

5 – Exceptions to discrimination by clubs and club members

Section 61 – Clubs for disadvantaged people or minority cultures

Section 61 allows a club that was established for people with a particular attribute to exclude people without that attribute from membership if the club's principal operation is to prevent or reduce disadvantage suffered by people of that group, or to preserve a minority culture.

61. Exception—clubs for disadvantaged people or minority cultures

A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally—

- (a) to prevent or reduce disadvantage suffered by people of that group; or
- (b) to preserve a minority culture.

This exception has an important public purpose that promotes freedom of association (*Charter* s. 16) for the sharing of a particular culture (*Charter* s. 19) or the advancement of a particular disadvantaged group (s. 8(4)). There are no less restrictive means to achieve the purpose of this exception. The limitation placed on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

The only concern with this provision is that it may be unclear which groups qualify as a 'disadvantaged group' or a 'minority culture'. However in a case of dispute these issues could be determined by reference to the requirements of the *Charter* for reasonable limitations on the right to equality (s. 7(2)).

There were no submissions raising any concerns about s. 61.

Similar provisions exist in the SA, Qld, NT and Tasmania. The SA provision protects 'a club established principally for the purpose of promoting social intercourse between the members of a particular racial or ethnic group.' (s. 57(2)), and in other jurisdictions they are likely to be provided by the general welfare measures provisions or exceptions for where a club's principal objective is to provide benefits for persons of a particular race or who have a particular impairment, eg NSW s. 20A(3).

Options for reform:

Option 1: No legislative change is proposed in respect of this exception.

Section 62 – Clubs and benefits for particular age groups

Section 61 allows two exceptions. A club that was established for people of a particular age group may exclude people outside that age group from membership. In addition, any club may restrict a benefit to members of a particular age group if it is reasonable in the circumstances.

62. Exception—clubs and benefits for particular age groups

- (1) A club, or a member of the committee of management or other governing body of a club, may exclude a person from membership if—
 - (a) the club exists principally to provide benefits for people of a particular age group; and
 - (b) the person is not in that age group.
- (2) A club, or a member of the committee of management or other governing body of a club, may restrict a benefit to members who are members of a particular age group, if it is reasonable to do so in the circumstances.

VEOHRC commented that:

The purpose of this exception is to enable a club to exclude a person from membership if the club exists principally to provide benefits for people of a particular age group and the person is not part of that age group. This exception has an important public purpose that promotes freedom of association (s. 16) for the sharing of mutual interests and the provision of benefits for the benefit of particular age groups (s. 8(4)). There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Similar provisions exist in all other state and territory jurisdictions except Qld and Tasmania. The 'voluntary bodies' exception in the *Age Discrimination Act* (Cth), s. 36, covers the same area.

Options for reform:

No legislative change is proposed in respect of this exception.

Section 63 – Separate access to benefits for men and women

Section 63 allows a club to provide equivalent benefits to male and female members where it is not practicable for men and women to enjoy the benefit at the same time.

63. Exception—separate access to benefits for men and women

A club, or a member of the 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—

- (a) it is not practicable for men and women to enjoy the benefit at the same time; and
- (b) either—

- (i) access to the same or an equivalent benefit is provided for men and women separately; or
- (ii) men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.

The purpose for this exception is to enable a club to provide separate but equivalent benefits for members of each sex, only where it is impracticable to provide the benefit to both sexes at the same time. Note that section 78 provides an exception for 'private clubs' to be established for members of one sex only. Section 63 relates to clubs that have both male and female members.

The test of 'practicability' in paragraph (a) is not very informative. Every state and territory law, and the Sex Discrimination Act, includes a similar provision (s. 25(4)), with very minor variations. The Qld and Tasmania provisions follow the model of s. 63, while all the other provisions follow a closely related model but this requires clubs to ensure that men and women are 'each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit' and includes a further subsection listing the factors relevant to determining the issues. For example, *SDA* (Cth) s. 25(5) lists the following factors:

- (5) In determining any matter relating to the application of subsection (4), regard shall be had to:
 - (a) the purposes for which the club is established;
 - (b) the membership of the club, including any class or type of membership;
 - (c) the nature of the benefits provided by the club;
 - (d) the opportunities for the use and enjoyment of those benefits by men and women; and
 - (e) any other relevant circumstances.

Where the separate rights are because of limited facilities for changing, or personal use of a resource that can be used by one sex only, then s.63 may operate to protect the right to privacy (*Charter* s. 13) for reasons of respect for privacy and decency. This is a legitimate purpose and the limitation it gives rise to on the right to equality is rational and proportionate to the purpose it is seeking to achieve.

Concerns were expressed that the exception does not require clubs to work towards avoiding this situation altogether. The Law Institute of Victoria commented:

We understand that this exception was originally intended to allow clubs a reasonable opportunity to provide facilities and benefits, such as changing rooms and hygiene facilities suitable for the other sex, than a club's current dominant membership. The LIV submits that s. 63 should be amended, so that private clubs are required to make reasonable adjustments to accommodate for the opposite sex, except where they can show unjustifiable hardship or protection by another exception.

This exception was also of interest to VicSport, the peak body for Victorian sporting associations and organisations. It was concerned about clarifying the issues relating to gender equality in sport that are also discussed in the context of s.66. Many sporting clubs would be affected by both exceptions, as s. 66 would apply in relation to sports where 'strength stamina and physique are relevant', but

s. 63 may be relevant to club activities outside that area, for example where there is only one sports ground and it is used by one sex at a time. VicSport raised some concerns about how equal was the integration of sport that has in effect been required by VCAT during the last decade in a series of decisions. It noted that while the ideal situation may be to have male, female and mixed competitions, in many sports there may not be resources or volunteers sufficient to staff all, and there may not be enough players who want to compete in a mixed competition to make it viable. As discussed in s. 66, experience over the 14 years since the 1995 Act was passed suggests that a rethink of the sporting exception may be needed. Given the close relationship between s. 66 and s. 63, this provision should be reconsidered in that context as well.

In this context, 'not practicable' is a test that gives too little guidance. VicSport suggested that attention needs to be paid to the right of everyone to have access to sporting activity for recreation and fitness, and to criteria like enjoyment and ability to effectively compete, and access to leadership opportunities within the sport.

Because s. 66 operates only at the level of inclusion or exclusion from a particular sporting competition, s. 63 plays an important role in defining the level of equity in allocation of limited resources that must be made by sporting clubs that control access to these resources. It has an important role to play in relation to club-based gender equity in sport and recreation.

Options for reform:

Option 1: No change.

Option 2: Section 63 should be amended to follow the model of the *SDA* (Cth) s. 25(4) and (5). This would involve adding a provision similar to s. 25(5) quoted above.

The Committee recommends that a review be undertaken of the appropriate structure for reform of s. 63 along with s. 66 in relation to single and mixed sex sports.

6 – Exceptions to discrimination in Sport and Local Government

Section 66 – Competitive sporting activities

Section 66 permits two types of restrictions. Persons of one sex or with a gender identity can be excluded from participating in a competitive sporting activity in which the strength stamina or physique of competitors is relevant. Secondly, participation in a sporting activity can be restricted to people who can effectively compete, people of a specified age group and to people with a particular or general impairment.

66. Exception—competitive sporting activities

- (1) A person may exclude people 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.
- (2) A person may restrict participation in a competitive sporting activity—
 - (a) to people who can effectively compete;