

Does sex segregated sport still hold value?

The demand that transgender women be accorded their human right to play sport at all levels has challenged thinking in the sports industry. The Australian Football League's decision to exclude transgender woman Hannah Mouncey from competing in its premier women's league but allow her to continue to play in the lower, state, leagues appears inconsistent and raises a number of issues. Sports administrators and members of the public are asking: What do we mean by fairness and a 'level playing field'?; how do we define 'women' in women's sport?; and does binary sex segregation in sport still hold any relevance or benefit in the future? Catherine Ordway, Senior Consultant at Snedden Hall & Gallop and Senior Fellow at the University of Melbourne, addresses those questions in this article.

In Australia, the issue which is causing significant debate in sport circles is how to embrace diversity and inclusion in sport while protecting existing competitors from perceived 'unfair advantage'. The demand that transgender women be accorded their human right to play sport has challenged the thinking of sports administrators, policymakers and cis women in the industry. (Cis women, also sometimes referred to as 'non-transgender women' are women who identify with being female in alignment with their biological sex at birth².) Transgender men (people born biologically female, and now living and identifying as men), do not appear to cause the same level of angst for sports authorities, as their physical prowess is not perceived to be a threat to the male competitors or to the 'fairness' of the competition. To analyse this contradictory approach, this article asks: What do we mean by fairness and a 'level playing field'? which leads to answering: how do we define 'women' in women's sport?, and considering whether binary sex segregation in sport still holds any relevance or benefit in the future?

Background

Women have overcome centuries of sexism to now be permitted to participate in sport within a strict binary sex segregated system. People identifying with, or being 'outed' by sports authorities as having anything other than the 'standard' genetic and hormonal profiles³, are being marginalised and excluded. A solution to this debate is proposed here using an Ethics of Care ('EoC') approach⁴. The starting point for this approach is the conviction that all human beings are born free and equal in dignity and rights, as stated in Article 1 of the Universal Declaration of Human Rights⁵. Ethical

behaviour involves treating people in this spirit, regardless of gender. EoC, also known as Care Ethics, has developed historically from the feminist tradition of recognising, and requiring, that we can and should respond to marginalised members of the community with care and empathy. Doing the right thing means taking action to make the world a better place for those who have been made vulnerable or otherwise excluded and/or marginalised, even beyond our legal requirements. In this context, it requires sports administrators to provide more 'care' and resources to people on an increasing scale to match the needs of vulnerable and marginalised people within our community to ensure that everyone has both equitable access to the benefits of sport, and an equal opportunity to earn a living from those activities if they have the ability to do so.

What do we mean by fairness and a 'level playing field'?

The UNESCO International Charter of Physical Education and Sport states that: '[A]ccess to physical education and sport should [...] be assured and guaranteed for all human beings⁶.' The International Olympic Committee's ('IOC') Olympic Charter also sets out, as one of the fundamental principles of the Olympic Movement, that: 'The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play⁷.'

The IOC's 2003 policy (known as the Stockholm Consensus⁸) recognising athletes after sex reassignment surgery has been heavily criticised for being

based on flawed and inaccurate scientific hypotheses⁹. Athletes and commentators have claimed that the policy amounts to "gender discrimination¹⁰" in preventing transgender women, and women with a range of hormonal and genetic profiles, from playing sport¹¹. The Stockholm Consensus was amended in 2015 to take into account societal and legal recognition of changes to gender identity. The IOC's amended Transgender Guidelines maintains the flawed 'advantage' biology assumptions based on testosterone levels, without taking into account significant genetic and other variations in the athlete population¹². For example, cyclist Kristen Worley is not transgender, but has undergone reassignment from a XY male to XY female. She succeeded after 16 years to win her right to play when the Human Rights Tribunal of Ontario found that the International Cycling Union rules (based on the IOC policy) were discriminatory¹³. Worley equated the gender testing she underwent during her athletic career to sexual assault consistent with complaints arising out of the #MeToo movement¹⁴.

A transgender person is defined by UNAIDS as a person who: "has a gender identity that is different from his or her sex at birth. Transgender people may be male to female (female appearance) or female to male (male appearance). It is preferable to describe them as 'he' or 'she' according to their gender identity, i.e. the gender that they are presenting, not their sex at birth¹⁵."

To achieve the aims of the UNESCO and IOC Charters, the starting position from an EoC perspective must be that transgender women be included, unless it can be established that there is an

evidence-based unfairness warranting that they be excluded. To allow for women's sport to be as inclusive as possible, it is clear that comprehensive and transparent transgender policies are needed. These policies must be based on science. In line with the human right to sports participation, the Australian Federal Government's sport policy and funding arm, the Australian Sports Commission ('ASC'), is currently undergoing a consultation to ensure that their guidelines are developed to allow transgender women to play sport, including at the elite level. The ASC guidelines should be released in August 2018.

Hannah Mouncey

Hannah Mouncey is a transgender woman who wants to play in the Australian Football League ('AFL') Women's Competition (the 'AFLW'). The AFL has been basking in the glow of the success of its recently introduced premier women's competition¹⁶, promotes its support for social issues including gay pride¹⁷, and claims a: "strong commitment to equality and inclusion at all levels of the game"¹⁸." On this basis, it would be expected that the AFL take an inclusion-based EoC approach to a person who finds herself in a highly marginalised class of people. However, the AFL appears to have resorted to conservative risk minimisation to exclude Mouncey. After the AFL finally announced, on the day before the AFLW Draft in October 2017¹⁹, that Mouncey would be ineligible to be selected for teams in the 2018 AFLW, commentators criticised the decision²⁰. The AFL has relied on an exception to the anti-discrimination legislation which allows sports organisations to exclude people on the grounds of gender where their 'strength, stamina or physique is relevant'²¹.

There is no doubt that strength, stamina and physique are required to play AFL football²². The AFL's decision appears to be based on an assumption that Mouncey has an unfair advantage on some or all of these criteria. Therefore, the AFL's announcement that Mouncey was eligible to continue playing in the lower state leagues²³, but not in the AFLW, is further support for the conclusion that the AFL decision is inconsistent and *prima facie* in breach of anti-discrimination legislation. Given that the AFL has not published detailed reasons for its decisions, it is assumed that the AFL must have determined that Mouncey has: i) an unfair physical advantage over the other women in the AFLW competition; ii) may cause a more than insignificant risk of injury to other players; and/or iii) that Mouncey's 'look' is not the marketing image sought to be promoted by the AFL. Allowing Mouncey to play in the state

football leagues, where the players can be expected to be physically weaker and less experienced, negates the unfair advantage and risk of physical harm arguments.

Mouncey is being given a right to play, but not at the elite level. The UN Convention states that discrimination 'of any kind' is unacceptable²⁴, and so it follows that an EoC approach requires that Mouncey not be denied access to the elite level in any sport, where she has the sporting ability. Mouncey has a right to earn a living and where she is denied access to the professional league, but permitted to play in the amateur league, this also amounts to economic discrimination. It seems unlikely that transgender women would make the prodigious decision to undergo the medical, social and legal transformation for reasons relating to potential economic benefits. Despite the considerable gains recently experienced by female athletes in professional team sport, the monetary compensation offered to AFLW players, as compared with their AFL 'brothers,' remains pitiful²⁵, and it cannot be imagined that it would lead to the opening of the proverbial 'floodgates'!

How do we define 'women' in women's sport?

The AFL does not have a transgender policy. The AFL is, in effect, the international federation for the sport, and not being on the Olympic program does not have to comply with the IOC policy. However, the AFL is required to comply with Australian law. In the AFL Female Football Club Guide²⁶, the AFL refers readers to the: 'Transgender and Intersex Sport Inclusion Guidelines plus Guidelines: Transgender, People and Sport'²⁷. Despite these public statements, in its 2017 decision, the AFL stated that its subcommittee had: "carefully considered all the information provided by Hannah [Mouncey], as well as the available data on transgender strength, stamina, physique along with the specific nature of the AFL competition" to determine that Mouncey is not eligible to play in the women's competition. The AFL did not clarify what information was provided by Mouncey, and did not specify what the 'available data' was or how it could be verified.

It can be assumed that the 'physique' criteria relates to Mouncey's height (190 cm) and that she previously weighed 100kg. The AFL version of football is a collision sport played on a wide open grassed oval. This means that the most successful teams will have a broad diversity of physiques, and, presumably, skill levels. To illustrate this, the statistics

provided by the 2017 AFL men's premiership winning club are instructive²⁸. The senior Richmond Football Club players have an almost 30cm difference between the shortest to the tallest in the 40-man squad (from 175-204cm). By weight the difference between lightest (71kg), to heaviest (106kg) is 35kg. The AFLW does not provide statistics on its players, but a similar diversity exists within the Australian women's rugby union team: with spans of 25cm between tallest and shortest and 44kg between heaviest and lightest²⁹. Even taking into account that these are results for a national team of only 28 players, which includes both Super W and 7's representatives, the heaviest Wallaroo weighs more than the heaviest Richmond men's player. To imagine that cis women in the Australian national teams, would be excluded from playing in the AFLW on the grounds of an unfair advantage is incongruent.

There is no evidence in the public domain that the AFL has measured Mouncey's strength or stamina, and the AFL has not indicated that the other AFLW players have been measured against any of the criteria relied on to exclude Mouncey. Mouncey's coach in the local Canberra competition notes that while Mouncey's hand-eye skills are good, she does not have the endurance, speed, or strength of some of the other players, and, as she is still learning the game, is improving her kicking accuracy³⁰. It has also been accepted by the International Handball Federation (the sport Mouncey played prior to her transition) that her hormone levels and consequent loss of strength means that she has been legally and medically cleared to play the Olympic sport of handball³¹. The Olympic sports have been grappling with how to achieve a 'level playing field' in a world where assumptions about a 'standard' of XX and XY chromosomes and testosterone levels for each sex have been shown to be false. Despite the best efforts of some to lower the discussion to one on genitalia³², research has demonstrated that people can be born with either only one, or three or more sex chromosomes³³ and there is a 'complete overlap between the sexes' in testosterone levels, particularly in elite athletes³⁴. The evidence presented here suggests that the criteria relied on by the AFL to exclude Mouncey is inadequate in determining what is fair competition in a sex segregated sport environment.

Future considerations Does binary sex segregation in sport still hold any relevance?

Sport has traditionally been developed

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by and for men³⁵. As society has evolved, an additional category of 'women's sport' has been developed to give cis women an opportunity to compete. This could be seen as a kind of affirmative action program to overcome the centuries of sexism and presumptions about capability that prevented women from having equal access to sport. Men and women have also played competitive sport together. The traditional racquet sports³⁶, Olympic sailing³⁷ and curling, for example, have competitions for mixed doubles at the highest levels. New sports like triathlon and touch football also have mixed team events, requiring designated minimum numbers of women on each team. However, these disciplines remain hedged in binary definitions of gender, which would not necessarily assist the gender-neutral or transgender athletes³⁸. These advances have also not protected women from being physically, sexually and emotionally abused when competing in or working within the sports industry³⁹.

Given that the science demonstrates significant overlap between the height, weight and hormone levels between

male and female elite athletes, then an EoC perspective could allow for the introduction of new, gender neutral and inclusive team sports to allow for the range of physicalities and skills sets represented.

One sport which has already made in-roads in this direction is roller derby. Roller derby started as a female-only sport, but has recently introduced a Gender Statement as follows: 'An individual who identifies as a trans woman, intersex woman, and/or gender expansive may skate with a WFTDA [the Women's Flat Track Derby Association] charter team if women's flat track roller derby is the version and composition of roller derby with which they most closely identify⁴⁰.' Despite this, the sport continues to grapple with how to include men. Similar generalised reservations are expressed in relation to assumed physicality advantages, despite the range of physical descriptions of the men seeking to be involved in roller derby⁴¹.

Sociologist Jennifer Hargreaves, is credited for calling for new gender and

sex inclusive sports from as far back as 1990⁴². If the AFL had considered an EoC perspective and gone beyond a merely responsive Respect and Responsibility policy⁴³ to adopt a truly gender mainstreaming approach⁴⁴ in introducing the AFL's latest product this year, the AFLX would have been designated as a mixed, gender-neutral, sport⁴⁵.

The AFL decision in relation to Hannah Mouncey demonstrates that a great deal is needed from policymakers to ensure that those in our midst experiencing the greatest challenges are given more care by those with the power to provide it. Legal definitions of gender discrimination and inclusion go some way, but additional work needs to be done through education and awareness-raising to reflect the scientific evidence that cis women are not being unfairly disadvantaged by including transgender women in competitive sport, particularly in team environments. Perhaps the answer lies in developing new, gender-neutral, sports that celebrate the skills and attributes present in the diversity of our communities.

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7. IOC, 'Fundamental Principles of Olympism', Olympic Charter, 2 August 2015, 13-14, http://www.olympic.org/Documents/olympic_charter_en.pdf
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11. http://www.tas-cas.org/fileadmin/user_upload/award_internet.pdf
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15. UNAIDS Terminology Guidelines, http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf
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FIFA amends the RSTP Regs

FIFA announced amendments to its Regulations on the Status and Transfer of Players ('RSTP') on 26 April 2018 in Circular 1625, which introduces an amendment to Article 14 to include a new paragraph concerning abusive situations where the stance of a party is intended to force the counterparty to terminate or change the terms of the contract; a new Article 14bis to address the circumstance of terminating a contract due to overdue salaries; a change to Article 17 regarding the calculation of compensation for breach of contract without just cause; and a new Article 24bis relating to the execution of monetary decisions, granting FIFA's decision-making bodies the power to impose sanctions on players and clubs if a monetary decision is not complied with.

"The major regulatory change is Article 24bis because it introduces a new concept," said Paolo Lombardi, Managing Director at Lombardi Associates. "Some of the other amendments seem at first sight very significant, although they actually enshrine principles that have been established through consistent jurisprudence of FIFA decision-making bodies. Having said that, the act of codifying principles arising from jurisprudence should not be underestimated."

Under Article 24bis, when instructing a party (a club or a player) to pay another party (a club or a player) a sum of money, the Players' Status Committee, the Dispute Resolution Chamber ('DRC'), the Single Judge or the DRC judge will also decide on the consequences for failure to pay the relevant amounts in due time. The specific consequences for non-compliance with a monetary decision will be included in the findings of the decision and will be the following, when applicable to debtor clubs: a ban from registering any new players until due amounts are paid over a maximum of three consecutive registration periods; and when applied to debtor players: a restriction from playing in official matches until due amounts are paid over a maximum of six months.

"Article 24bis is clear in indicating that the relevant FIFA decision-making body 'shall' include with a monetary decision the specified sanction that will apply in the event of non-compliance with such decision," adds Lombardi. "As it stands, if a monetary decision is not complied with following a final and binding decision, the creditor needs to request the FIFA Disciplinary Committee ('FDC') to open disciplinary proceedings and potentially impose sanctions in order to enforce payment. Instead, such sanctions will now be included in the monetary decision, which in principle means less delays for creditors, and less cases for the FDC to deal with. Of course, parties can still lodge an appeal with CAS against the FIFA decision, and the challenge here will be for CAS to provide equally swift appeal proceedings so as not to counteract the positive impact of the new amendments."

FIFA also issued Circular 1628 on 9 May 2018, announcing a new approach to debtors within the procedure of Article 64 of the FIFA Disciplinary Code. FIFA acknowledged the introduction of Article 24bis in this Circular but stated that due to the limited scope of the new Article and that it will only apply to claims lodged after 1 June 2018, the FDC will still have a "considerable" number of cases to deal with so the implementation of sanctions under a new procedure in the Disciplinary Code is also necessary. The new procedure will see point deductions and transfer bans automatically imposed on debtors by member associations from the expiry of the final deadline for payment.

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