

Submission to the Exceptions Review

**A review of the exceptions and
exemptions for the
*Equal Opportunity Act 1995 (Vic)***

VicSport

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The Exceptions Review - A review of the exceptions to and exemptions from the Equal Opportunity Act 1995 (Vic)

Overview

On behalf of Victoria's sport and active recreation sector VicSport is pleased to submit this response to the review of exceptions to and exemptions from the Equal Opportunity Act 1995 (Vic).

There are a number of exceptions to the Act that impact directly on sport. VicSport believes each of these exceptions acts to support the provision of safe and enjoyable sport and active recreation opportunities for all and as should remain within the Act. In many instances, the exceptions to the Act refer to differences in physical specific attributes, such as strength, stamina or physique, as the key determinant for provision of an exception. Given the physical nature of sport and recreation pursuits it is vital differences in physical attributes are accounted for.

The exceptions to the Act however fail to take into consideration a range of psychosocial factors and other issues pertinent to the emotional welfare of participants when determining suitability of exceptions. VicSport believes this is a significant omission as many factors, such as body image concerns, self confidence and self esteem, cultural requirements, lifestyle factors, or quite simply just personal preference, must also be taken into account in the consideration of providing suitable opportunities for both males and females, as well as for people of differing abilities and religious and cultural backgrounds. VicSport believes consideration for these psychosocial factors should also be included within the exceptions.

The following information addresses in further detail responses to exceptions which are relevant to, and have an impact on sport and active recreation.

About VicSport

VicSport is the peak body representing Victoria's sport and active recreation sector. Our Mission is to lead the sport, active recreation and associated health agendas into the future.

As the peak body for sport and active recreation, VicSport represents the collective interests of Victoria's single largest community sector. As an independent member based organisation, VicSport represents the needs and concerns of over 170 member groups including State Sporting Associations (SSA), Regional Sport Assemblies (RSA), Local Government Authorities (LGA), active recreation organisations, University, TAFE and school sport groups, as well as organisations representing specific sub-groups of the sector such as the Victorian Council on the Ageing, ACHPER Victoria, Aquatics and Recreation Victoria and the Australian Drug Foundation.

Through our extensive network, VicSport supports over 20,000 clubs and associations, and over 1.8 million participants, workers and volunteers in the sport and active recreation sector across Victoria. The activities these organisations offer play a vital role in promoting better physical and mental health outcomes for Victorians, as well as creating vital capacity within metropolitan and regional communities.

As Victoria's Peak-Body for sport and active recreation our key roles are to:

- *Advocate*: as the "Voice for Sport", VicSport represents the interests and concerns of the sector to government, to statutory authorities and to the broader industry.
- *Inform policy development*: VicSport listens to members and uses this feedback to provide visionary strategic advice to key policy and decision makers.
- *Facilitate program delivery*: VicSport works with government, statutory authorities and key external stakeholders to develop strategies and provide support required to assist members deliver participation opportunities for all Victorians.
- *Build Members' Capacity*: VicSport supports and educates members through the provision of quality advice and consultation services and delivery of professional development opportunities.
- *Research*: through industry research and development, VicSport analyses issues, identifies trends and develops innovative strategies that play a vital role in planning for the future.

Responses to Exceptions Relevant to Sport and Active Recreation

Chapter Six – Exceptions to discrimination by clubs and club members

Section 61 – Exception – clubs for disadvantaged people or minority cultures

This section allows clubs that operate principally to prevent or reduce disadvantage suffered by people of a particular group or to preserve a minority culture to exclude from membership a person or people without an attribute for whom the club was established.

VicSport supports the ongoing inclusion of Section 61 – Exception – Clubs for disadvantaged people or minority cultures. Although the community sport and active recreation sector is a strong advocate for cultural inclusion at all levels, and works hard to make people of all cultures feel welcomed and included, there are occasions when it is the actual preference of people from disadvantaged groups or minority cultures to maintain exclusivity, or initially participate in a club specifically for disadvantaged people or minority cultures before transitioning into mainstream clubs. VicSport agrees, where it is appropriate to reduce disadvantage suffered by people of a particular group, or to preserve a minority culture, the option of restricting

membership to those persons who have the particular attribute for which the club was established be maintained.

Section 62 – Exception – clubs and benefits for particular age groups

A club, or a member of a committee of management or other governing body of a club that exists principally to provide benefits for people of a particular age group may exclude a person who is not in that age group.

VicSport supports the ongoing inclusion of Section 62 – Exception – clubs and benefits for particular age groups. The physical nature of many sport and active recreation pursuits, and the varying skill and ability levels of persons of different ages, requires that in most cases, it is necessary to define participation by age group in order to ensure participant safety and an equitable level of competition or play. It should be noted the variations in skill and ability level at different ages are not limited only to physical aspects of development, such as strength, stamina and physique, but also relate to a range of technical skills and psychosocial factors, and these needs, in addition to physical attributes, are important considerations which must be taken into account in supporting the need to allow age restrictions to be applied to sport and active recreation competition and play (see responses to Section 63 and Section 66 exceptions for further details).

Section 63 – Exception – separate access to benefits for men and women

A club (or a member of a committee of management or other governing body of a club) may limit a member's access to a benefit on the basis of the member's sex if it is not practicable for men and women to enjoy the benefit at the same time. This section applies where either access to the same or an equivalent benefit is provided for men and women separately or men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.

VicSport supports the ongoing inclusion of Section 63 – Exception – separate access to benefits for men and women. As noted previously, the physical nature of many sport and active recreation pursuits, and the varying physical abilities between males and females at certain ages, renders mixed competition and play in some cases unsuitable for reasons of safety, particularly in contact sports. In addition, differences in physical attributes and ability, although they may not have the same impact on safety as for a contact sport, the ability of males and females to compete together, and the enjoyment derived from competing together, can still be compromised due to differences in physical capacity. As an example, consider a game of tennis or volleyball, where players, although they do not come into direct contact with each other due to competing on opposite sides of the net, can find it difficult to compete equitably due to differences in physical ability.

In addition to physical differences, there are a range of other psychosocial and emotional factors that should be considered when making provision for separate access for males and females. These factors include concerns over body image (an issue affecting both males and females), religious beliefs (note YMCA Exemption No. A339 of 1999 ruling), personal confidence and self-esteem issues which may preclude mixed participation, lifestyle choices, or quite simply, a preference to participate with members of your own gender through personal choice.

Sport and active recreation aims to make provision for male only, female only, and mixed competition and play where it is appropriate to do so, and there is adequate demand for such competition and play. It is important to note here, although at an intellectual level, mixed participation opportunities may appear to be the most equitable and appropriate form for competition or play, there are numerous examples of instances where a requirement to open up competition and play to mixed teams has been detrimental to females, and had resulted in a loss of female participants.

As a case in point, in response to a VCAT ruling Lawn Bowls are required to open all levels of competition up to males and females, (but for a few exemptions), as it was deemed the ability to partake in the sport is not affected by the differences in strength, stamina or physique between the average male and female. Consequently, pennant competitions are now open to male and female participants. As a result of competing in mixed competition, it has been noted that female participation is often less than satisfying for a range of social and emotional reasons, but specifically in many cases because of the following. When teams are selected on merit, as needs to occur, females often do not play the key leadership role of "Skip" or "Third" in the team with those roles being held predominantly by males; this is having a detrimental effect on the capacity of females to develop their leadership skills and confidence, and is limiting their enjoyment of the game (please refer to the Royal Victorian Bowls Association and Victorian Ladies Bowls Association submission for further details and comments).

It should also be noted in some instances, the demand for a female stream of a male dominated sport, a male stream of a female dominated sport, or a mixed competition, is not sufficient for a club or association to include both male and female opportunities to participate. Sport and active recreation groups make every effort to include opportunities for male only, female only and mixed participation where there is adequate demand. Community sport and active recreation clubs are however, primarily fully volunteer run and resource poor. For many of these clubs, adding an additional competitive stream to meet the demands of a few is beyond their means, and although every effort to meet the demands of all members of the community is made, at times this is simply not practicable. It is important to remain cognisant of the fact that a lack of interest from participants in establishing a single gender competition should not automatically lead to a call for females to be allowed to play in a male competition, or males to play in a female competition for the range of physical, psychosocial and emotional welfare reasons outlined above.

Chapter Seven – Exceptions to discrimination in sport and local government

Section 66 – Exception – competitive sporting activities

This exception permits the exclusion of a person of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant. This exception does not apply to a sporting activity for children under the age of 12 years old. A person may restrict participation in a competitive sporting activity to people who can effectively compete, to people of a specified age or age group, or to people with a general or particular impairment. A “competitive sporting activity” includes an exhibition or demonstration of a sport but does not include coaching, umpiring, administration or non-competitive practice of a sport. Therefore, it would be unlawful to prohibit a person from coaching a particular sporting team on the basis of their sex if the person can fulfill the requirements of the position.

VicSport supports the ongoing inclusion of Section 66 – Exception – competitive sporting activities. As noted previously, the physical nature of many sport and active recreation pursuits, and the varying physical abilities between males and females at certain ages, renders mixed competition and play in some cases unsuitable for reasons of safety, particularly in contact sports. In addition to safety concerns, there are some cases where safety may not be a primary issue, however the ability of males and females to compete together, and the enjoyment derived from competing together, may be compromised due to differences in physical capacity (*see response to Section 63 – Exception – separate access to benefits for men and women for further details*).

Although Section 66 quite rightly makes allowances for a range of physical differences, it fails to take into consideration a range of psychosocial and emotional factors that are every bit as important as physical differences, in particular at the adolescent and young adult stages. Body image, personal confidence and self-esteem are all issues affecting both males and females, and play a key role in contributing to the enjoyment of sport and physical activity opportunities. As mentioned in the response to Section 63 – Exception – separate access to benefits for men and women, Lawn Bowls Victoria have experienced a negative outcome for females as a result of opening pennant competition up to mixed male and female competition. As noted, females have found this participation is often less than satisfying for a range of social and emotional reasons, such as the key leadership role of “Skip” or “Third” in the team being held predominantly by males as an outcome of these priority positions being selected on merit. This is having a detrimental effect on the capacity of females to develop their leadership skills and confidence, and is limiting their enjoyment of the game.

Psychosocial and personal preference factors all contribute to the emotional welfare of the participant, and are as equally important in contributing to the enjoyment and safety of participation as physical attributes and skills. As such these factors should be given the same consideration that differences in physical attributes are given under the Section 66 exception competitive sporting activities.

As a note, there have been several instances where VCAT rulings have raised the age restriction for male and female participation from 12 to 14 or 15 years of age (see AFL Victoria and Netball Victoria submissions for further information). It is important to keep in mind the particular abilities of a few who may have the strength, stamina, confidence and skills to compete with members of the opposite sex in age groups older than 12, should not be used as the yardstick for making generalised decisions to raise the age to which this exception applies. There is no question there will always be extremes on any continuum, males and females who are particularly confident, particularly tall, particularly strong, skilled or gifted ability wise. Making a generalised decision on the basis of a few can have negative ramifications for the broader participant population and this should be considered when making such decisions. In cases where a person of exceptional ability wishes to participate, and can do so on their own merits in line with selection processes, it may be appropriate to make an exception to the rule. This does not mean a general exception however is appropriate for all.

In regard to the Section 66 exception – competitive sporting activities, it is important sport and active recreation groups are able to restrict participation in a competitive sporting activity to people who can effectively compete, to people of a specified age or age group, or to people with a general or particular impairment. As noted above, for reasons of safety and personal enjoyment, sport is often restricted by age limits (see response to Section 62 exemptions). In addition, participation is further restricted by a grading system that separates persons into defined levels of competition or play based on their ability to compete effectively in that grade.

Given the physical nature of sport and active recreation pursuits it is vital exception 66 allowing for the restriction of participation to those who can effectively compete remain in place to ensure the safety and enjoyment of participants.

Section 80 – Protection of health, safety and property

A person may discriminate against another person on the basis of impairment or physical features for the purposes of protecting the health, safety or property of any person (including the person discriminated against), or the public generally. In addition, a person may discriminate on the basis of pregnancy if it is necessary to protect the health or safety of any person (including the person discriminated against).

VicSport supports the ongoing inclusion of Section 80 – Protection of health, safety and property. Protecting the health and safety of participants is always the primary concern for any club or organisation offering a sport or physical activity opportunity. It is important this exception remain in place to allow groups to take steps to protect the health and safety of all if required. In regard to the issues of playing or competing in sport or physical activity pursuits whilst pregnant, many sports, such as netball for example, have policies specifically outlining issues regarding competing whilst pregnant. In general, these policies indicate medical guidance should be sought to determine the suitability of the mother-to-be to participate. With appropriate medical

advice, participation is at the discretion of the mother-to-be. These policies should be referred to as part of any discussion regarding Section 80.

Response to Questions for consideration

VCAT Exemption Process.

In regard to the VCAT exemptions process, VicSport recommends a review of the process to ensure hearings are both timely and affordable. Past experiences have shown the VCAT hearing process can become quite drawn out in terms of timeliness, and can also become costly if professional legal advice is required. Efforts to streamline the hearing process and keep costs to a minimum, in particular for community groups, would be appreciated at all levels.