

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;

- (b) to people of a specified age or age group;
- (c) to people with a general or particular impairment.

(3) Subsection (1) does not apply to a sporting activity for children under the age of 12 years.

This area of activity involves a large and diverse range of individuals and organisations involved in organising and administering sport at all levels from local to elite. Concerns were expressed by two of these organisations, Netball Victoria and AFL Victoria that consultation with those affected in the field had not been adequate. This Options Paper identifies some issues concerning the sports exception and some desirable reforms, but proposes that full consultation be undertaken in relation to the impact of this exception and any changes to it. In particular, the consultation should explore views on paragraph (a) in relation to each attribute covered, sex and gender identity.

### Gender identity

In relation to gender identity, the VEOHRC noted that, for a person who affirms a different sex from their birth sex, s. 66(a) raises issues of fundamental rights to privacy, reputation and freedom of expression, as well as equality rights. Any inquiry into this area should consider the impact of the statement adopted by the International Olympic Committee Medical Commission in 2004 on sex reassignment in sports known as 'the Stockholm consensus'.<sup>52</sup> This specifies conditions under which persons with a gender identity are able to compete alongside people of their identified gender providing they satisfy certain conditions. It is premised on the assumption that this assessment will be made individually in relation to each such person by a medical practitioner. The Law Institute of Victoria regarded these criteria as too restrictive, as they require surgical as well as hormonal and legal reassignment to have taken place, for at least two years. The Law Institute suggested that competitive sporting activities in Victoria should recognise the affirmed sex of a person of transgender background, noting that 'one of the ways that discrimination on the basis of gender identity is manifested is a refusal to accept and respect the transition of a person to their affirmed sex from the sex in which they were brought up.' These issues cannot be decided without discussion and consultation among the affected communities.

The LIV suggested that where a less restrictive alternative exists, the current exception cannot be compatible with the *Charter* test of reasonableness and proportionality and therefore warrants amendment.

### Sex discrimination in sport: s. 66(1)

The VEOHRC noted that: 'Culturally in Australia single sex competitive sporting competitions are recognized as important and necessary given the physiological differences between men and women in terms of strength, stamina and physique. Similarly, restrictions based on age, ability and capacity are also recognized as legitimate in terms of participation in competitive sport.'

However, it is not clear that this provision facilitates an appropriate balance between the right to equality, and observance of cultural rights broadly in relation to competition between the sexes. Submissions were received from a number of organisations that administer widely popular sports indicating that there are some issues that need clarification before this exception could be amended.

<sup>52</sup> IOC Medical Commission, Stockholm consensus on sex reassignment in sports, available at [http://multimedia.olympic.org/pdf/en\\_report\\_905.pdf](http://multimedia.olympic.org/pdf/en_report_905.pdf).

In particular, the AFL and Netball Victoria (with the support of Netball Australia) expressed concerns that changes in this area should only be made after broad consultation with sporting associations has occurred.

At its most basic, the basis for and limits to pursuing equality in sport between men and women, and for people with an impairment, need to be clarified. Where there is authority to exclude on the basis of sex or impairment, then the circumstances in which that right arises, and the criteria on which it can be exercised, need to be reviewed and clarified. Perhaps more importantly, however, it may not be possible to achieve equality in access to sporting and recreational opportunities through a simple exception such as s. 66.

There has been a significant amount of litigation on the scope and effect of the sporting exemptions and exceptions to the *EO Act*, and some problems of interpretation of each phrase within s. 66(a) have been raised. The most human rights compatible form for this exception is not yet clear and needs further consideration. For example, what is a:

competitive sporting activity in which the strength, stamina or physique of competitors is relevant?

As VicSport pointed out, this exception focuses on the physical aspects of a sport and the idea of competition to win rather than on the social and psychological aspects and the playing of the game, which for many participants may be as, or even more, important. While it extends beyond 'contact sports' it is not clear how far it goes. It is far from clear that equality in sport can only be provided by requiring sex-integrated competitions, but equally it is not clear when such competitions can be justified and when single sex competitions are acceptable. Much may depend on the history of the sport and how it is administered, including the resources available for administration. Should sporting administration organisations be required to offer both single sex and mixed competitions? If so, how are they to be funded and staffed if they depend on volunteers or limited funding, and especially if there are only low numbers wanting to participate in the mixed competitions? Should those of the opposite sex be allowed to continue playing in sports that become single sex if there is no alternative competition for them to play in?

### Provisions in other jurisdictions

Other provisions around Australia provide expressly that the power to exclude does not apply to coaches, administrators etc, and some jurisdictions allow a power to prescribe limits by regulation (see eg. WA, s. 35; NT, s. 56). The Queensland Act s. 111 provides the best laid out version of this exception, referring to restricting participation in (rather than exclusion from ) a sporting competition.

Submissions addressing these issues were received from a number of organisations. VicSport expressed its concerns that s. 66 fails to take account of the psychosocial aspects of sporting participation that affect enjoyment of the sport. For example participation of women in lawn bowls in Victoria has declined as a result of the series of VCAT decision that have led to the forced integration of both the men's and women's competitions, leaving no single sex competitions at local level. In this way the operation of s. 66 appears to have produced a perverse result of reducing rather than enhancing women's access to sporting opportunities. The Royal Victorian Bowls Association (RVBA) and Victorian Women's Bowls Association (VWBA)<sup>53</sup> combined submission suggested that women-

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<sup>53</sup> These organisations are in the process of amalgamating.

only competitions should be allowed due to these factors, and that one aim of s. 66 is to foster fair and enjoyable competition, which it argued was a reasonable limitation on the right to equality.

Similarly VCAT's decisions regarding the right of capable 12 and 13 year old girls excluded from Australian football teams have led to a situation where the age for sex segregation of such teams is now 14.<sup>54</sup> As a result, Netball Victoria felt obliged to seek an exemption from the tribunal under s. 83 to ensure that it could run a single sex competition for girls of 12 and 13 to prevent them dropping out of the game if they were forced to play only in mixed competitions, as many do not have the size or strength to compete with boys at that age.

Despite these complexities all submissions supported the need for s. 66. It is clear that these complex issues need adequate consideration and any resulting exception needs careful thought. One area that has not been explored in the tribunal is the meaning of the power to restrict participation to 'people who can effectively compete'.

Comments on the impairment exclusion were received from Basketball Australia and the Disability Discrimination Legal Service.

#### Options for reform:

**Option:** The Committee recommends that a review involving broad consultation with affected organisations be undertaken of the appropriate structure for reform of s. 66 along with s. 63 in relation to equality in single and mixed sex sports.

### Section 68 – Political belief or activity

Section 68 provides limited exception from section 67, which prohibits discrimination by councillors, to allow discrimination against another councillor of that council or a member of a committee of that council on the basis of political belief or activity. The sections provide:

#### 67. Discrimination by councillors

A councillor of a municipal council must not discriminate against—

- (a) another councillor of that council;
  - (b) a member of a committee of that council who is not a councillor of that council—
- in the performance of his or her public functions.

#### 68. Exception—political belief or activity

Section 67 does not apply to discrimination on the basis of political belief or activity.

The purpose of this exception is to allow discrimination on the basis of political belief or activity, facilitating the efficacy of Local Government through democratic political affiliations. This is a legitimate purpose in a democratic society and therefore the limitation is rational and proportionate to the purpose.

<sup>54</sup> *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158.

There are no less restrictive means to achieve the purpose of the 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.

There is no equivalent to this provision in any other state. This reflects the history of this provision as a response to an early tribunal case that involved sex discrimination against a woman councillor. However, political discrimination in the actual elected political arena is likely to be regarded as a genuine occupational requirement, where there is a general exception to this effect.

**Options for reform:**

No legislative change is proposed in respect of this exception.

## 7 – General Exceptions

### Section 70 – Things done to comply with orders of the courts and tribunals

70. Things done to comply with orders of courts and tribunals

A person may discriminate if the discrimination is necessary to comply with—

- (a) an order of the Tribunal;
- (b) an order of any other tribunal or any court.

This exception allows discrimination if it is necessary to comply with an order of any tribunal or court. This is an important purpose in a democratic society committed to the rule of law. As courts and tribunals are required by the *Charter* to interpret all legislative provisions consistently with the *Charter* it is likely that any limitation this exception may give rise to will be reasonably limited and balanced and accordingly is likely to be reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Every Australian anti-discrimination Act except the *RDA* (Cth) contains a provision similar to this one. There is a little variance in exact terminology, but s.70 is among the narrowest and best targeted of these provisions.

**Options for reform:**

No legislative change is proposed in respect of this exception.

### Section 71 – Pensions

Section 71 excepts pensions from all the prohibitions of discrimination in *the EO Act*.

71. Pensions

Nothing in Part 3 affects discriminatory provisions relating to pensions.