reduce or eliminate the barrier or challenge. Accordingly, providing substantive equality involves adjusting the socially constructed environment, whether in the physical aspects, the rules and regulations, or social attitudes, to provide a person with a disability with an experience on an equal basis to a person without a disability, as far as is possible.⁴⁰

Commented [LW13]: We note that it was recommended by one of the referees to cite the 3rd ed. of Fredman's *Discrimination Law*. Kindly confirm the correct pinpoint.

Commented [SP13R2]: Yes.

³⁷ Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712–715; Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Journal* 199–200; Elizabeth Dickson, 'Disability Standards for Education and the Obligation for Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 25.

³⁸ *DDA* (n 8) ss 5, 6.

³⁹ Sandra Fredman, *Discrimination Law* (Oxford Press, 3rd ed, 2023).

⁴⁰ *DDA* (n 8) ss 5, 6; Subject to unjustifiable hardship or reasonableness.

Substantive equality provided to a child with a disability in a sporting contest means making adjustments to the structures and rules to provide a fair and meaningful contest. Substantive equality and the concept of adjustments to rules and structures of sport for children with disability are not clear in the human rights instruments and are less clear in the *DDA*. Additionally, not all discriminatory conduct is unlawful. Discrimination is only unlawful if it has been legislated against. Discriminatory conduct that is not unlawful, can however still have a detrimental effect on those people subject to it and may still leave a person at a disadvantage or encountering the negative consequences of the discriminatory conduct.⁴¹

The legislative regime in Australia is not necessarily effective in achieving the application of substantive equality to the experience of children with disability in sport. The current circumstances in Australia are that sport for children with disability is not adjusted to provide them with fair and meaningful contests, with and against the mainstream, or in comparable events to children without disability, or for each child with disability.

IV. THE LAW —DISABILITY DISCRIMINATION IN SPORT IS COMPLEX, AND INEFFECTIVE

The *DDA* is not necessarily clear as to how people with disability are to be treated in their experiences in sport, and in particular when it comes to reasonable adjustments and competition. This section explains some of the complexities and demonstrate why the *DDA* has not necessarily had the impact that it could, on the treatment of children with disability in sport.⁴² Broadly, sections 5 and 6 of the *DDA* are the sections that set out what constitutes discrimination. These sections provide that people with disability are to be treated no less favourably than a person without disability (because of their disability). In addition, these sections set out the requirement that reasonable adjustments be made for a person with a disability to be provided with 'no less favourable' treatment and to prevent discrimination.⁴³

Section 28 of the *DDA* provides that it is unlawful to discriminate against a person with disability, by excluding that person from sport. That means that it is unlawful to treat a person less favourably than a person without disability, by excluding them from sporting activity, including by not providing reasonable adjustments. There is an exception in section 28, that provides that if the person is 'not reasonably capable of performing the actions reasonably

⁴¹ See for example, Simone Pearce, 'The fundamental nature of sport: disability, discrimination and sport in *Holzmueller v. Illinois High School Association*' (2021) 21(1) *The International Sports Law Journal* 74–93; *Sklavos v Australasian College of Dermatologists* [2017] 256 FCR 247.

⁴² See above n 8.

⁴³ *DDA* (n 8) ss 5(2), 6(2); subject to unjustifiable hardship.

required in relation to the sporting activity,⁴⁴ it is not discriminating (presumably to exclude them). This section is complex and confusing, when read with sections 5 and 6. What section 28(3) means by 'reasonably capable', is not defined in the legislation, and there is very little case law in Australia that assists in interpreting the phrase.⁴⁵ On a simple reading of the sections of the *DDA*, if a person is (considered) reasonably capable of the actions reasonably required for the sporting activity, then ss 5 and 6 of the *DDA* apply, and they are to be provided reasonable adjustments to provide 'no less favourable treatment'.⁴⁶ However, it is not necessarily easily understood what these sections mean. Consider this: if the child is reasonably capable of the actions reasonably required for the sporting activity, it is unlawful to exclude them from the activity; however, if they then take part physically in the activity, are they being excluded from the sporting activity if they are not included in a fair and meaningful contest; and in terms of ss 5 and 6 of the *DDA*, are they being treated no less favourably than those without disability, if they are not provided a fair and meaningful contest?

There are no judicial decisions in Australia that deal with the issue of whether children, or adults for that matter, with disability are to be provided an adjustment to the structure of sport, so they might have a fair and meaningful contest. Additionally, there is no judicial guidance about whether being 'reasonably capable of performing the actions required in relation to activity of the sport', includes being reasonably capable of taking part in a competitive way, in a fair and meaningful contest. If that were the case, then, it would be lawful to exclude children with disability from a sporting contest because they are not reasonably capable of being competitive (because of the disadvantage they face because of their disability intersecting with the rules of the sport). If they are reasonably capable of being competitive, then they must not be excluded, and must not be discriminated against. Therefore, do the requirements for adjustments provided in ss 5(2) and 6(2), mean that adjustments should be provided to the contest, to ensure that they are treated no less favourably than those without disability—and have a fair and meaningful contest? These questions demonstrate how complicated these

⁴⁴ *DDA* (n 8) s 28(3).

⁴⁵ The case law that has dealt with the question of the inclusion of a person with disability in sport, on the basis of whether or not they are reasonably capable, has been limited to one decision of the Australian Human rights Commission (AHRC), where it was decided that a competitor in a cycling race who had vision impairment, was not reasonably capable, because they posed a danger to the other competitors. *Martin Wells v Queensland Cyclists Association Incorporated*, in the Human rights and Equal opportunity Commission No. H98/67, 24 August 1999 <<https://humanrights.gov.au/know-your-rights/rights-of-individuals/disability-rights/disability-rights/disability-rights-and-the-disability-discrimination-act/commission-determinations-dda-decisions#other99>>.

⁴⁶ *DDA* (n 8) ss 5(2), 6(2).

Commented [LW14]: Kindly provide the link to the below reference as we have been unable to locate same.

Commented [SP14R2]: There is a precis here <https://humanrights.gov.au/know-your-rights/rights-of-individuals/disability-rights/disability-rights-and-the-disability-discrimination-act/commission-determinations-dda-decisions#other99> But I cannot find the access any longer, other than this. The AHRC changed access to decisions some years ago.

sections are and how difficult it is to interpret the discrimination law as it applies to the experience of a person with a disability in sport.

The case law in relation to discrimination in Australia is concentrated on education and workplace incidents.⁴⁷ There is only one reported case where a person with disability has challenged their treatment in sport, based on the provisions of section 28 of the DDA. In *Wells v Queensland Cyclists Association Incorporated*,⁴⁸ the Court was asked to decide if the applicant had been discriminated against by being prevented from road racing in cycling, on the basis that he was vision impaired. The decision was that the safety concerns related to the applicant's vision impairment making it a risk to himself and others to road cycle in a race, were sufficient to justify complete exclusion from the physical event. There has been no case law considering the nature of inclusion of children or adults with disability in contests, the nature of separate and segregated events, and in particular the concept of reasonable adjustments in and to sport.

When the cases do consider the application of sections 5(2) and 6(2) in areas other than sport, they do not provide a helpful interpretation of how the provisions might be applied. The Court's decisions about the subsections have been criticised for failing to implement substantive equality⁴⁹—the substantive equality that they were designed or intended to provide.⁵⁰ While the case law falls short of guidance in applying reasonable adjustments to provide substantive equality, the DDA will remain a difficult tool to assist in the aim to provide people with disability non-discrimination. If there is not a move to provide substantive equality in the future, there are likely to be more cases that argue for it. That said, there is legislation in some jurisdictions that is developing the notion that there is a 'positive duty' to ensure that discriminatory treatment does not occur.⁵¹ The requirements for adjustments to be made have been legislated in relation to fields such as education, the structural environment and the workplace.⁵² Disability Standards have been introduced in certain fields in accordance with the DDA

⁴⁷ See for example *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, and *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *L v Minister for Education for the State of Queensland* (1996) EOC 92-787 and *P v Director-General, Department of Education* (1996) 1 QADR 755.

⁴⁸ *Martin Wells v Queensland Cyclists Association Incorporated* (n 45).

⁴⁹ See for example, Alice Taylor, 'Disability discrimination, the duty to make adjustments and the problem of persistent misreading' (2019) 45(2) *Monash University Law Review* 461, 486.

⁵⁰ Report (n 14) 185.

⁵¹ See example: *Equal Opportunity Act 2010* (Vic) s 14.

⁵² See example: *DDA* (n 8) s 22; Australian Government, Department of Education, Skills and Employment, *Disability Standards for Education 2005*; *Equal Opportunity Act 2010* (Vic) s 14.

specifying the steps to be taken to identify the potential for discrimination and requiring the implementation of strategies to prevent it.⁵³

In relation to sport, the exceptions in s28 of the *DDA* will provide a challenge for any litigant seeking to be provided a fair and meaningful contest in sport. This is evident in light of the judicial approach taken in relation to other matters, such as education.⁵⁴ The *DDA* is complex and ineffective. To date, the law has had little impact, if any, on the provision of sport for people with disability. There is literature that guides the provision of sport for people with disability in sport,⁵⁵ such as the Inclusion Spectrum,⁵⁶ and the TREE principle,⁵⁷ however, these do not deal with inclusion in the competition. Structured competition for people with disability is restricted to separated and segregated contests, that fail to provide for all people with disability. Multiclass or para divisions do not cater for all people with disability, require complex medical and examination processes, and are conducted separately.⁵⁸ Disability-specific sports are restricted to certain disability categories, and are separate from the mainstream.⁵⁹

The practices that sporting organisations employ for the provision of sport for children with disability have, over time, developed through the sharing of information. Information is shared between a network of administrators, coaches and managers, as well as people in the disability sport sector promoting sport for people with disability in the best way they know how. Some sports have simply developed disability sport practices by adopting some of the structures of the Paralympic competitions.⁶⁰ Other sports seem to have developed contests and structures on the basis that people with disability need to be separated, to provide them with a fair contest.

⁵³ *DDA* (n 8) s 31; See, eg, *Disability Standards for Education 2005*. Disability Standards are a regulatory mechanism that are introduced by the responsible Minister, binding, and designed to implement non-discrimination.

⁵⁴ Such as *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247.

⁵⁵ Florian Kiuppis (n 6) 10–14.

⁵⁶ *Ibid* 7; Michelle Grenier, Nancy Miller, and Ken Black, 'Applying Universal Design for Learning and the Inclusion Spectrum for Students with Severe Disabilities in General Physical Education' (2017) 88(6) *Journal of Physical Education, Recreation and Dance* 53.

⁵⁷ Little Athletics Australia, 'Inclusion of Athletes with Disability' (Web Page)

<<https://www.littleathletics.com.au/inclusion/inclusion-and-diversity/athletes-with-disability/inclusion-of-athletes-with-disability/>>; Florian Kiuppis, (n 55) 15–16.

⁵⁸ See Simone Pearce, 'Disability Discrimination in Children's Sport' (2017) 42(2) *Alternative Law Journal* 143–148; Dominique Moritz and Simone Pearce, '#whataboutme: Can the Inclusion of Gender Diverse Children Pave the Way for Children with Disability in Sport?' (2019) 13(1) *Australian and New Zealand Sports Law Journal* 169–177.

⁵⁹ Netball Queensland (n 34); Football Network (n 35); Football Queensland (n 35).

⁶⁰ For example, Athletics, Swimming, Triathlon.

Considering the law in relation to discrimination, including human rights, provides a different perspective on the treatment of children with disability in sport. Discrimination law applied to inclusion in a contest, potentially produces a different outcome from the traditional offerings for people with disability. Structures of sport undertaken without reference to discrimination law, do not adequately address inclusion in the contest, and promote separated and segregated contests.⁶¹ There is little scholarly consideration of the impact Australian discrimination law has had on people with disability being included in sport.⁶² This article contributes to the work in relation to sport for children with disability, in that it touches upon the challenges faced in children with disability being provided fair and meaningful contests, and the complexities of the law being applied to their inclusion. The next section proposes solutions to the complexities in the law, and the way children with disability are treated in sport.

V. GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT

Legal frameworks can influence the structure of sport and prevent discrimination against children with disability in competitive sport through the implementation of *Guidelines* prepared and published pursuant to the *DDA*. The *DDA* provides that the Australian Human Rights Commission (AHRC) has the power to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of disability'.⁶³ Importantly too, Guidelines have been prepared by the AHRC in relation to the inclusion of transgender and gender diverse people in sport.⁶⁴ Using the example of the *Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport*, the AHRC can publish *Guidelines* that would assist in understanding the law regarding non-discrimination and, more importantly in a practical sense, in avoiding discrimination. *Guidelines for the Inclusion of Children with Disability in Sport* could be a useful regulatory mechanism for guiding sporting organisations and the public, as to how children with disability might be provided fair and meaningful contests. *Guidelines* as provided for in the *DDA*, are a viable solution to the complexities and difficulties that are currently faced in providing children with disability a fair and meaningful contest in sport.⁶⁵

⁶¹ Simone Pearce (n 57); Dominique Moritz and Simone Pearce, (n 57).

⁶² *Ibid.*

⁶³ *DDA* (n 8) s 67(1)(k).

⁶⁴ Australian Human Rights Commission (n 12).

⁶⁵ There are other mechanisms that might be considered appropriate for implementing the *DDA* as it relates to sport for children with disability, such as Disability Standards and Action Plans provided for in the *DDA*.

Guidelines are a mechanism by which the parliament delegates the power to aid and explain the way in which law might be implemented in a practical way.⁶⁶ While *Guidelines* are not binding on any person or entity, the law on which the *Guidelines* are based is binding. Compliance with *Guidelines* is not a defence or adequate response to an allegation of discriminatory conduct. Compliance with *Guidelines*, however, may demonstrate an intention and attempt to comply with the law.⁶⁷

The purpose of *Guidelines* is to enhance the operation of the law in preventing treatment that is discriminatory.⁶⁸ *Guidelines* are a positive apparatus for developing social structures and conduct that treat people with equality and dignity—avoiding discrimination. To treat people with equality and dignity is the basis of human rights instruments.⁶⁹ To treat people with equality and dignity is the foundation of non-discrimination.⁷⁰ Accordingly, *Guidelines* might aid in the treatment of people with disability in sport and accordingly, enhancing life within society for all.

The *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport (Transgender and Gender Diverse Guidelines)* published in 2019, are the only discrimination *Guidelines* published in Australia.⁷¹ These *Transgender and Gender Diverse Guidelines* provide practical examples and explanations for sporting organisations and society for the treatment of people who are transgender or gender diverse when they seek to take part in sport. The *Transgender and Gender Diverse Guidelines* were prepared and published after research revealed that transgender and gender-diverse people were experiencing exclusion and discrimination in their experience in sport.⁷² The *Transgender and Gender Diverse Guidelines* use case studies as a mechanism for demonstrating the way in which the law is intended to operate to prevent potential discrimination based on gender identity. The case studies are examples of circumstances that might be discriminatory and include examples of practical steps that would

⁶⁶ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford, 2nd ed, 2012); see also Australian Government, Department of the Prime Minister and Cabinet, 'Australian Government Guide to Policy Impact Analysis' (Web Page, 17 February 2023) <https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf>.

⁶⁷ Australian Human Rights Commission (n 12) 12.

⁶⁸ Australian Human Rights Commission (n 12).

⁶⁹ *Universal Declaration of Human rights*, A/RES 217 (III), UN GAOR, UN Doc A/810 (10 December 1948).

⁷⁰ *Ibid* art 1.

⁷¹ There are *Guidelines* published for Insurance, *Guidelines* on accessible bus stops, and *Guidelines* on application of Premises Standards; see Australian Human Rights Commission, 'Disability Standards' (Web Page) <<https://humanrights.gov.au/our-work/disability-rights/disability-standards>>; The other alternative is for the Government to issue Standards pursuant to s 39 of the *DDA*, for example the Disability Standards for Education.

⁷² Australian Human Rights Commission (n 12).

remedy that treatment. The use of these case studies provides clear direction for sporting organisations and society about the structures and practices to be implemented in the conduct of sport at the community and sub-professional level.

To date, there is no literature examining the outcomes and impact of the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport*. The *Transgender and Gender Diverse Guidelines* have not necessarily resolved all issues for sporting organisations, individuals, or society, in the treatment of transgender or gender-diverse people in sport.⁷³ The inclusion of transgender or gender-diverse people in competitive sport still poses challenges for all involved, particularly when it comes to considering how the contest that is involved in sport is to be made fair.⁷⁴ Interestingly, the *Transgender Guidelines* do not deal with the inclusion of people in the contest. Whilst there are several case studies that assist in how to treat a person who identifies as transgender or gender diverse, there are no examples for adjusting the contest when a person takes part in a category they identify with. There might be various reasons that the issue of adjusting the contest was not dealt with in the *Transgender Guidelines*. One reason might be that the *Transgender Guidelines* relate to community sport, and the contest is not considered important, or that discrimination being avoided is more important than a fair contest. Another reason might be that it is difficult to provide for changing the contest when there are issues regarding advantage. Following on from the *Transgender and Gender Diverse Guidelines*, in 2023, the Australian Sports Commission published the *Transgender and Gender Diverse Guidelines for HP (High Performance) Sport (Guidelines)*. These Guidelines address issues of fairness in sport and provide for eligibility and reasonableness criteria for the elite athletes taking part in contests. The Guidelines are said to 'balance fairness and inclusion'.⁷⁵ The *HP Guidelines* are not published pursuant to the *Sex Discrimination Act*,⁷⁶ as the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport* were. The *HP Guidelines* specifically provide that they apply to high-performance sport, and that in relation to any other sport, the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport*, as published by the AHRC apply.⁷⁷ The *Transgender and Gender Diverse Guidelines* have brought attention to be paid to the discrimination of transgender and gender diverse people in

⁷³ See for example, Proud2Play, 'Resources Hub' (Web Page) <<https://www.proud2play.org.au/resources>>, which provide various suggestions and resources for making sport less discriminatory. These resources do not necessarily resolve issues of competition.

⁷⁴ Rachel McKinnon, 'Participation in Sport is a Human Right, Even for Trans Women', *The Sports Integrity Initiative* (Web Page, 17 June 2019) <<https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/>>.

⁷⁵ Part 1. Introduction, page 3.

⁷⁶ *Sex Discrimination Act 1984* (Cth) s 48(1)(ga).

⁷⁷ Part 1. Introduction, page 3.

sport. Not only have they provided a catalyst for the HP Guidelines, but, various sporting codes in Australia have referred to the *Transgender and Gender Diverse Guidelines* in issuing statements of their policy for the treatment of transgender and gender-diverse people in their sport.⁷⁸ Given the relative success of the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport, Guidelines for the treatment of children with disability in sport* could provide assistance for sporting organisations and impetus for attention to the treatment of children with disability in sport to avoid or limit discriminatory conduct and structures. Given that there are *some* structures in place for children with disability to be provided *some* opportunities in *some* sports, it is understandable that there is little attention paid to the structures of sport for children with disability and the potential discrimination that occurs. Put another way, society generally thinks that there is sport for children with disability and there isn't a problem. The fact is that there is a problem, and the structures of sport that society relies on, are potentially unlawfully discriminatory, and at best, wrongfully discriminatory, for most children with disability.

Avoiding discrimination for children with disability in sport can have a significant impact on many people within society. Concentrating on the inclusion of children (rather than all people) with disability in sport is based on three key reasons: first, all children are exposed to participation in sport in Australia (through the school system); second, the culture in Australia is one that encourages and promotes children being involved in contests involved in sport from a young age; and third, influencing children's attitude to true inclusion could create a whole new generation of people who practice true inclusion. This impact can also have a flow-on effect for other levels of sport, and other types of activity, for example, in the education system. The structure of sport is a good sector in which to challenge the inclusion of children with disability, because of the contest. Sport offers an opportunity to change perspectives about contests. The treatment of children with disability in sport provides a further specific opportunity to alter societal perspectives, as children are considered vulnerable and in need of protection. Additionally, it is unlikely that sport for children, no matter how competitive or important, would involve complications of professionalism or elitism. Put simply, children are not *playing*

⁷⁸ See Monique Schafer and James Carmody, 'Sporting bodies unveil policies for greater inclusion of trans and gender diverse people', *ABC NEWS* (News, 1 October 2020) <<https://www.abc.net.au/news/2020-10-01/sporting-bodies-unveil-guidelines-for-transgender-athletes/12719706>>.

for sheep stations. This means that changes to the structure of sport might be more readily accepted by society—a society that has traditionally considered sport as static and fixed.

Guidelines for the inclusion of children with disabilities in sport published by the AHRC could assist in the implementation of human rights law and domestic legislation. To be effective, and have maximum impact, the *Guidelines for the Inclusion of Children with Disabilities in Sport* should be drafted in a similar format and language used in the *Transgender and Gender Diverse Guidelines*. If drafted in the same way as the *Transgender and Gender Diverse Guidelines*, *Guidelines for Inclusion of Children with Disability in Sport* would be designed to be easily understood by sporting participants and organisers, and easily followed and implemented. Similar to the *Transgender and Gender Diverse Guidelines*, the *Guidelines for Inclusion of Children with Disability in Sport*, would explain the law about discrimination of people with disability, and clearly outline the way in which the law (interpreted with substantive equality and wrongful discrimination in mind) is to be implemented in a variety of instances. The proposed *Guidelines* would use case studies explaining how certain treatment of children with disability is arguably discriminatory and include examples of practical steps that would remedy that treatment which does *not* currently occur in Australian sport. The use of these case studies provides clear direction for sporting organisations and society about the structures and practices to be implemented in the conduct of sport at the community and sub-professional level. These case studies would provide a new perspective for inclusion, and assist in changing traditional, potentially discriminatory practices. Two brief case studies are provided below:

A. *CASE STUDY A—INCLUDED WITH AND AGAINST THE MAINSTREAM; INDIVIDUAL SPORT*

Jasper's arm was not developed at birth and finishes at the shoulder. He is a good runner and does well enough at school athletics. He has no adjustments for his disadvantage, although there is a functional impact on his running technique that others in the race without that disability do not have. Jasper comes second at school and progresses to the District/Zone representative level. There is no category for children with disability at the District/Zone level. Jasper loves to race his friends and mainstream peers. He takes part in the 100m race at Districts and comes 5th. He is told that he can directly enter the 'Multiclass' division of the 100m at the Regional Championships (the next level). Jasper does not understand why he could not race against, and be compared to, his mainstream peers, and have his disability taken into account.

To not be provided with a category at the District level that takes into account his disadvantage may be discriminatory. The race against his peers does not include an adjustment.

To be provided a Multiclass opportunity at the Regional level provides a type of adjustment to recognise that Jasper is at a disadvantage compared to those without disability. This adjustment, however, does not include Jasper in the mainstream event—the race itself, or the contest. Jasper can be included in the mainstream event, as there is an opportunity for Jasper to be given an adjusted time, taking into account the functional impact of his disability. That might mean deducting .8 of a second from his official time (akin to a head start). Jasper is then able to compete in a fair and meaningful contest with his friends and peers.

Another alternative to address the discrimination Jasper faces in not being included in the mainstream, is by altering the contest, awarding results for the children who have achieved best, relative to their own personal best. For example;

<i>Athlete</i>	<i>Time</i>	<i>Previous PB</i>	<i>First past the post</i>	<i>PB Difference</i>	<i>PB Placing</i>
<i>Jarryd</i>	<i>13.9</i>	<i>13.9</i>	<i>1</i>	<i>0</i>	<i>4</i>
<i>Levi</i>	<i>14.0</i>	<i>14.2</i>	<i>2</i>	<i>-.2</i>	<i>2</i>
<i>Axel</i>	<i>14.3</i>	<i>14.2</i>	<i>3</i>	<i>-.1</i>	<i>3</i>
<i>Ollie</i>	<i>15.9</i>	<i>15</i>	<i>4</i>	<i>+.9</i>	<i>5</i>
<i>Jasper</i>	<i>17.0</i>	<i>17.9</i>	<i>5</i>	<i>-.9</i>	<i>1</i>

The traditional structures of the sport mean that it may be difficult for mainstream participants to accept that they might be displaced from the first past the post system. The sporting organisation therefore might consider it reasonable to award both first past the post and personal best systems.

B. CASE STUDY B—INCLUDED WITH AND AGAINST THE MAINSTREAM; TEAM SPORT

Michelle has Downs Syndrome. She started playing netball as a 'Net Set Go' participant when she was 7 years old. As Michelle progressed, she was playing with her age groups, through the 'Net Set Go' program. She played in levels Green, Gold and White, until she was 10 years old. The sport was not competitive, there was no scoring, and for the most part, other teammates passed her the ball. When Michelle turned 11, she was playing 'Divisional' netball, based on her ability comparable to others. Once the sport became competitive or divisional, at the age of 11 years old, the local netball association introduced a rule for Michelle to play as an extra player in the centre third of the court and be undefended. When questioned by an opposing team, the Association advised that they

considered this a reasonable adjustment to make to the rules to accommodate Michelle's disadvantage and include her in the mainstream. The alternative might be that Michelle plays one of the seven positions, but that she is not defended (or defended by 6ft) within certain parts of the court.

These case studies demonstrate changes to the traditional structures of sport to prevent discrimination. They provide examples to assist sporting organisations, schools, and the community in understanding that the way children with disability currently experience sport in Australia is possibly discriminatory and encourages changes to the way sport is provided—promoting a change to the culture of separation and segregation.

The *Guidelines* would also include guidance for sporting organisations to develop and maintain policies to provide inclusion for children with disability, including inclusion in a fair and meaningful contest. The *Guidelines* would also include details for codes of conduct to be implemented by sporting organisations, and guidance as to how structures and rules can and should be changed to provide children with disability true inclusion in sport, including in a fair and meaningful contest. The *Guidelines* could include a decision framework that is helpful in guiding how to make reasonable adjustments for a child with a disability in sport. As an example, the following framework could be utilised as a basis for the *Guidelines* and would assist sporting organisations in deciding how a child with a disability might be best provided for in a competitive sporting opportunity:

1. Can the child be included in the mainstream as the first option, and if at a disadvantage, the rules altered to provide a fair contest against the mainstream?;
2. If number 1 is not possible, can the child be included in the event with mainstream and rewarded separately as an athlete with a disability?;
3. If number 2 is not possible, can the child be provided a separate contest in a disability-specific sport or category, that is fair and meaningful (i.e. not on their own), and that is comparable to the mainstream offering of the event?; and
4. If number 3 is not possible, can the child be offered a separate and segregated sport that is as close to the mainstream offering as possible?

The *Guidelines* should articulate the way the law can be implemented, raising awareness and shifting the social paradigm regarding the provision of sport for children with disabilities, to, as far as possible, provide them with non-discriminatory experiences.

VI. CONCLUSION

Commented [LW15]: The following amendment has been suggested to clarify that your example supplements a potential framework for the guidelines.

Guidelines for the Inclusion of Children with Disability in Sport have the potential to alter the structure of sport to ensure that all children are provided truly inclusive and meaningful experiences in sport, and to gain the benefits that those experiences bring.⁷⁹ The publication of *Guidelines* would provide sporting organisations, participants and their families, the tools to change the structure of sporting offerings. In this way, the *Guidelines* provide a solution for the barriers to the true inclusion of children with disability in sport, as identified in this article. The *Guidelines* provide a mechanism to apply substantive equality to children's sport. In so doing, the *Guidelines* enable children with disability to be included in a non-discriminatory way, as provided for by the human rights regime, and the *DDA*. They will also help improve social attitudes towards the treatment of children with disability.

Commented [LW16]: We have suggested the following amendment with the understanding that your argument is to change the nature of how sport is offered rather than to change the intrinsic nature of sport as a whole. Please confirm if this is correct.

Commented [SP16R2]: Yes.

Commented [LW17]: We have suggested the following change to avoid repetition of the word 'provide'.

Commented [SP17R2]: I try to avoid the use of Accommodate, as it is a word used in discrimination law in the United States (reasonable accommodations) and other contexts and is confusing if used in the context suggested.

⁷⁹ Rochelle Eime et al, 'A systematic review of the psychological and social benefits of participation in sport for children and adolescents: informing development of a conceptual model of health through sport' (2013) 10 *International Journal of Behavioral Nutrition and Physical Activity* 98.

REFERENCE

A. ARTICLES/BOOKS/REPORTS

- Baldwin, Robert, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford, 2nd ed, 2012)
- Breivik, Gunnar, 'Sport as part of a meaningful life' (2022) 49(1) *Journal of The Philosophy Of Sport* 19–36
- Bula, Michael, 'Competition for Children: The Real Issue' (2013) 42(7) *Journal for Health, Physical Education, Recreation* 40
- DePauw, Karen and Susan Gavron, *Disability Sport* (Human Kinetics, 2nd, 2005) 13
- Dickson, Elizabeth, 'Disability Standards for Education and the Obligation for Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 25
- Eime, Rochelle, Young, J A, Harvey J T, Charity M J and Payne, W R, 'A systematic review of the psychological and social benefits of participation in sport for children and adolescents: informing development of a conceptual model of health through sport' (2013) 10 *International Journal of Behavioral Nutrition and Physical Activity* 98
- Fredman, Sandra, *Discrimination Law* (Oxford Press 3rd ed, 2023)
- Fredman, Sandra, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712-715
- Greely, Henry T, 'Disabilities, Enhancements, and the Meanings of Sports' (Research Paper No 82, Stanford Law School, February 2004)
- Grenier, Michelle, Nancy Miller, and Ken Black, 'Applying Universal Design for Learning and the Inclusion Spectrum for Students with Severe Disabilities in General Physical Education' (2017) 88(6) *Journal of Physical Education, Recreation and Dance* 53
- Holzapfel, Simon and Louisa Summers, 'An Introduction to Wheelchair Tennis for Future Athletes and Coaches' (2013) 27(4) *Palaestra* 27
- 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*, A/HRC/30/50 (17 August 2015)
- Kiuppis, Florian, 'Inclusion in Sport: Disability and Participation' (2018) 21(1) *Sport in Society* 5
- Krein, K, *Philosophy and Nature Sports* (Routledge, 1st ed, 2018)
- Lord, Janet and Michael Stein, 'Social Rights and The Relational Value of the Rights to Participate in Sport, Recreation, and Play' (2009) 27(2) *Boston University International Law Journal* 249
- Loy, John and W. Morford, 'The Agon Motif: Redux. A Study of the Contest Element in Sport' (2019) 82 *Physical Culture and Sport Studies and Research* 10-45
- Mareš, Lukáš, and Daniel Novotný, 'What is sport? A response to Jim Parry' (2023) 17(1) *Sport, Ethics and Philosophy* 34–48
- Moritz, Dominique and Simone Pearce, '#whataboutme: Can the Inclusion of Gender Diverse Children Pave the Way for Children with Disability in Sport?' (2019) 13(1) *Australian and New Zealand Sports Law Journal* 169–177
- Pandel, Hannah, 'Healthy Competition is Good for Children' (2015) 67(1) *IPA Review* 31–33
- Parry, Jim, 'On the Definition of Sport' (2022) 17(1) *Sport, Ethics and Philosophy* 49–57

- Parry, Jim, 'The concept of sport in Olympism' (2020) 4 *International Academic Journal on Olympic Studies* 131–148
- Pearce, Simone, 'Disability Discrimination in Children's Sport' (2017) 42(2) *Alternative Law Journal* 143–148
- Pearce, Simone, 'The fundamental nature of sport: disability, discrimination and sport in *Holzmueller v. Illinois High School Association*' (2020) 21(1) *The International Sports Law Journal* 74–93
- Pearce, Simone, Sanderson, Jay, 'The myth of a "human right to sport": how human rights can lead to true inclusion for children with disability' (2024) *International Sports Law Journal* 1–24
- Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report, 2004) 185
- Suits, Bernard, 'The elements of sport' *The Philosophy of Sport: A collection of essays* Robert Osterhoudt (ed): 48–64
- Taylor, Alice, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Journal* 199–200
- Taylor, Alice, 'Disability discrimination, the duty to make adjustments and the problem of persistent misreading' (2019) 45(2) *Monash University Law Review* 461–486
- Tint, A, K Thomson, and JA Weiss, 'A Systematic Literature Review of the Physical and Psychosocial Correlates of Special Olympics Participation among Individuals with Intellectual Disability' (2017) 61(4) *Journal of Intellectual Disability Research* 302
- Turgeon, Stephanie, Jessica Turgeon and Diane Morin, 'Coaching Special Olympics: a Scoping Review' (2023) 18(1) *International Journal of Sports Science and Coaching* 304–306

B. CASES

- By Holzmueller v Illinois High School Association* (2018) 17-2456
- L v Minister for Education for the State of Queensland* (1996) EOC 92-787
- Martin Wells v Queensland Cyclists Association Incorporated* (1999) EOC 93-031
- P v Director-General, Department of Education* (1996) 1 QADR 755
- Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92
- Sklavos v Australasian College of Dermatologists* [2017] 256 FCR 247

C. LEGISLATION/BILL/EXPLANATORY MEMORANDUM

- Anti-Discrimination Act 1991* (Qld)
- Disability Discrimination Act 1992* (Cth)
- Equal Opportunity Act 2010* (Vic)
- Sex Discrimination Act 1984* (Cth)
- House of Representatives, The Parliament of the Commonwealth of Australia, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth): Explanatory Memorandum*; Australian Government, 'Review of the *Disability Discrimination Act 1992*, Inquiry Report', *Productivity Commission* (Report, 12 July 2004)

D. TREATIES/GUIDELINES/CHARTERS

- Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport*, June 2019
- Convention on the Rights of the Child* (CRC) 1989, (resolution 44/25), opened for signature 20 November 1989, entered into force 2 September 1990 ('CRC')
- Disability Standards for Education 2005*
- Human Rights and Equal Opportunity Commission No. H98/67, 24 August 1999
- Human Rights Council, United Nations General Assembly, *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*, A/HRC/30/50 (17 August 2015)
- International Charter of Physical Education, Physical Activity and Sport*, UNESCO(adopted by November 2015)
- The Olympic Charter, in force as from 17 July 2020 ('Olympic Charter') art 1
- U.N. General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 13 December 2006, A/RES/61/106, entered into force on 3 May 2008
- Universal Declaration of Human rights (UDHR)*, A/Res 217 (III), UN GAOR, UN Doc A/810, (10 December 1948)

E. WEB PAGES

- Australian Government: Department of the Prime Minister and Cabinet, 'Australian Government Guide to Policy Impact Analysis' (Web Page, 17 February 2023)
<https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf>
- Australian Human Rights Commission, 'Disability Standards' (Web Page)
<<https://humanrights.gov.au/our-work/disability-rights/disability-standards>>
- Australian Government, 'Equity, Diversity and Inclusion', *Australian Sport Commission* (Web Page) <https://www.sportaus.gov.au/integrity_in_sport/inclusive-sport>
- Disability Sports Australia, 'Wheelchair Basketball' (Web Page)
<<https://www.sports.org.au/wcbasketball>>
- Disability Sports Australia, 'Wheelchair Tennis', (Web Page)
<<https://www.sports.org.au/wheelchair-tennis>>
- FIDA, 'Welcome to FIDA' (Web Page) <<https://fida.org.au/>>
- Football Network, 'All Abilities', *Play Football* (Web Page)
<<https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities>>
- Football Victoria, 'All-Abilities Football' (Web Page)
<<https://www.footballvictoria.com.au/community/programs/all-abilities>>
- Goalball Australia, 'About' (Web Page) <<http://www.goalballaustralia.org/about>>
- Little Athletics Australia, 'Inclusion of Athletes with Disability' *Inclusion* (Web Page)
<<https://www.littleathletics.com.au/inclusion/inclusion-and-diversity/athletes-with-disability/inclusion-of-athletes-with-disability/>>

- Little Athletics Queensland, 'McDonald's State Relay Championships' (Web Page)
<<http://laq.org.au/mcdonalds-state-relay-championships/>>
- McKinnon, Rachel, 'Participation in Sport is a Human Right, Even for Trans Women', *The Sports Integrity Initiative* (Web Page, 17 June 2019)
<<https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/>>
- National Wheelchair Basketball Association, 'History of Wheelchair Basketball' (Web Page)
<<https://www.nwba.org/history.html>>
- Netball Queensland, 'The Queensland Gems', (Web Page, 2023)
<<https://qld.netball.com.au/queensland-gems>>
- New South Wales Government, 'Athletics Come and Try days for Students with Disability', *School Sport Unit* (Web Page) <<https://app.education.nsw.gov.au/sport/page/1343>>
- O'Flaherty, Antonia, 'New inclusive sport program 'exhilarating' for Queensland students with disability', *ABC News* (News, 10 June 2021) <<https://www.abc.net.au/news/2021-06-10/new-queensland-inclusive-sports-program-aims-to-address-barriers/100202856>>
- Proud2Play, 'Resources Hub' (Web Page) <<https://www.proud2play.org.au/resources>>
- Queensland Government, 'Inclusion: Multi-class pathways', *Queensland Representative School Sport* (Web Page, 14 May 2024)
<<https://queensland-schools-sport.education.qld.gov.au/inclusion/multi-class-pathways>>
- Queensland Little Athletics Multi class relays at State Championships. Little Athletics in Queensland, 'State Competitions' (Web Page, 2023) <<https://laq.org.au/mcdonalds-state-relay-championships/>>
- Schafter, Monique and James Carmody, 'Sporting bodies unveil policies for greater inclusion of trans and gender diverse people' *ABC NEWS* (News, 1 October 2020)
<<https://www.abc.net.au/news/2020-10-01/sporting-bodies-unveil-guidelines-for-transgender-athletes/12719706>>
- Special Olympics Australia (Web Page) <<https://www.specialolympics.com.au/about/index>>
- Sporting Wheelies and Disabled Association, 'Para-Sport Come and Try Day', (Web Page, 2021) <<https://www.sportingwheelies.org.au/para-sport-come-and-try-day>>
- Swimming Queensland, 'Multi-class Swimming' (Web Page)
<<https://qld.swimming.org.au/multi-class-swimming>>
- Variety: The Children's Charity, 'Variety Active Kids Sports Days' (Web Page)
<<https://varietyactivekidssportsdays.com.au/>>