

IN THE EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number 1 of 1998

IN THE MATTER OF A COMPLAINT BY:

LISA JERNAKOFF

Complainant

- against -

WA SOFTBALL ASSOCIATION (INC)

Respondent

REASONS FOR DECISION

Before: Mr N Hasluck, QC President
Mrs Kean Member
Mrs Kopke Deputy Member

For the Complainant: Mr MacDonald

For the Respondent: Mr Herron

Heard: 29 and 30 September, 1998
1 and 2 October, 1998

REASONS FOR DECISION

Delivered:



REASONS FOR DECISION

The Complainant Lisa Jernakoff claims that the Western Australian Softball Association Inc discriminated against her on the ground of sex in the area of the provision of goods, services and facilities. The complaint arises out of Lisa's wish to play softball in a junior competition conducted by the Softball Association in the winter months of 1997.

The case before the Tribunal raised various issues including the question of whether the Softball Association could properly be described as providing "services" within the meaning of the Equal Opportunity Act 1984, whether a decision taken by the Softball Association to refuse permission for Lisa to play in a competition organised on the assumption that the only participants would be boys under the age of 16 was the operative cause of her being unable to play competitive softball during the winter months, and whether the Softball Association was excused from liability under Section 35 of the Act whereby it is lawful to exclude persons of one sex from participating in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. It will be useful to begin by looking at the history of softball in this State, viewed both as a recreational and competitive activity, and to consider the issues having regard to current policies and practices within Australia and overseas.

Evidentiary materials received by the Tribunal during the course of the hearing included a report published in 1997 by the Women's Sport Foundation of WA (Inc) under the title *Teenage Girls Perceptions of Participation in Sport*. This report noted that sport contributes towards good health, self confidence, a sense of achievement, social skills and a complete education and is therefore of considerable benefit both to individuals and to the community. The same report

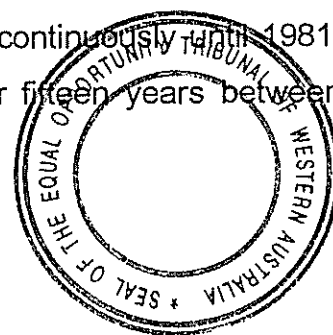


noted, however, that in Australia registered sportsmen outnumber registered sportswomen by more than 3:1 from which it seems to follow that a significant proportion of the female population are missing out on the many benefits of sport. The authors of the report refer to suggestions advanced in various research papers and in the course of public debate that the organisation of sporting contests can serve to support an aura of male competence and superiority in publicly acclaimed skills while at the same time diminishing the achievements of women and their skills. It is therefore important that in looking at the manner in which softball has been played to date the Tribunal should approach the task of determining whether the matters complained of by Lisa Jernakoff amount to discrimination on the ground of sex within the meaning of the Act with an awareness of these broader considerations.

History

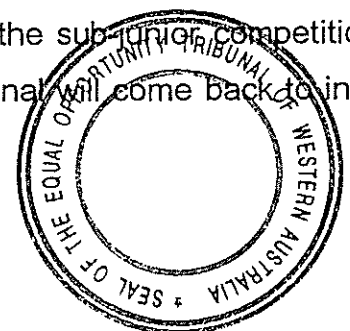
It seems that the history of softball commenced in America. The WA Women's Softball Association was formed in 1948 as a consequence of six teams of female players wishing to form a competition. A decision was made by the inaugural committee to follow the international tradition whereby softball is played in summer, this being for reasons of safety on the assumption that it might be dangerous to play in rain when conditions become slippery and it is hard to control the ball and the bat. Three years later Western Australia joined the Australian Women's Softball Council which was made up of associations in Victoria, Queensland, South Australia and New South Wales.

The subsequent history of the sport was presented to the Tribunal by Shirley Schneider. She is presently employed as the State Coaching Director of the WA Softball Association and has had a long and distinguished involvement with the game of softball in this State. She started playing softball in 1954 and played in competitions organised by the WA Softball Association continuously until 1981. She represented the State in a national competition for fifteen years between



1960 and 1976 and then became the State Coach for the senior women's team for the next seventeen years. She was on the selection panel for the Australian senior women's Olympic team for 1996, the women's under 19 team World Series for 1996 and the women's senior team for the World Series in 1998. She has been State Coaching Director for the WA Association for both men and women since 1978 and has been President of the Association on a number of occasions. She is currently Vice President of the Association. She has been an accredited coach since 1982 and has a long experience in running coaching clinics for male and female players, at both senior and junior levels. She has also organised junior development camps for boys and girls for ages 13 to 16 years and has also coordinated an academy in this State for elite male and female players and satellite academies for both country and metropolitan female players to develop their skills.

According to Shirley Schneider Western Australia was the first state to introduce men's softball. This was because a lot of New Zealanders had moved to Western Australia and they brought the interest with them as New Zealand did not play baseball. An informal competition for men was held in 1976 in which 8 teams participated. This led to the formation of the Western Australian Men's Softball League which subsequently sought affiliation with the national softball body. At that time, in 1988, the national body was comprised exclusively of women's softball associations and, in any event, it was only prepared to recognise one softball association in each state. Principally for that reason the WA Men's Softball League sought to amalgamate with the WA Softball Association and soon afterwards the amalgamation was effected. For logistical reasons, to do with the availability of grounds, it was decided that the men's competition would be played in winter while the women's competition would continue to be played in the summer months. The WA Softball Association took on the task of organising the competitions for both the women and the men but it follows from this narrative that, with the exception of the sub-junior competition for boys and girls under the age of 13 which the Tribunal will come back to in a



moment, the winter competition for players above the age of 13 has traditionally been a men's competition.

Constitution of the WA Softball Association

The Association has the general aim of the organisation of softball competitions and the promotion of softball as a sport in Western Australia, in both metropolitan and country areas. The structure of the Association is that it is an incorporated association with a management committee. The Association raises funds from some areas to subsidise other areas. It is a non-profit organisation in that all monies made are put back into the Association. It moved into premises at Mirrabooka in or about 1991, such premises presently comprising four fields which surround circular premises in the shape of a wheel. These premises include a meeting hall, reception area and bar or entertainment area and are occupied pursuant to a 25 year lease from the City of Stirling. There are approximately 64 clubs affiliated with the Association and these clubs collectively embrace approximately 2,290 players. That figure includes 790 players in the winter competition all of whom are males save for 5 female players in the sub-junior under 13 division.

Before turning to the details of the various competitions it will be useful to pause briefly and look at certain features of the WA Softball Association's constitution which have a bearing upon the issues before the Tribunal.

By clause 3 the objects of the Association include a determination to abide by the official rules of the game as issued by the Australian Softball Federation, to ensure the proper representation of Western Australia in interstate and international matches, to arrange courts of appeal on all matters pertaining to control of the game, to act for its members on all matters pertaining to the game and to do all such other things as are conducive or incidental to the attainment of the objects mentioned earlier.



It is apparent from clause 7 that membership of the Association is comprised of clubs or affiliated associations rather than individual members. Related evidence established that the various clubs and associations are entitled to be represented at meetings of the Association having regard to the size of the membership list of the affiliated body. Nonetheless, there are provisions in the constitution indicating that individual players participating in competitions organised by the Association will be directly affected by the policies and practices of the Association, notwithstanding that the individual player's primary allegiance is to the local club and to the team fielded by that club. By clause 5 the WA Softball Association is said to have sole jurisdiction throughout Western Australia in all matters pertaining to softball. It is apparent from clause 15 that it will keep a true record of all registered players in the competition, enforce the rules of match play and exercise a supervisory role in regard to the organisation of winter and summer competitions and the conduct of umpires, coaches and record keepers. Further, it was a matter of undisputed evidence before the Tribunal, that in practise a portion of the fee paid to a local club by the individual player would find its way to the WA Softball Association which would then undertake the task of obtaining insurance cover for all registered players participating in competitions organised by the Association.

The Tribunal pauses to note in passing that by clause 7.2 a club is defined as two or more teams wishing to play in interclub matches conducted by the Association. Nine players shall constitute a team and each playing member shall be entitled to all the rights and privileges of membership.

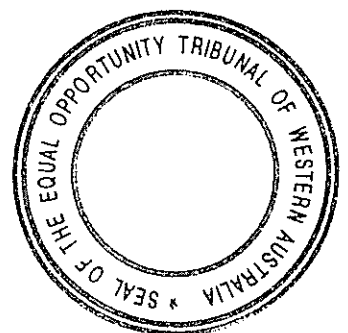
The official playing rules for the sport of softball as approved by the Australian Softball Federation Inc were received in evidence. They confirm that the WA Softball Association is a member of the Federation. It is material to note that by Rule 4 a team must have the required number of players present in the team area to start or continue a game. "The male roster shall include only male



players and female roster shall include only female players.” It is also material to note that by Rule 2 different pitching distances are prescribed for girls and boys. Thus, the “official diamond” in regard to players under the age of 15 is required to have a pitching distance of 12.19 metres (or 40 feet) for girls and 14.02 metres (46 feet) for boys in the “fast pitch” category although, in the “slow pitch” category there is a common pitching distance of 14.02 metres (46 feet).

Competitions

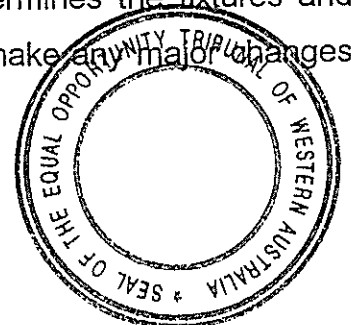
Shirley Schneider described the various competitions organised by the WA Softball Association and much of her evidence in regard to this point was confirmed by other witnesses. It runs a mixed sex competition for boys and girls aged 12 years and under known as the sub-junior competition, this being run in both winter and summer. From that age onwards, there has traditionally been a separation of the sexes into two streams with the result that on the female side in the summer months there is a women’s junior competition for those between 13 and 16 years, a women’s junior under 19 competition for those between 16 and 19 years, a women’s senior competition for women aged over 16 years, a state league competition for elite female players, and a female veterans competition. On the male side, as competitions run in the winter months, there is a men’s junior competition for those aged between 13 and 16 years, a men’s junior under 19 competition for those aged between 16 and 19 years, a men’s senior competition, a state league competition for elite male players, and a male veterans competition. It is apparent from this that from the age of 13 years competitive softball activity, at least within the metropolitan area of Perth, is organised upon the basis that males and females will play the sport in single sex teams. Shirley Schneider said that she was aware that one of the WA Softball Association’s affiliated association in Busselton ran a mixed competition at a junior level, but this was due to low membership numbers.



Shirley Schneider went on to say that players from clubs and Associations affiliated with the WA Softball Association are also entitled to be nominated for and chosen in state teams. The Association does not organise separate state teams for its own metropolitan competition and the competitions of the affiliated associations. It is just the one state team comprised of members from the WA Softball Association's competition and the competitions organised by the affiliated associations. She pointed out that competition at the elite levels has traditionally been on a single sex basis. There is an Olympic contest conducted on the basis of a single sex competition for female players, but there is no such event at the Olympics for men. In the 1996 Olympics there were 8 teams competing made up of female players. Australian women perform well internationally in softball competitions, having won a bronze medal in the 1996 Olympics.

She said that consistent with the Association's constitution competitions conducted by the Association are actually organised by a subcommittee made up of representatives from each club and a coordinator selected by the subcommittee of the Association. The Association pays all bills associated with the competition which include umpire fees, trophies, ground hire, electricity and marking of diamonds depending upon the competition. For example, in relation to the men's winter competition at the end of each year's competition, the winter competition's subcommittee holds an AGM. The clubs who have participated in the winter competition are entitled to appoint a delegate to attend that AGM. At that AGM the next year's winter committee which is the subcommittee to the Association is elected from the delegates of the clubs who attended the meeting. The committee appointed at the AGM then appoints various officials who organise the next year's competition. A coordinator (similar to a chairperson) reports to the Association and attends the Association's monthly meetings.

The winter committee holds regular meetings and determines the fixtures and rules of match play. However, they are not entitled to make any major changes

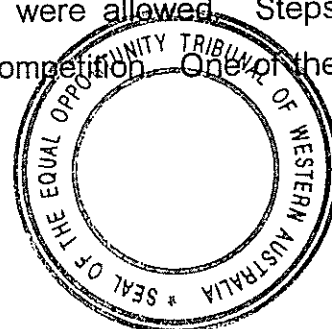


to the way in which the competition is organised without the Association's board or committee ratifying those changes at a board meeting. Thus, if the winter committee decided they wanted to organise a mixed (ie male and female) competition for under 16s they would vote on it at a normal committee meeting, the coordinator would then attend a board meeting, and if the board ratified and agreed that such a competition be organised the competition would be organised by the winter committee with the approval of the board.

She went on to say that it is the policy of the Association not to allow mixed competition for under 16 players. She said it would be logistically possible to run a winter competition for junior women on the basis of the grounds available but the limitation on the organisation of such a competition is the availability of girls to play in the teams and the fact that no request has been received for such a competition by the number of players such a competition would require. It was apparent from the evidence that the Association's view of a winter competition for players under the age of 16 competing in mixed teams was affected by perceptions about the physical capacities of boys and girls at that age.

Lisa Jernakoff

Lisa was born on 17 May 1985 and was therefore 11 years of age at the commencement of the 1997 winter competition season. She would turn 12 years of age early in the season on 17 May 1997. She said in evidence at the hearing that she started playing T-ball at 7 years of age and had been playing T-ball for a number of years before she turned to softball. Her brother had played for the Northern Districts Club and it seems that at the beginning of the 1997 season she paid the relevant fees and joined the Northern Districts Men's Softball Club Inc with the intention of playing as a member of the Club's sub-junior team. It follows from earlier discussion that she was at liberty to do so because in the under 13 or sub-junior winter competition mixed teams were allowed. Steps were taken to have the team entered in the sub-junior competition. One of the



boys in the team was only 8 years of age and it seems from the evidence that he was noticeably smaller than the other team members.

The elements of the sport of softball are well known and there is no need to describe them at length. Suffice to say for present purposes that the batting team presents to the fielding team a succession of batters who are expected to hit the ball in a way which will permit the batter and the other batting members of the team to score by running around the bases. This brings into play various skills including hitting, sprinting and "sliding in" to avoid being tagged by a fielder or catcher on the final approach to the base. The nine players comprising the fielding team will consist of outfielders, players positioned on each base, a pitcher, and a catcher stationed immediately behind the batter. Unlike baseball, pitching is effected by an underarm delivery. The catcher is generally equipped not only with a catcher's glove but also with a face mask and padded clothing. A number of witnesses confirmed that the special protection afforded to the catcher is to guard against injury from deliveries pitched to the batter and from the risk of the catcher being knocked over by a player on the batting team sliding in to home base. Lisa said in evidence that she had prospects of being the team's catcher although the expectation was that each member of a softball team should be able to play in all positions.

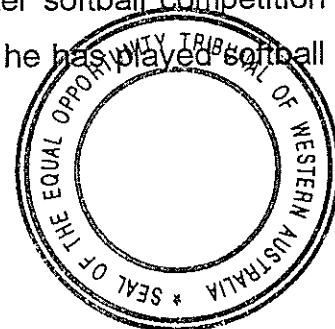
Lisa also said that in the training sessions the team coach, Stephen Bandy, required members of the team to do various warm-up exercises and to practise the various skills required of a softball player. The Tribunal understands that the Northern Districts sub-junior team played some preliminary matches before the season proper commenced, these being regarded as grading matches to ascertain at what level within the sub-junior competition a team should be placed. She said that they played about four matches at the grading stage. According to her even though mixed teams were permissible in the sub-junior competition there was only one other team that had girls in it, the team in question having two girls of about her age.



It was at this preliminary stage of the season that an unwanted problem came to the attention of Mr Bandy as the coach of the team. It turned out that three of the boys would turn 13 years of age prior to the grand final at the end of the season. This meant that they were not eligible to play in the sub-junior competition. The Northern Districts Club already had a boys' team playing in the A division of the under 16 winter competition but it occurred to him that one solution to the problem he now faced was to have the sub-junior team - which included Lisa and the three boys who would otherwise be barred by the age barrier - elevated to the B division of the junior competition as a Northern Districts B team. According to him, he recognised that there were some risks attached to such a course because the team included some players such as the 8 year old boy and Lisa, aged 11, who would be younger than many of their opponents.

Mr Bandy discussed these concerns with the parents of the children involved. The consensus of opinion was that as the members of the team were working well together, and had forged a team spirit, it would be pity to break up the team by requiring the three older boys to play elsewhere. Further, Mr Bandy said in evidence that he foresaw difficulty in obtaining three substitute players under the age of 13 and if no substitutes could be found then it might prove impossible to field a sub-junior team. He said in evidence that at the time the proposal to move the sub-junior team up to the junior level was under discussion he was not aware of any rule that would prevent a girl such as Lisa Jernakoff playing in the winter competition although he conceded that he had not previously seen any girls playing at that level as part of a mixed team. A decision was taken to move the entire team into the junior competition as a Northern Districts B team with the result that there was no longer a Northern Districts sub-junior team.

The Tribunal heard evidence from Kevin Osborne bearing upon this aspect of the matter. He was the winter coordinator for the men's winter softball competition for the 1996 and 1997 seasons. He said in evidence that he has played softball



for approximately nine years and became involved through his children when they were playing T-ball and then graduated to softball. He is a member of the Morley Eagles Softball Club, a division of the Morley Eagles Baseball Club. He confirmed that he was the winter committee coordinator when the Northern Districts Club, known as the Northern Vikings, applied for registration of the sub-junior team and when the team was regraded to the junior competition because various members of the team were ineligible.

According to Mr Osborne, when a club nominates a team it sends in a team nomination form. However at that time no team list is lodged. In relation to sub-junior and junior teams, team lists are sent in to the WA Softball Association at the commencement of the season. It was his recollection with respect to Lisa Jernakoff and the Northern Vikings team that initially their team nomination was accepted for division sub-junior A. It was later during the refixturing of the sub-junior and junior teams that Steve Bandy, Northern Vikings delegate and coach of the sub-juniors advised him that the Northern Vikings sub-junior team had some players in the team that would reach the age of 13 before the end of the playing season. It was after the third grading game that the fixturing committee met for regrading and it was at this point that he was advised of the problem. The committee of which he was coordinator gave approval for the regrading. However at the time the approval was given he was unaware that Lisa Jernakoff was playing in the team.

Mr Osborne said that had he been aware Lisa was a member of the team he would not have given approval to the team playing in the junior competition because the competition at that level was for boys. He did not become aware that she was playing in the team until after the second game of the junior season when a complaint was received from an opposing team. Other evidence confirmed that the first game played in the junior competition was on 25 May 1997, by which time Lisa had turned 12 years of age, and she played for the Northern Districts B team on that occasion.



The question of Lisa's eligibility was raised at the 9th June 1997 winter competition monthly meeting and referred to the WA Softball Association board meeting for a ruling. The result of the board meeting was that Lisa was ruled ineligible to play in the junior B boys' competition and a letter was sent to the President of the Northern Districts Softball Club accordingly.

The letter written by Mr Osborne in his capacity as coordinator of the winter competition and on behalf of the WA Softball Association to the President of the Northern Districts Club is dated 11 June 1997 and reads as follows:

"As convenor of the winter competition I wish to advise you that Lisa Jernakoff is not eligible to play in the winter competition junior division. This competition is for male players only.

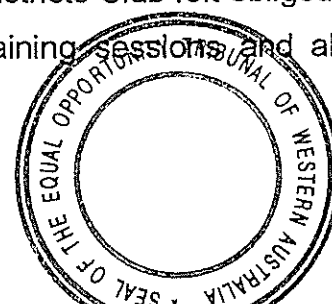
The Western Australian Softball Association competitions are conducted under the guidelines of the national junior sports policy. WASA has mixed competition for softball players under the age of 13 years (sub-juniors) however competitions for age groups over the age of 13 are of single sex competitions as recommended by the national sports policy.

I appreciate the dilemma this ruling creates for you, however I would like to point out Lisa is not being barred from playing softball, she is still able to play in the sub-junior competition in winter, or in any of the women's competitions in summer. It is unfortunate that your club no longer has a sub-junior side in the competition for Lisa to be transferred to.

Any further correspondence relating to this ruling should be directed to the WASA board."

Subsequent Events

Some further enquiries were made by the Northern Districts Club which seemed to suggest that as a corollary to the stance adopted by the Association Lisa would not be covered by the insurance effected by the Association on behalf of its registered players. Thus, reluctantly, the Northern Districts Club felt obliged to comply with the ruling. Lisa continued to attend training sessions and also



attended the various matches and assisted with warming up and providing practise for the players. Indeed, she was so conscientious in these ways that at the end of the season she received an award from the club. In the meantime, on 16 June 1997, shortly after the Association's ruling was conveyed to the Northern Districts Club, Mr & Mrs Jernakoff, on behalf of their daughter, lodged a written complaint of discrimination on the ground of sex with the Commissioner of Equal Opportunity, such complaint being the subject of these proceedings before the Tribunal.

In the course of her evidence Lisa summed up her own feelings about the matter. She said she could not quite believe what had happened "because in this day and age everyone is told that you should never let anyone tell you that you are not good enough just because you're a girl." She referred to the fact that as a catcher she was protected by the special clothing and thus she saw no risk of injury while acting in that capacity. "When you're batting you have to wear a helmet and you're encouraged to wear a mouth guard."

In the summer of 1997/1998 she played for the Carine Cats in the female competition. Her experience was that the training done with the girls was the same as with the boys and was mostly based on "getting your skills right" rather than in improving strength. When asked why she wished to play with the boys she said in part:

"They were a lot more competitive, and they really cared about, like, how they were playing, and they never gave up ... when you tend to play with the girls, if they are losing by a lot then they just give up, and then nobody tries any more, and then it's really hard to, like, keep playing well ..."

She said that she did want to play in the winter competition with the boys at junior level and would wish to do so until she was 16. The case before the Tribunal proceeded upon the basis that she did not seek any form of relief other than a ruling that she had been discriminated against on the ground of her sex and an

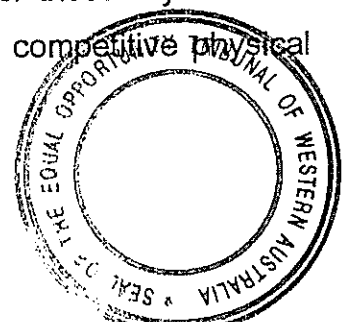


order that the WA Softball Association does not continue the unlawful discrimination and allows her to play with the Northern Districts junior team. In other words, in practical terms, and recognising that the 1998 winter competition has now ended, a ruling is sought which would permit Lisa to play in the Northern Districts junior team in the 1999 winter competition and until such time as she ceases to be eligible to play in that competition because of her age.

National Junior Sport Policy

The determination by the WA Softball Association that Lisa was ineligible to play in the junior winter competition placed reliance upon the terms of the National Junior Sport Policy and it will therefore be useful to look briefly at the policy in question. The foreword to the relevant document, published in February 1994, was written by the Federal Minister for the Environment, Sport & Territories and the Federal Minister for Schools, Vocational Education and Training. They note that playing sport is an integral part of growing up in Australia. The majority of young people are active participants in sport, whether it be in the school yard or back yard, the local park or in organised competitions. If children find their involvement enjoyable and fulfilling, they are more likely to continue it into their adult lives and the chance of lifelong participation is greatly increased. They say that the policy will "set a solid foundation for the participation in sport by all young Australians."

The preamble to the policy document notes that in response to certain concerns including duplication and conflicting standards in regard to sporting activities the Australian Sports Commission and Confederation of Australian Sport convened a national conference in October 1991 to address the structural and philosophical changes required for the more systematic and coordinated provision of junior sport in Australia, this being defined as the organisation and management of sport for young people aged from 5 years to 19 years. For those 8 years and above, the term is used in the policy document to mean a competitive physical



and educational activity played according to agreed rules and procedures. The major recommendation of the national conference of 350 representatives from sport, education and government was that a national junior sport policy be developed and the policy document is said to represent the outcome of that recommendation after preparation of a draft document and an extensive process of feedback and consultation throughout the country.

The purpose of the policy document is to ensure the provision of opportunity to all young Australians to develop and enrich their lives through sport. To that end, the policy contains a framework and guidelines for those responsible for the development, organisation and conduct of junior sport, including guidelines for a coordinated and complementary approach to sport in schools and in the community. A fundamental tenet of the policy is the principle of social justice. This means that all young Australians must be given the best opportunity to develop their physical potential and fitness, and to develop interests in physical activities (including sport). The authors note that the low level of girls participation in sport is still a matter of major concern and that all sport providers must work together to develop and implement policies that specifically address the needs of girls. They also note that unlike physical education competition is an intrinsic part of sport. Competition is thought to be a test of ability and potential with the pursuit of excellence as desirable in junior sport as in other forms of endeavour. All junior sport participants should be encouraged to achieve, do their best, and develop their full sporting potential. Challenging competition is one element of this development process.

At clause 3.3 the policy document includes some observations on "mixed sex participation" which are set out below in their entirety:

"Physical differences between girls and boys under the age of 12 years are generally considered irrelevant to sporting ability. However, socialisation may – and often does – prevent girls developing sporting competencies equal to those of boys.



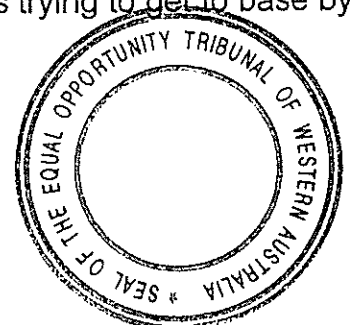
Current evidence suggests that skill development in mixed groups is generally appropriate, but that competition should remain single sex until it can be shown that girls will not be disadvantaged in mixed sex contests. This means that special measures may be necessary for some time to assist girls to increase their sporting skills.

Sporting organisations are strongly encouraged to adopt a single sex competition philosophy until such time as there is substantial research evidence to suggest review. The provision of single sex sporting competitions is the best way at present to encourage maximum participation and guarantee all children a 'fair go'.

For young children (5-7 years approx), mixed sex activities are always appropriate. At all ages, mixed sex sports participation may be appropriate in an informal or social situation."

Administrators of the Game

It is apparent from the history of softball in this State that well before the publication of the National Junior Sport Policy administrators of the game had taken the view that although mixed sex teams were appropriate up to the age of 13, thereafter, with the onset of puberty, the boys tended to be stronger and to have greater stamina with the result that girls could be placed at a disadvantage unless provision was made for competition in single sex teams. Shirley Schneider confirmed that this was her perception based on her long experience as a player and as a coach. She said that it was her belief, and the belief of the Association, that having mixed softball teams at a sub-junior level was appropriate where players are developing an interest in the sport. However, mixed softball in the under 16 competitions may discourage girls from playing softball. Further, if teams were mixed, the majority of players in the best teams would be males, due to their mass, strength and stamina. This would further discourage girls from playing. It is of great concern to have a large under 16 boy running quickly to a base, where the base player might be a small, slight bodied, under 16 girl where there is body contact as the runner is trying to get to base by



sliding into it before being tagged. She added "I have personally a concern that there is a risk of physical injury to girls of that age if there is mixed competition."

She said further that in her experience under 16 boys throw the ball a lot harder and quicker than under 16 girls, and where a boy is throwing a ball to a girl she might possibly be injured by not being able to properly control the very quick or hard throw. Also in relation to batting where girls are fielding in the infield, boys hit the ball a lot harder than girls and there is the risk of injury to girls in those circumstances. It was her opinion that there are certain positions in a softball team where men are so clearly advantaged that if women had to compete against men to obtain these positions women would not get the opportunity to play on those positions in the majority of cases. The positions of pitching and catching were nominated as areas in which men would predominate. This would mean that when women were fielding they would be likely to be placed in the outfield, where the skills required are fewer, and the opportunity for development of skills in other positions would be limited. She reiterated that softball internationally and at an interstate level is both played in women's and men's competitions. She testified that as part of a selection panel and in her position as Coaching Director she had been involved in the timing of pitchers with a speed gun. She found very significant differences in the average pitching speed of under 16 girls and boys. According to the timing she had done the under 16 girls average pitching speed is between 76-84 kph while the under 16 boys pitching speed varies on average between 94-96 kph. She was of the view that there was a considerable difference in the strength and speed of boys and girls at the age in question, and those differences were very noticeable in a softball competition at junior level, with the boys being advantaged.

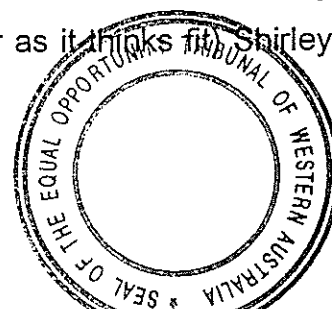
She went on to say that from her own personal observation she had noticed that the extra strength and weight boys have on average over girls in the 13-16 age group is particularly noticeable in base sliding where the on-average lighter girl standing on a base will be easily knocked over should she be playing against a



boy. When people are taught to base slide, they are taught to slide in with one leg tucked underneath the other to present as small a target as possible to be tagged. Necessarily they are sliding quickly towards the base and start at about a body length away from the base. On the other hand the base player is taught to take the ball on the corner of the base so that they are not in a direct line with the base runner sliding. From both points of view they are both difficult skills to master and if they are not properly executed there is a very real risk of injury. In her view the risk of injury would be increased if there were to be larger males playing against smaller females.

It was also her experience in regard to coaching both junior girls and boys that the males were more aggressive than females and the game played by males was a lot quicker. When coaching boys in pitching, because of their greater upper body strength, they were able to release the ball much quicker. In that regard she drew attention to the different pitching distances prescribed for junior males and junior females mentioned earlier. She said that if Lisa was permitted to play in the under 16 boys competition a prospect existed that she would have to play against under 16 boys who had represented Western Australia and who were much quicker and stronger at the game than elite under 16 females. She testified that in August 1997 she contacted Softball Australia for advice regarding their position with respect to the National Junior Sport Policy and received a letter dated 6 August 1997 confirming that the Federation "endorses the National Junior Sport Policy produced by the Australian Sports Commission in 1994". The letter went on to say that "in 13-19 years age group softball is played at a more competitive level with national champions at under 16 and under 19 for both boys and girls. We believe that this is the appropriate stage for single sex competition."

At the request of the Tribunal, pursuant to the special powers allowed to the Tribunal by Section 120 of the Act (whereby the Tribunal shall not be bound by the rules of evidence and may inform itself on any matter as it thinks fit) Shirley



Schneider made enquiries from responsible office bearers of the relevant associations concerning the position in the other States of Australia. In South Australia competition in the under 13 to under 16 age bracket is on the basis of single sex teams. In Queensland competition is on the basis of single sex team for girls although the office bearer of the Association in that State was aware of mixed competition in outlying areas due to lack of numbers. In Victoria competition in the under 16 age group is on the basis of single sex teams. In the ACT all competition is on the basis of single sex teams. All informants seemed to acknowledge the possibility of competition on the basis of mixed teams in country areas due to low numbers. Information could not be obtained as to the position in New South Wales but, as appears below, evidence concerning the position in certain areas of that State was presented to the Tribunal by witnesses called on behalf of the Complainant.

The Tribunal pauses to note that the evidence of Shirley Schneider was supported by the evidence of Kevin Osborne, mentioned earlier as the coordinator of the winter competition. He has been coaching softball for ten years and has two sons and two daughters all of whom have participated in the sport. He has coached at all levels and both sexes. He said that in his experience boys playing in the under 16 junior competition are much stronger than girls playing in their under 16 competition. The boys display much more strength and stamina. They throw and pitch harder and more quickly and hit harder than girls of the same age. He went on to say that occasionally there are girls such as one of his daughters, who represented the State schoolgirls team and was a member of the Western Australian Institute of Sport, who can compete with males in the same age group but that is exceptional.

In his experience the good boys are always better than the good girls in that strength and stamina advantages them. It was his opinion also that if mixed competition was allowed in the under 16 junior competition it would weaken the female competition as well as the male competition in that the good girls will want

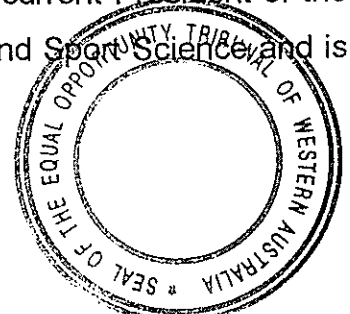


to play in the boys competition, thus weakening the girls competition. He too was aware of a risk of injury to junior girls because the boys generally play the game with more strength and stamina than the girls. Experienced coaches will not play weak players in positions where they can sustain injury. This will mean that if the competition is not balanced in strength and skills, the lesser players get played in positions where they are "hidden". The end result is boredom and player dropout from the sport.

Expert Evidence

In support of its defence to the claim the WA Softball Association also presented expert evidence by Dr Timothy Ackland who is a senior lecturer in the Department of Human Movement and Exercise Science at the University of Western Australia. His views were encapsulated in a written report dated 18 September 1998 ("the Ackland report") which included reference to his qualifications and work experience. The Tribunal pauses to note that an earlier version of the Ackland report was available to the opposing side well before the hearing.

Dr Ackland completed a Bachelor of Physical Education at the University of Western Australia, with an Honours Degree, in 1980. He followed that with a Masters Degree in Physical Education and then a Ph.D from the same University. The primary focus of his research work was in the area of biomechanics which is the application of mechanical principles to the human body. In particular, he had looked at changes that occur during adolescence in terms of growth and development and the influence of these changes on the ability of the human body to perform physical tasks. His lectures deal with functional anatomy with particular reference to the relationship of elements of structure such as size and body composition to one's ability to perform physical tasks both at work and in the sporting arena. He is the current President of the WA Chapter of the Australian Association for Exercise and Sport Science and is

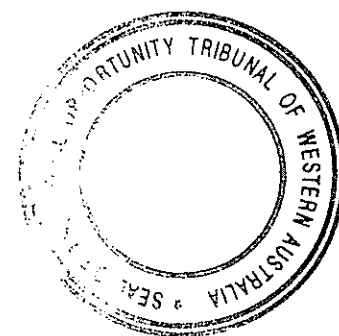


the Deputy Chair for the 5th International Olympics Committee Conference in Sports Medicine which is traditionally held in the host city in the year prior to the Olympic Games. He himself had been an active sports person all his life and he confirmed that he was personally familiar with the sport of softball.

The Ackland report noted that he was instructed by the solicitors for the WA Softball Association to provide an analysis of how strength, stamina and physique are relevant to a softball competition, and an analysis of the differences in the strength, stamina and/or physique between boys and girls in the 13-16 years age group, and the relevance of these differences in a softball competition between 13-16 year olds.

He said in evidence to the Tribunal that he began by defining some of the terms the subject of his analysis by drawing upon a number of respected texts. Strength can be regarded as the state or quality of being strong or powerful. More specifically, the texts suggested that the word can be said to represent the amount of force (or torque) a muscle group can exert against a resistance in one maximal effort. Stamina denotes resistance to fatigue, illness and hardship. The concept embraces endurance, that is to say, the ability of the body to sustain prolonged exercise. Physique means the structure, form, constitution, strength or appearance of the body.

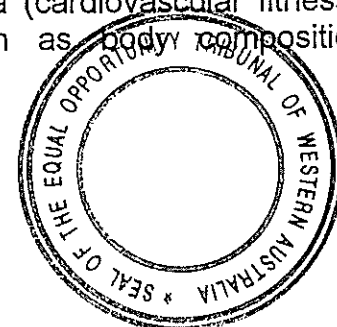
Dr Ackland broke the game of softball down to its constituent elements in terms of the elements of play including such matters as pitching, batting, base running, base sliding, the running component of fielding, the picking up component of fielding, the throwing component of fielding and the catching component of fielding. He noted that whilst many of these elements were strongly influenced by good technique and coordination nonetheless the strength, speed and endurance of the player played an important role.



In regard to size and body composition he noted that at puberty the body composition of the sexes begins to differ markedly because of endocrine changes. From the time of adolescence females experience a rapid increase in body fat accumulation so that by the time they are fully mature females are 6-10% higher in relative body fat than males but some 18-22 kg lighter in fat free mass. Adult males are generally stronger than females in terms of absolute strength, this being in part due to size differences between males and females which begin to appear around the time of adolescence with the differences in absolute strength being more pronounced for the upper body than the lower body musculature. When it comes to cardiovascular fitness women generally have a higher rate response for any absolute level of sub-maximal exercise, ie they are less fit than males, this being primarily due to females having a smaller heart, smaller stroke volume and smaller blood volume and lower levels of haemoglobin. Maximum oxygen consumption values (fitness/stamina) of females and males are similar until puberty, but then begin to diverge. He noted that many studies of this phenomenon are biased due to the differences in activity levels of males and females in society but studies on elite athletes, however, where no such biases exist, still show males to have higher maximum oxygen consumption values compared to females.

He then referred to a wide range of data, including data from a University of Western Australia growth and development study conducted in 1994, showing in summary that from the time of puberty, males are generally advantaged with respect to key physical capacities and characteristics for competitive sporting ability. He said at page 9 of his written report:

"These data support the assertion that, on average, 13-15 year old Australian males are advantaged compared to females on a number of physical capacities that are important for successful participation in competitive softball. These capacities include muscular strength and related measures of speed and agility, stamina (cardiovascular fitness), and specific components of physique such as body composition



(adiposity). These differences exist despite an equal opportunity for males and females to develop these capacities in their training for sport.”

He went on to say that there was no question that a proportion of the female adolescent population will have developed the physical capacities to match those of the average male, particularly when given equal opportunity to develop that capacity. Nonetheless, he noted, this was not the case for all capacities. The trend is for increased disparity between male and female scores as age increases from 13 to 15 years. For example, in the case of upper body strength, girls who are 1SD (Standard Deviation) above the mean will match the score of the average boy at 13 and 14 years. But this is not the case at 15 years of age. This trend is similarly true for speed, agility and adiposity.

He was conscious that this left open the question of to what extent these gender differences could be said to influence or be relevant to the outcome of softball competition. It was clear that boys and girls within the ages of 13-16 years could participate in recreational softball but would the differences provide an advantage for males in the competitive game? He defined the competitive game as one in which a set of match fixtures for the season are adhered to by a number of teams, the primary goal is for the team to defeat the opposition, the team aims to finish the season of fixtures at the top of a competition ladder, or to successfully compete in a final series of matches, and individuals may be selected on the basis of their performances to play for a “representative” team such as a state or national team.

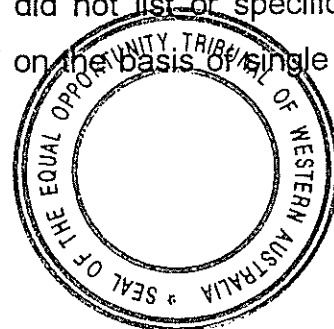
Dr Ackland said that to his knowledge no scientific study had been conducted that specifically addressed this issue, namely, the relevance of gender differences to softball competition. However, in his professional opinion, taking into consideration the elements of play in the game of softball and the associated effect of strength, stamina and physique on each element, the differences in physical capacities between average male and female adolescents were relevant



to competitive softball. In other words, 13-16 year old males would be very much advantaged compared to females in their ability to succeed in the competitive game of softball because of the differences in strength, stamina and physique which begin to occur at puberty. Although some girls might have the physical capacities or characteristics to match those of the average boy, in a competition where adolescents of 13-16 years compete together, it is most likely that the majority of females would be at a competitive disadvantage with respect to the majority of males.

Dr Ackland noted that both the National Junior Sport Policy and the Guidelines of Gender Equity in Secondary Schools published by the Education Department of Western Australia in 1993 allowed for single sex sporting competitions in sports where strength, stamina and physique were relevant factors and in his opinion this was a sensible means of applying the requirements of the Equal Opportunity Act in regard to the organisation of sport for the 13-16 year age group. He accepted that in many sporting endeavours (both competitive and recreational), strength, stamina and physique differences between males and females do not disadvantage one group of participants. The examples he gave in his written report of such sports included golf, sailing and ten pin bowling. In his verbal testimony he added sports such as darts and shooting to the list. There were other sports, at the far end of the spectrum, such as marathon running and power lifting where females were clearly at a disadvantage. He also noted that in track and swimming events although there had been a dramatic improvement in the times recorded by females in recent decades, this probably being due to the increased participation of women in sport and improved training techniques and skills, nonetheless, at the elite level, fundamental anatomical differences meant that at the elite level, females would not be able to match the male achievements.

He recognised that the National Junior Sport Policy did not list or specifically identify the kind of sports which should be conducted on the basis of single sex



teams. He accepted that the sport of softball lay somewhere between the two extremes of the spectrum but, notwithstanding a lengthy cross examination directed to the various factors which might arguably tend to refute his opinion, he held to the view that softball, when played at a competitive level in which the primary goal of the team was to beat the opposition, 13-16 year old females will be disadvantaged when playing against males of similar age.

The Tribunal pauses at this point to return briefly to the 1997 report published by the Women's Sport Foundation WA (Inc) mentioned earlier. That report refers to a growing body of literature which suggests that physical and psychological differences between girls and boys, where they do occur, are not nearly as inhibiting as one supposed, nor do they provide sufficient justification for the marginal position of women in sport. The report also documented strong indications from teenage girls that many would like to play traditionally male sports as a way of receiving equal treatment, attention and resources. Nonetheless, it is significant that when the authors turn to the question of whether teenage girls should be allowed to play in mixed sex competition the authors of the report said that no straight forward answer could be provided. They said, at page 40:

"Rather than successfully challenging male hegemony, forced 'mixing' can result in increased prejudice against sportswomen or sportsgirls. In short, making mixed sports compulsory does not ensure that females are treated by males as equals in the sporting arena. While the cultural construction of masculinity still requires men to be superior to women, forcing boys to play sports with girls, either at school or in the community, may serve to further intimidate many sportsgirls and boost patriarchal sporting myths."

The authors eventually concluded at page 101:

"The debate over single sex or mixed sex classes has continued for a considerable time and there are important arguments on both sides. However, there is sufficient evidence from this survey (confirming other research) that mixed sport at certain ages inhibits girls' sporting activities."



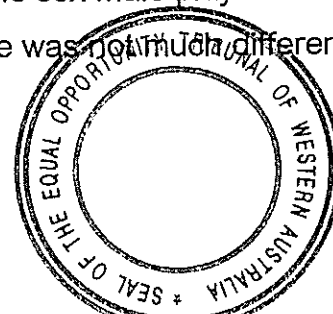
While in the longer term it is obviously essential that boys and girls, men and women, learn to respect one another as equals, the timing of mixed sport is crucial. Organising mixed sport on ability rather than gender is another option but one that must be handled sensitively."

Complainant's Witnesses

Counsel for Lisa Jernakoff contended, consistently with the National Junior Sport Policy, that in the 13-16 age group mixed teams should be regarded as appropriate unless it could be demonstrated by those asserting a view to the contrary that in competitive sports strength, stamina and physique might affect the outcome. Nonetheless, being conscious of a need to address this issue, he led evidence from several witnesses concerning mixed teams and the ability of young women in the 13-16 age group to compete with their male counterparts.

Darren Harding said in evidence that he is the current President of the Mudgee Softball Association, Mudgee being a country centre in New South Wales. He had held that position for three years and had extensive coaching experience. He accepted that in other areas of New South Wales and especially "at the top flight level" softball might well be organised on the basis of single sex teams. However, the position in Mudgee was that all grades were open to mixed teams. In his view there were no significant differences between girls and boys in the under 16 age group in relation to skill or stamina which might affect the game and in his view the most important quality for a player was enthusiasm.

Under cross examination, he conceded that Mudgee was a comparatively small centre having a population of about 8,000 and in regard to the softball competition with which he was associated there were about 200 players of which 130 were female players. He conceded under cross examination that if there was no mixed competition for juniors he and his colleagues would probably have difficulty in mounting a viable junior competition for single sex male players owing to a lack of numbers. As far as he was concerned there was not much difference



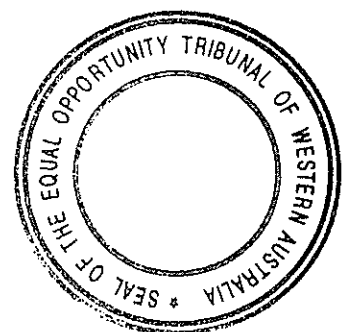
in strength and stamina between boys and girls at the junior level. Further, in his view, at the elite level there was not much difference between male and female players in regard to pitching or hitting or in sprint speed. He conceded that he had not done any detailed testing or research in arriving at that conclusion. He also conceded that even in regard to the mixed team competition in Mudgee attempts were made to "even out" the teams so that the teams would compete on a roughly equal basis.

Evidence was also received from the Coordinator of the Georges River Softball Association situated in metropolitan Sydney and having a catchment area including such centres as Bankstown, Campbelltown and Liverpool. Mr Crisp said that there were about 1,500 players in the competition which was made up of various divisions and included a competition for juniors under 14 and juniors under 16. He said that there was mixed competition in all divisions up to the age of under 18 and there was also a senior mixed competition. There was no restriction whatsoever in regard to gender in the junior competitions but in regard to the senior competition there was a rule that each team must have at least three players of a particular sex. He seemed to accept that from the age of 15 and above male players tended to be stronger but this didn't necessarily produce a superior result. He said that in training sessions for the under 16 junior team he trained the girls as hard as the boys. In his view, the principal qualities which gave a player an edge in the sport of softball were hand and eye coordination. He accepted that strength does play a part but he hadn't seen a difference between men and women in that regard sufficient to affect the outcome of the game. If a player lacked strength he would recommend gym training or institute a regime of harder training drills. He agreed that the players performing the functions of pitching and catching were more exposed to risk of injury but in his view injuries were mostly associated with poor technique. He said that the only adjustment required to effect parity between male and female players at the junior level was in regard to the pitching distance of 40 feet for females and 46 feet for male players.



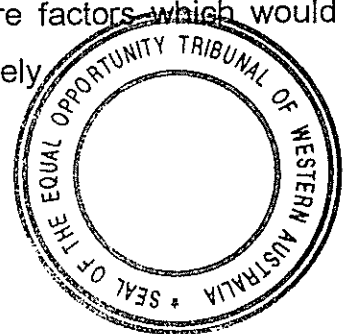
Mr Crisp agreed under cross examination that there was no mixed competition for players representing their respective states. He also agreed that at age 16 men tended to be stronger and therefore hit the ball harder and pitched harder.

Counsel for the Complainant also presented evidence from William Leonard who is the President of the Northern Districts Softball Club and held that position in 1997 when the circumstances giving rise to the complaint arose. He said in evidence that he has four children and he himself began playing and taking an interest in softball about five years ago owing to his children's participation in the game. At the commencement of the 1997 winter season one of his sons was a fellow team member with Lisa Jernakoff in the Northern Vikings sub-junior team which was expected to compete in the under 13 competition. He attended the preliminary or grading games to watch his son in action and therefore had some appreciation of Lisa's ability, although he does not have an accredited coaching qualification in regard to softball. As far as he was concerned she was able to compete on equal terms because, in his view, strength is not "a decisive factor" this being evidenced by the fact that people of different sizes play the game. When the team's coach, Stephen Bandy, first canvassed the proposal to enter the sub-junior team in the under 16 junior competition because some of the boys in the team were too old for the sub-junior category, Mr Leonard saw no reason why Lisa should not continue playing with the team at the higher level. It came to him as a complete surprise when the question of her eligibility arose as a result of a complaint made by an opposing team and it was for that reason, in his capacity as President of the Northern Districts Club, that he wrote to the WA Softball Association to obtain a ruling. The Tribunal will return to this aspect of the matter shortly but for the time being it is sufficient to note that Mr Leonard did not purport to speak authoritatively about the strength, stamina and physique issue and Dr Ackland's written report was not put to him for comment.



The Tribunal has already noted that the coach of Lisa's team was Stephen Bandy. He is an accredited softball coach and started coaching for the Northern Districts Club in 1985, thereafter acquiring further experience in coaching both boys and girls. He had experience in coaching girls in mixed teams up to the age of 13. Under cross examination he was not prepared to express a firm view as to whether boys were generally stronger in regard to the playing of softball in the 13-16 age group because he did not have direct experience of mixed teams in that age group and had seen comparatively few girls playing at that level. He also agreed that the Northern Districts Club was in practical terms a club for male players entering teams in the winter competition only, although as far as he was concerned there was no hard and fast rule on this point. The Tribunal will return to this aspect of Mr Bandy's evidence in due course. For the moment it is sufficient to note that according to Mr Bandy he was not aware of the National Junior Sport Policy as at the commencement of the 1997 season and was surprised by the challenge to Lisa's eligibility and was surprised by the complaint about her participation in the junior winter competition.

Dr Ackland's written report and the views reflected in it were put to Mr Bandy for comment. He did not object to Dr Ackland's description of the elements of softball or the physical capacities required to play the game effectively. Mr Bandy was not in a position to challenge any of the research data in the report underpinning Dr Ackland's reasoning but expressed reservations about the views expressed in the report. He did not directly challenge the definition of competitive sport reflected in the report but he sought to draw a distinction between softball played at the "grass roots level" and softball played as an elite competitive activity. He conceded that at age 16 to 17 boys probably did have greater strength and stamina and at the elite level this would probably work to their advantage. At the grass roots level, however, he doubted that at age 13 the boys had any particular advantage. In his view Dr Ackland had not made sufficient allowance for skill and coordination which were factors which would enable females such as Lisa Jernakoff to compete effectively.



Under cross examination, Mr Bandy agreed that the Northern Districts junior A team was comprised of slightly older and stronger boys than the proposed Northern Districts junior B team of which Lisa was intended to be a member, and that the A team pitched faster and more accurately, drove harder, had better sliding technique, and would certainly beat the B team. The two teams mostly trained separately although they had sometimes trained together. He said that Lisa could have competed in the A team but she would have been at the bottom end of the scale and would not have been put in as catcher in the A team. It was his practice as a coach to move players around during the season so that they were skilled in all positions but in the finals he would generally select the best possible side and with the best players in key positions. He disagreed with the proposition put to him on behalf of the WA Softball Association that if mixed teams were allowed at the junior level then the stronger female players would play in the male team with the result that female teams would be adversely affected. He agreed that the protective cladding and mask allowed to the catcher was designed to protect the player against both pitching and sliding in. In his view, a coach has to be attentive to the safety requirements of each player and there was therefore no need to draw any distinction between a male player of a slight build and a female player. He did not believe Lisa's strength and physique would have placed her at a disadvantage if she had been allowed to play in the Northern Vikings junior team as proposed. Her skills were good in regard to all areas of the game and she was improving all the time. He agreed that by the end of the 1997 season, overall, the Northern Districts junior B team of which he was coach did not do well and failed to win any matches but neither the parents nor the players were disappointed by the outcome.

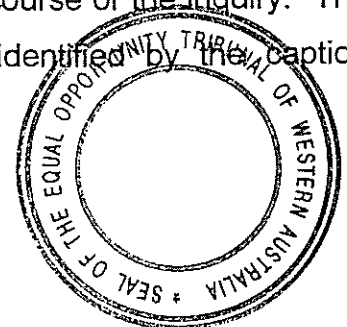
Nature of the Northern Districts Club

Before leaving the evidence of Mr Leonard and Mr Bandy it will be useful, as a matter relevant to the causation issue dealt with below, to look more closely at



the nature of the Northern Districts Club and the constitutional provisions and conventions influencing the conduct of its affairs. Lisa's complaint proceeded from the premise that the reason she was denied an opportunity to enjoy the game of softball and develop her skills in the two years or so preceding the hearing was because the WA Softball Association refused to let females play in the junior winter competition which was confined to boys in the 13-16 age group. One of the lines of argument advanced in answer to this plea was that Lisa had substantial opportunities to participate in the sport. She was entitled to play in the summer competition and she was at liberty to play in the sub-junior winter competition because mixed teams were allowed in the under 13 age group. The operative cause of her not participating in the 1997 winter competition was that in order to retain the skills and enthusiasm of three boys who had become too old to play in the sub-junior team, the Northern Districts Club failed to enter a team in the sub-junior competition with the result that Lisa, the one female player in the team, was excluded from the competition. In other words the impediment standing in her way was not a decision by the WA Softball Association to exclude female players but, rather, a decision by the Northern Districts Club, being a decision made consistently with its prevailing credo, to favour the male players. Further, and in any event, it was argued that the constitution of the Northern Districts Club confined membership of the club to male players and therefore, irrespective of any ruling made by the Association, Lisa was not at liberty to play for the club in the winter competition at either the sub-junior or junior level. For ease of reference, the Tribunal will describe these various issues collectively as "the causation issue".

The starting point for this aspect of the inquiry must obviously be the constitution of the club. One notes at the outset that according to the copy of the constitution received as an exhibit the name of the club is the Northern Districts Men's Softball Club Inc (emphasis added) and this is the name which appears on the various letters written on behalf of the club during the course of the inquiry. The letter includes a logo portraying a helmeted head identified by the caption



"Vikings" and hence the shorthand title "Northern Vikings" being a term used by various witnesses and mentioned in some of the documents including the WA Softball Association's annual report. For example, in that part of the report dealing with the winter competition coordinated by Mr Osborne, reference is made to the Northern Vikings as premiers of the junior A division. In the same passage of the report one notes that Stephen Bandy of Northern Vikings is thanked particularly for his work on the fixtures and grading committee.

By clause 3 the objects of the club include providing members with the facilities for playing softball and to promote good fellowship amongst its members. By clause 9 membership of the club is open to ordinary members that is to say "any male person" who becomes an ordinary member of the club. Other categories of membership, including associate members, social members and junior members is open to "any person" of a prescribed age who pays the relevant fee. It therefore seems, on the face of it, that although the ordinary membership is comprised of male persons there is an opportunity for females under the age of 18 to join as a junior member and for other women to participate in the activities of the club as associate members, social members or as temporary members.

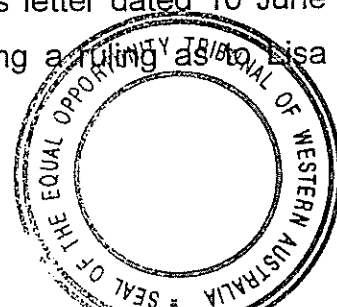
In addition to his responsibilities as a coach Mr Bandy is also a member of the management committee of the club and is also the incumbent secretary of the club's executive. He confirmed that women are associated with the activities of the club. He said that in practise, on game day, the club will require players, scorers, base umpires and other officials to represent the club in competition. All of these players and officials must be registered with the WA Softball Association for insurance purposes if they are to participate in the game. For example, the woman who runs the club's canteen might be an associate member but also be the club's scorer. The club would register her with WASA as an ordinary member for the purpose of her role as scorer, but otherwise her membership status will not change. The constitution also makes provision for temporary members. He said in evidence that:



"It has never been the practice of the club, nor was it the intention of the management committee to only permit male members to represent the club at junior softball games."

Notwithstanding this evidence, Mr Bandy conceded that the club did not enter teams in the summer competition for women and the club was essentially concerned with the winter competition for male players. He conceded that he personally had not seen any female player either in his club or other clubs take the field in the junior winter competition prior to Lisa playing the first game of the season. He conceded that, with the benefit of hindsight, it probably did represent a significant departure from the usual state of affairs but, being confident that she would not be at a disadvantage, it did not occur to him to check the question of her eligibility under the club's own constitution or with officials of the WA Softball Association before the decision was made to elevate the sub-junior team to the junior level. He simply assumed she was entitled to play at the higher level. His primary concern was to try and keep the team together by making sure that the three boys who were now too old to play at the sub-junior level stayed in the team and his attention was focused on that point. He agreed, under cross examination, that the alternative course of action of holding the team at the sub-junior level so that Lisa could play was never fully explored with the parents or the players because Lisa's presence in the team was not thought to be a problem. Looking at the position with the benefit of hindsight he was of the view that, in any event, it would have been difficult to find additional players in substitution for the three boys rendered ineligible by the age barrier and thus, even if the alternative had been considered, the presentation of a sub-junior team by the Northern Districts Club might not have eventuated.

The President of the club, Mr Leonard, presented evidence to similar effect. He said the club was solely a winter competition club and therefore essentially a male club as the name implied. At the time he wrote his letter dated 10 June 1997 to the Coordinator of the winter competition seeking a ruling as to Lisa



Jernakoff's eligibility he was surprised that the issue had arisen. In regard to that point his letter includes the following passage:

"It has therefore come as a surprise to find out that she (Lisa) may be considered ineligible as the impediment to girls playing in the competition is not highlighted in the regulations or in any other information supplied to our club. In fact it is silent on the issue. Had we been aware that this was going to occur we would have considered other options available to us at that time."

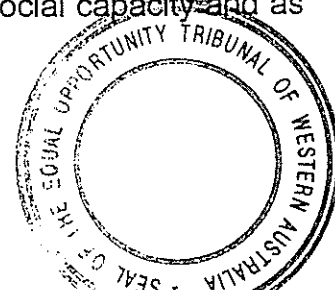
He agreed under cross examination that if he knew then what subsequently came to light concerning the issue of eligibility then he certainly would have looked more closely at the question of whether substitutes could be found for the three boys rendered ineligible for the sub-junior competition by the age barrier so that Lisa would not be prejudiced by the club's decision to elevate the sub-junior team to the junior level. He was referred to a later letter dated 15 June 1997 written by him to the Equal Opportunity Commission which includes the following passage:

"The Northern Districts Softball Club does not support the WASA decision and is prepared to allow Lisa to play. Lisa is 'on the bench' this weekend only as risk management strategy -- as an unsanctioned player, she has no insurance cover apart from that organised by her parents.

I have established that a vacancy exists with another nearby club in their sub-junior side for Lisa. It is her choice to play with our club and in this competition. We respect and support that right. In the event that this matter cannot be resolved, the option is available for her to play for someone else. Not a very satisfactory situation for our club.

Our club would appreciate this matter being resolved in Lisa's favour."

In essence, then, the evidence presented by the club in regard to the causation issue suggested that although the club was essentially a club for male players participating in the winter competition, opportunities were available for women to be involved in the activities of the club in a supportive and social capacity and as



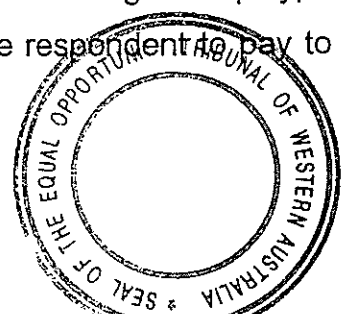
players below the age of 18. Further, and in any event, according to Mr Bandy, if there was any technical impediment to be found in the club's own constitution and conventions which might stand in the way of Lisa playing at the junior level then any such restriction would be waived in her favour. Mr Bandy emphasised, and in any event it appeared to be common ground at the hearing, that it was quite legitimate according to both the rules of the club and of the WA Softball Association for a sub-junior team to be elevated to the junior competition and this could therefore be regarded as one option available to a team at the commencement of a season.

Statutory Provisions

By Section 8 of the Act discrimination occurs if, on the ground of the sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different sex. By Section 20 of the Act it is unlawful for a person who provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, by refusing to provide the other person with those goods or services or to make those facilities available to the other person. By Section 5 of the Act discriminatory conduct need not be the dominant or substantial reason for doing the act complained of.

The Act also contains provisions concerning vicarious liability. By Section 161 an employer can be held liable for the conduct of its employee or agent. Acts done on behalf of a corporate body can be treated as discriminatory conduct by the corporate body itself.

When it comes to determining what relief is available to a successful complainant one turns to Section 127 of the Act. This provides that after holding an inquiry, if the complaint is substantiated, the Tribunal may order the respondent to pay to



the complainant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct. It may also find the complaint substantiated and make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by any act. The Tribunal pauses to note that it was made clear at the commencement of the hearing that in respect of the complaint initiated by her parents on Lisa's behalf no damages were being sought. The relief sought was an order that the WA Softball Association does not continue the unlawful discrimination and allows the Complainant to play with the Northern Districts junior team so long as she is eligible to do so. If such an order was made, the practical effect of it would be, having regard to Lisa's date of birth, that she would be at liberty to play in the 1999 winter competition in the junior team.

The Tribunal pauses to note that in construing these provisions it is useful to take account of principles emerging from previously decided cases. These cases establish that the complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proved on the balance of probabilities but, in the absence of direct evidence, the complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence. *Fenwick v Beveridge Building Products Pty Ltd* (1986) EOC 92-147. Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. Statutory provisions include conduct arising from thoughtlessness and neglect. Nonetheless, in order to establish an act of unlawful discrimination it is necessary to point to a causal connection between the alleged discriminatory act and the circumstances of the complaint. *Waters v Public Transport Corp* (1991) 173 CLR 349.

It follows from earlier discussion that in the circumstances of the present case the Tribunal must also pay careful attention to Section 35 of the Act which provides that nothing in those divisions of the Act concerning discrimination at work or in

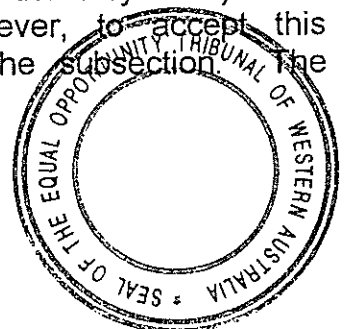


other areas "renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant."

It appeared to be common ground at the hearing that the burden of making out this special line of defence lies upon the party raising the defence, in this case the WA Softball Association, and this is consistent with the rules of evidence, the tenor of the Equal Opportunity Act and with the National Junior Sport Policy. In that regard the Tribunal notes that the line of defence reflected in Section 35 should not be regarded as an exemption from the provisions of the Act – because Section 135 allows to the Tribunal a specific power to grant exemptions from the operation of earlier provisions of the Act – but should properly be regarded as an exception to the general rule rendering discrimination on the ground of sex unlawful. It is important to note that by Section 35(2)(e) this exception does not apply to sporting activities by children who have not attained the age of 12 years, the assumption being, as indicated by the expert evidence and the National Junior Sport Policy, the capacities of boys and girls below that age are thought to be the same.

The Tribunal also notes with approval a recent decision of the Anti-discrimination Tribunal in Victoria in *Robertson v Australian Ice Hockey Federation* (unreported) 26 March 1998, in which the Tribunal made the following observations about a provision to similar effect:

"What relevance must the strength stamina and physique of competitors have to attract the operation of section 66(1)? Does it mean relevant to the sporting activity itself, or relevant to the outcome of the sporting activity? One interpretation of the subsection would be that it permits women to be excluded from a sporting activity which requires strength stamina or particular physical powers from those who undertake it. On this basis, it will permit the exclusion of women from sports such as horse racing, because that is a sport which requires (at the very least) some strength and stamina from the riders. However, to accept this interpretation would be to ignore the rest of the subsection.



subsection must be read as a whole. It permits the exclusion of one sex from a sporting activity where strength and stamina or physique is relevant. In my view, this means that the subsection only permits the exclusion of one sex from a competitive sporting activity where the relative strength, stamina or physique of each sex is relevant. In other words, the subsection is directed to competitive sporting activities where, if both sexes competed against each other the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors. This interpretation is consistent with the objectives of the Act which include the elimination (as far as possible) of discrimination and the promotion and acceptance and recognition of everyone's right to equality of opportunity. Exceptions to the prohibitions of the Act, like other statutory exceptions, should be construed strictly and in the light of the objectives of the Act. It would not be consistent with the objectives of the Act to construe one of these exception provisions to authorise discrimination against one sex or the other in competitive sport, where there is no disparity between the requisite strength stamina or physique of men and women that would prevent them competing together in the sporting activity."

The Tribunal in that case, on the basis of the comparatively limited evidentiary materials before it, was unable to make a determination as to whether relevant strength, stamina and physique were relevant to the playing of ice hockey at the level and in the manner in dispute.

In looking at the provisions of the Act in this State, namely, Section 35, it is material to note that the provision does not speak in terms of the skills or strength of the individual complainant and nor does it speak in terms of advantage or disadvantage. The reference is to "participation in any competitive sporting activity" and the provision goes on to speak of the strength, stamina or physique of "competitors". The generality of these concepts, and particularly the use of the plural "competitors" suggests that those required to construe the Act are entitled to look at the circumstances relevant to administration of the game viewed not simply as a recreational activity but, more specifically, as a competitive sporting activity. The concept of certain human capacities being "relevant" suggests that the term is being used broadly to encompass matters which may have a bearing



upon the outcome of the competitive sporting activity without necessarily being decisive in a particular situation.

Issues

It is against this background that the Tribunal now turns to the issues raised by the circumstances of the present case. In that regard it is important to note that the issues raised by the initial exchanges of correspondence between the parties and by the complaint lodged by Lisa's parents with the Commissioner of Equal Opportunity on her behalf have been further refined by pleadings filed on behalf of the parties pursuant to directions given to this Tribunal in the period leading up to the hearing. Some amendments were made at the commencement of the hearing.

The amended Points of Claim reflects the narrative referred to earlier and pleads that as a result of the decision by the WA Softball Association Lisa has been "prevented from participating in competitive sport as a member of the Northern Districts junior team for 1997." It is said the Association has discriminated against her on the ground of her sex by refusing to provide her with a service, and/or make facilities available to her, or in the terms and conditions on which it provides the service, and has treated her less favourably than it would a male in the same circumstances or circumstances that are not materially different.

These allegations are denied in the Points of Defence and it became apparent both from the Points of Defence and from the way in which the case was argued by Counsel on behalf of the Association that various issues fall to be determined.

Counsel for the WA Softball Association summarised the matters in issue in the course of his opening address. He began by referring to paragraph 8 of the Points of Defence and contended that allowing an individual to compete in the men's winter junior competition was not a provision of a "service or facility"



within the meaning of Section 20 of the Equal Opportunity Act. He went on to say that if the Respondent Association was held to have provided a service and/or facility within the meaning of the Act then, contrary to the allegations raised in the complaint, the Association had not in the terms and conditions on which it provided the service treated Lisa less favourably than it would treat a male in the same circumstances because other opportunities to play softball were available to her including the opportunity to play in the summer competition for females or in the sub-junior competition in which mixed teams were acceptable for girls of her age.

Lisa's Counsel then drew attention to the causation issue and contended, being a plea reflected in paragraph 10 of the Points of Defence, that if the Northern Districts Club does not organise a women's junior team, it is that which prevented and continues to prevent Lisa from participating in competitive sport as a member of the Northern Districts junior team and, further, and in any event, it was open to her with the assistance of her club to play in the sub-junior competition or to play with a sub-junior team fielded by another club. Thus, it could not be said that there was a sufficient causal link between the alleged discriminatory stance adopted by the WA Softball Association and the disadvantage allegedly suffered, namely, that she was unable to play and is still unable to play in the junior winter competition.

Finally, as appears in paragraph 12 of the Points of Defence, it was argued that even if the Association might otherwise be held to have discriminated against Lisa in breach of Section 20 of the Act concerning discrimination in the provision of services, the Association is excused from liability by reason of Section 35 of the Act whereby it is not unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

The Tribunal will deal with each of these issues in turn.

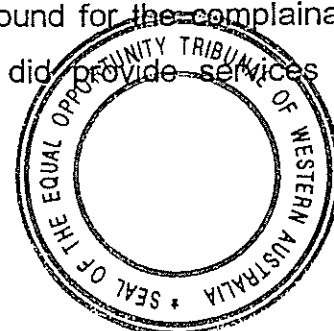


Services

By Section 4 of the Equal Opportunity Act the term "services" includes services relating to entertainment, recreation or refreshment. This does not purport to be an exhaustive definition of the term but, in any event, it is significant that the concept is thought to be sufficiently broad to embrace recreation.

A number of previously decided cases have a bearing upon this issue. In *Ross v University of Melbourne* (1990) EOC 92-290 a question arose as to whether a smaller light-weight room managed by the sports union of the University and made available for the exclusive use of women during certain hours was a service that was being provided in a discriminatory manner. The Tribunal held that this fell within the concept of a recreation service. The fact that those involved in the use of the equipment and facilities of the room may also have been involved in a sport did not mean that there was not a recreational component. Even if this were not so the definition of services was not exclusive. The provision of the equipment within the sports union facilities was a service that, whether or not it came within a specific definition, could be seen to be within the range of activities intended to be covered within the definition of services. The Tribunal went on to hold that the University had treated the male complainants less favourably than women on the ground of their sex in that it was clearly a less favourable treatment of a man to say that he could not use a particularly area during specified hours set aside for women.

In *Hoddy v Executive Director Department of Corrective Services* (1992) EOC 92-397 the male complainant alleged that he had been discriminated against on the ground of an HIV impairment in that he was denied access to certain classes, library services and other recreational activities whilst serving time as a minimum security prisoner at Fremantle Prison. The Tribunal found for the complainant and held that the respondent at the material time did provide services to



prisoners in his custody. The Tribunal approved the notion that it is not necessary that services should be provided pursuant to a contract, or directly. Thus, in *Goulden v Australian Mutual Provident Society* (1984) EOC 92-020 the word "services" was held to include the type of life insurance transaction in question in that case. The complainant was thought to have received a cognisable right or benefit even though he might not have received directly any legal right in respect of the policy itself. The service provided gave the complainant a rightful benefit in the form of relief from the necessity to pay the premium during the disability period.

In *Commissioner for Equal Opportunity v Parsons* (1990) EOC 92-278 an application was made by the South Australian Tennis Association Incorporated for an exemption from the operation of Section 39 of the Act to allow the Association to conduct tennis tournaments for young children exclusively for boys or girls as the case may be. The Supreme Court held on appeal from the Tribunal below that the Tribunal's characterisation of the service for which the exemption was sought was somewhat doubtful for it did not necessarily follow from the Act that the mere entry of children into a tennis tournament was a service. It is important to note that in the course of his judgment Jacobs J indicated that a tennis tournament could possibly be a service "if for example the provision of prizes or coaching is part of the competition". The learned Judge also seemed to be of the view that no exemption was necessary in the circumstances of that case because tennis could be regarded as a competitive sporting activity in which the strength, stamina or physique of the competitor was relevant. He said "whether the game is played by males or females or both together at any age level (emphasis added) the physical attributes of the competitor are relevant to the outcome." No decisive findings were made, however, in regard to this latter point because only limited evidentiary materials had been placed before the tribunal and, in due course, the superior court.

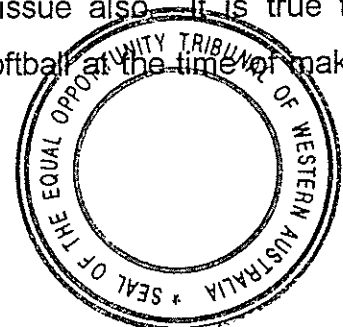


Counsel for Lisa Jernakoff in the present case also relied upon *Robertson v Australian Ice Hockey Federation* (supra) and the Canadian case of *Solin v British Columbia Amateur Hockey Association* (1988) Canadian Human Rights Reporter (vol 9) decision 816 in support of the proposition that the WA Softball Association was providing services. In the latter case the tribunal in question rejected the association's argument that the governance of amateur hockey was not a service customarily available to the public. In reaching that conclusion the tribunal drew attention to the fact that the respondent body was responsible not only for the enforcement of the relevant rules of play but also for the supervision of its constituent members – the amateur hockey leagues, teams, and associations throughout the province. It also provided certification programmes for both coaches and referees, operated training seminars for administrators, arranged insurance and other benefits for its members and served as the main conduit by which teams progressed to such provincial, national and international championships as exist.

Against this background, and having regard especially to the reasoning reflected in the Canadian case just mentioned, the Tribunal in the present case has little difficulty in being satisfied that the WA Softball Association does provide services and/or facilities within the meaning of the Equal Opportunity Act. Its constitution anticipates that it will enforce the rules of play and will generally play a supervisory role in regard to the conduct of various competitions. It provides playing and coaching facilities and collects fees (being fees paid in the first instance by individual players) with a view to ensuring that all registered players have appropriate insurance cover. Accordingly, the Tribunal finds against the Association in regard to this issue.

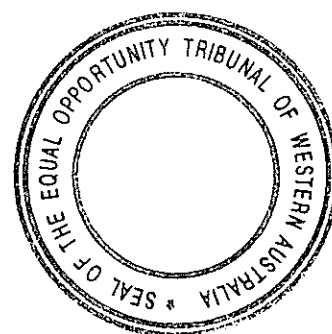
Less Favourable Treatment

The Tribunal finds against the Association on this issue also. It is true that various opportunities were available to Lisa to play softball at the time of making



her complaint including an opportunity to play with other females in the summer competition and an opportunity to play softball as a member of a mixed team in the sub-junior winter competition. Thus, in a general sense, it might be said being the case argued on behalf of the Association, that she was not being treated less favourably. It is important to remember, however, that the yardstick established by the Act is qualified by the requirement that the alleged discriminator must not treat the aggrieved person less favourably than in circumstances that are the same or are not materially differently the discriminator treats or would treat a person of the opposite sex.

In the present case, the material circumstances at the commencement of the 1997 winter season were that Lisa had commenced training with a sub-junior team and had a reasonable expectation that she would be able to continue as a member of that team throughout the season because, notwithstanding that she was the only female member of the team, mixed teams are allowed in the sub-junior winter competition. It rather seems that with the benefit of hindsight more detailed consideration could have been given to her special situation when it first became evident to Stephen Bandy as the coach of her team that it might not be possible to field a team in the sub-junior competition owing to the age barrier confronting three male members of the team. Nonetheless, the evidence is quite clear that one legitimate option open to the coach and to the members of the team was to arrange for the team to be moved up to the junior competition which was available to players in the 13-16 age group. This opportunity was available to the male players in the team and it therefore must follow that, putting other issues to one side for the moment, that if Lisa was denied an opportunity to compete at the higher level she was being treated less favourably than her fellow team members.



The Causation Issue

The various constituents of this issue have been canvassed at some length at an earlier stage of these Reasons for Decision. Again, with the benefit of hindsight, the Tribunal queries whether the coach of the team and his colleagues in the club paid sufficient attention to Lisa's situation or devoted sufficient time to exploring alternatives which might have allowed her to play in the 1997 winter competition as a member of a sub-junior team. From the outset, the matter of pressing concern seems to have been to find a way to retain the three male players barred by age as members of the team. Nonetheless, the Tribunal is satisfied on the balance of probabilities that the oversight concerning Lisa's eligibility was the result of an honest mistake and that if no objection had been raised by the WA Softball Association the Northern Districts Club would have waived any impediment to be found in its own constitution and/or conventions and allowed her to play for the junior team.

It follows from this finding that in the Tribunal's view the operative cause of her not being able to play was the determination made by the Association in response to the letter dated 10 June 1997 from Mr Leonard that female players were not at liberty to participate in the junior winter competition. This determination is reflected in the crucial letter dated 11 June 1997 written by Mr Osborne in his capacity as Coordinator of the winter competition on behalf of the Association to the Northern Districts Club. Not unexpectedly, the Northern Districts Club felt obliged to comply with the ruling of the supervisory body, bearing in mind especially the ambiguity that might otherwise arise concerning insurance cover for the player in question. When this finding is combined with the earlier findings, it becomes apparent that, prima facie, if the reasoning of the Tribunal proceeded no further, a further finding would be open that the WA Softball Association had discriminated against Lisa Jernakoff on the ground of her sex in that they had treated her less favourably than the male members of the team in regard to the provision of services offered by the Association.

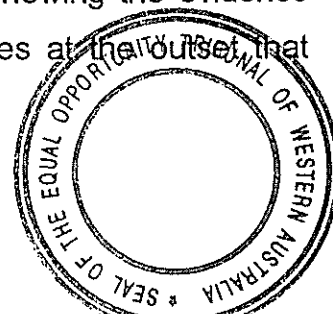


because, unlike the male players, of her age or younger, she was not allowed to compete in the junior competition. It will be apparent from earlier discussion, however, that the Tribunal is obliged to proceed further and consider the application of Section 35 of the Act to the circumstances of this case and make findings in regard to that further issue.

Section 35

The Tribunal has already noted that the burden lies upon the Respondent Association of establishing that the winter junior competition supervised by the Association falls within the description of a competitive sporting activity in which the strength, stamina or physique of competitors is relevant. The Tribunal has also noted that in construing this provision it seems that the Tribunal is obliged to look beyond the specific circumstances of an aggrieved individual and take account of matters which are relevant to, in the sense of having a bearing upon, the appropriate conduct of the competitive sporting activity in regard to "competitors" generally. In other words, it is not necessarily conclusive that a particular female complainant may be able to match the capacities of her fellow team members in the course of a particular season, although that too may be a relevant factor in determining whether discrimination has occurred. The Tribunal must also look at evidence bearing upon the capacities of others who may wish to participate in and derive enjoyment from the competitive sporting activity in question.

The application of this statutory provision will vary from sport to sport and the Tribunal wishes to say clearly at the outset that the conclusion arrived at on the facts of this case in regard to the sport of softball at the junior level should not necessarily be regarded as a decisive precedent in other cases. Each case must be decided upon its own particular facts, having regard to the nature of the sport and the nature of the competitive activity. However, in reviewing the evidence before the Tribunal in regard to softball, the Tribunal notes at the outset that



there seems to be general agreement that at levels of play above the age of 16 and in the elite competitions, there were significant differences in their respective physical capacities between male and female players which worked to the advantage of the male players. It also seemed to be common ground that there were no significant differences between the respective genders below the age of 13 and this was reflected in the practices of the association and in the National Junior Sport Policy. The critical question was whether the special statutory provision should be applied in the 13-16 age group.

The Tribunal was of the view that considerable weight should be attached to the expert evidence of Dr Ackland. He gave his evidence in a convincing manner and it was apparent both from his report and from the research data he drew upon that significant differences do begin to emerge in regard to strength, stamina and physique in the 13-16 age group. This provided him with a foundation for his opinion, having regard to the elements of play in softball, that boys in this age group would have an advantage, even though there might be individual female players from time to time who could compete on equal terms. His observations in that regard were supported by Shirley Schneider who was undoubtedly the most experienced of the various witnesses who presented evidence to the Tribunal bearing on this point.

The Tribunal pauses to note in passing that it was not persuaded to the view to the contrary expressed by the witnesses called by the Complainant. Mr Bandy's experience was not extensive in regard to the coaching of girls in the relevant age group and the two witnesses from New South Wales were not able to support their personal observations with research data. The witness from the Mudgee competition conceded that the presentation of mixed teams in the Mudgee competition was partly due to a lack of male participants. No attempt was made to refute the research data and related opinion put forward by Dr Ackland by an independent expert of equal standing. It is also significant that the National Junior Sport Policy and the report of the Women's Sport Foundation of



WA, both documents being the product of widespread public debate by those with an interest in the matter, acknowledged that in this age group, in many sports, it was appropriate, and perhaps necessary, that sporting competitions should be organised on the basis of single sex teams.

Against this background the Tribunal was satisfied that at the junior level for players in the 13 to 16 years age group, in circumstances where softball was being played as a competitive sport, Section 35 of the Equal Opportunity Act operated to excuse the WA Softball Association from liability. Put shortly, in the circumstances of the present case, it was not unlawful to exclude a female player from participation in a competitive sporting activity – in this case playing as a member of the Northern Vikings boys team in the winter competition – because the activity in question was one in which the strength, stamina and physique of the competitors is relevant.

It follows the complaint of Lisa Jernakoff by her parents will be dismissed.

The Tribunal concludes by saying that a ruling to this effect does not preclude the WA Softball Association from reviewing the question of single sex teams from time to time, especially if there is a demand from more players such as Lisa Jernakoff who wish to explore the prospect of playing in winter. It should also be said that both parties to the dispute recognised at the outset that this was in the nature of a test case and thus both parties and their respective counsel conducted the litigation in an atmosphere of civility with a view to obtaining a ruling upon what has proved to be a difficult issue. No claim was made for damages and in that respect it cannot be said that either party won or lost.

22.10.98

