



Submission to the

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

Contact: Margaret Kearney  
Executive Director

## INTRODUCTION

ClubsVIC welcomes the Government's initiative in reviewing the exceptions to and exemptions from the *Equal Opportunity Act 1995*. (the Act). ClubsVIC represents the interests of the not-for-profit community licensed clubs in Victoria, some of which operate within the exceptions to the Act, and some of which apply for exemptions to the Act.

The licensed club movement provides much of the of sporting, social, leisure and cultural infrastructure that keeps Victorians connected and healthy. We believe that the current exceptions to the Act which apply directly to clubs allow for the club movement to provide this infrastructure in a accessible manner. As a representative body, ClubsVIC is keen to see all licensed clubs in our not-for-profit network operate successfully to ensure that they continue contributing to the Victorian community.

Licensed clubs in Victoria are employers, and are therefore affected by the exceptions relating to employment. Clubs are also providers of goods and services and are affected by the exceptions relating to the provision of goods and services. A few clubs offer accommodation and are affected by some of the exceptions relating to accommodation. All clubs are affected by the prohibition on discrimination by clubs and club members and some clubs avail themselves of the exceptions thereto. Sporting clubs are affected by the exceptions in sport. Many clubs are "private clubs" under the Act and therefore affected by the exception for private clubs. Clubs are also affected by the general exceptions contained in section 79 –incapacity, section 80 – protection of health and safety, and section 81 age benefits.

This submission considers each of the exceptions that relate to clubs. It does not consider the provision of exemptions.

## **SUMMARY**

It is submitted that the exceptions that apply to clubs are appropriate having regard to the nature of the nature of the rights that are protected by the Act on the one hand, and the right to freedom of association on the other hand.

It is submitted that persons should be free to form associations for purposes that are lawful other than in the purview of the Act. Membership of clubs (but not other areas activities such as employment, provision of goods and services to non-members) should be a matter of preference, not disadvantage. The concept of *private club* should be replaced by the concept promoted in the federal Sex Discrimination Act – ie clubs are free to discriminate in respect of membership for the promotion of a lawful purpose.

## **EMPLOYMENT**

ClubsVIC contends that the exceptions for employers which affect clubs are appropriate. These sections are sections 19, 22, 23, 24, 25, 27, 27B.

### ***Nature of the right***

The right to freedom from discrimination in employment is fundamental to a fair society. Hence, only in exceptional circumstances should discrimination be allowed.

### ***Nature of the limitation***

Section 19 allows employers to discriminate in the offering of employment to people with a particular attribute in limited circumstances. It is acknowledged that clubs are often established for the advancement of persons with protected attributes (see discussion below regarding the advancement of persons with protected attributes)<sup>1</sup>. Obviously if the club is formed to advance such persons, it is appropriate to discriminate in favour of the employment of persons with that attribute.

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<sup>1</sup> Discussion at p 4 ff

For example, a club that is formed to preserve a minority culture<sup>2</sup> or for the benefit of persons of a particular age group<sup>3</sup> will better meet its purpose if it encourages employment of persons who have the particular attribute, or are sympathetic to it.

The limitation is restricted by the qualification that the services can be provided most effectively by people with that attribute. This qualification results in the limitation being minimally restrictive and reasonable. To a large extent the limitation acts to limit the discrimination against persons of a minority group by providing them with employment, as well as acting to advance the legitimate purposes of the club.

Sections 22 and 23 provide for discrimination based on the *reasonable* requirements of the job. Section 24 allows employers to enforce *reasonable* standards of dress, appearance and behaviour. Although enforcement of these standards and requirements can often reinforce disadvantage of persons with protected attributes<sup>4</sup>, the necessity to prove *reasonableness* operates to modify the limitation so as to ensure that the limitation acts fairly to all concerned.

Employers often find it difficult to interpret the criterion of *reasonableness*, and ClubsVIC would recommend that more literature and training be made available to employers to properly understand how the criterion works both in specific limitations (eg ss 22, 23, 24) and in respect of indirect discrimination under section 9 of the Act.

Section 25 also affects clubs, as does the *Working with Children Act 2005*. Many clubs provide services that involve the care, instruction and supervision of children, eg coaching, organisation of sport, presentation nights etc. In section 25 the employer must form a *genuine* belief (which belief has a *rational basis*) that the limitation is *necessary*. All these qualifications to the limitation restrict its practical affect to circumstances where the limitation is probably appropriate. However, it is difficult for employers to understand the differences between *reasonable*, *necessary*, *genuine*, *rational* etc. ClubsVIC

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<sup>2</sup> The Act s61

<sup>3</sup> The Act s62

<sup>4</sup> Eg prohibiting headwear can discriminate against persons whose religion requires hair to be covered – generally employers need to be cognisant of indirect discrimination when accessing these exceptions.

recommends that the Act adopt consistent language and where a different standard is required that this different standard be highlighted.

ClubsVIC submits that it is appropriate to continue the exception for youth wages.<sup>5</sup> Clubs are often threshold employers – providing youth with their first jobs in hospitality, sportsground maintenance, leisure etc. The provision of youth wages encourages the promotion of youth employment by providing an incentive to employ youth. Youth wages do not discriminate against the employment of youth.

The distinction between adult and youth wages is a national phenomenon and appears generally in industrial instruments such as awards and agreements that receive judicial and quasi-judicial consent.

#### **PROVISION OF GOODS AND SERVICES**

Clubs are affected by the exceptions provided under section 45 (supervision of children) and section 46 (special manner of providing a service). The operation of both these sections is restricted by the concept of *reasonableness*. It should be noted that the concept of *reasonableness* is often difficult for employers to interpret, and is open to inconsistent application by authorities. However the criterion of reasonableness makes it acceptable to have these exceptions to a person's right to freedom from discrimination.

#### **EXCEPTIONS TO DISCRIMINATION BY CLUBS AND CLUB MEMBERS**

Sections 61, 62 and 63 relate directly to the operation of clubs.

People are at liberty to form clubs for the benefit of disadvantaged people, minority cultures and people of a particular age; and to exclude from membership, or limit the rights of membership to, those people who do not possess the particular attribute.

The exception in the Act is more limited than the exception in the federal Sex Discrimination Act which provides that it is not unlawful for a club to discriminate in relation to membership on the grounds of sex if the club is available to persons of the

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<sup>5</sup> The Act s27

opposite sex only<sup>6</sup>. It is noted that “private clubs” have an exception under the Act – see discussion below.

ClubsVIC submits that the federal approach is more appropriate. It is a basic human right for people to associate freely. If the reason for the association is not unlawful (eg to commit a crime or to indulge in paedophilia) it is submitted that it is counterproductive to make the association itself unlawful because of the unprotected attribute of the people who are associating. It seems illogical to outlaw the formation of a club for men, because it is considered that men are not disadvantaged, whereas it is lawful to form a club for women because women are considered disadvantaged.

Clubs are private associations, not public organisations. Clubs are groups of like-minded persons<sup>7</sup>, like a group of friends. It is not unlawful for persons to discriminate on grounds of protected attributes in respect of whom they have as friends – this is a manifestation of the right to free association. Hence it should not be unlawful for persons to form clubs (associations) with other persons regardless of their protected attributes.<sup>8</sup>

In fact the prohibition on membership of clubs is “observed in the breach”, and has the potential to outlaw many acceptable community associations. For example, mothers clubs, singles clubs, card groups etc. None of these groups operate principally to prevent or reduce disadvantage. They operate to provide the company of compatible persons. It is simply over-kill to suggest that the regular poker night is unlawful and that uninvited persons have recourse to the courts to force their inclusion. People should be at liberty to decide to play poker with only men, only women, only Danish people, only grandmothers, whomever they want. The reality is that people do form clubs with their friends and often membership is denied to people with protected attributes, and this should not be illegal.

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<sup>6</sup> *Sex Discrimination Act 1984* (Cth) s25(3)

<sup>7</sup> The definition of a club is generally accepted to be that expounded in *Wertheimer on Clubs* “A club may be defined to be voluntary association of a number of persons meeting together for purposes mainly social, .....for the benefit of the members .....”

<sup>8</sup> The argument is not extended here to other areas of activity – eg employment, provision of goods & services – see discussion below

Clubs should be entitled to discriminate in respect of membership and rights of members when the club is established for a particular purpose that it not otherwise illegal, and the discrimination promotes the purpose. It is not illegal for a group of men to associate – therefore it should not be illegal for a group of men to form a club for men and to discriminate against women for membership.

### **PRIVATE CLUBS**

The exception for private clubs<sup>9</sup> recognises the essentially private nature of a club and the analogy between clubs (on the one hand) and domestic or personal services and the freedom to make wills (on the other hand).

Clubs are an extension of the members' personal arrangements. The analogy is recognised in the tax laws that provide that mutual income is not taxable. Clubs do not pay tax on the income from members because this is considered to be analogous to household income. The distribution of income from one spouse to another is not taxed because the household is one taxable unit – the income is mutual. If a wife shares her income with her husband the husband's share is not taxed in his hands. However, if a wife pays a child minding centre to care for her children, the income is taxed in the hands of the child minding centre.

The same principle is applied to the income from members (owners of the club) to the club. Income from members is mutual and not taxable.

The definition of *private club* is restrictive - if the club does not receive any benefit from the state or federal governments or does not occupy crown land. It is submitted that this is vague and too limiting. Many clubs that occupy crown land are required to pay commercial rents – hence there is no benefit. And some financial benefits from state and local governments are sporadic and hard to identify.

While the definition of private club is restrictive, the exception for private clubs is very broad – effectively providing exception from all the anti-discrimination provisions of the Act, not just membership.

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<sup>9</sup> The Act s 78

It is submitted that the concept of private club should be revisited. People should be entitled to form clubs for particular lawful purposes and to discriminate in respect of membership to promote those purposes. If the club employs people or conducts sporting activities or provides the gateway to a profession or trade (ie a qualifying body) or provides goods and services to persons other than members, then the club should be required to consider whether the discrimination is reasonable having regard to the purposes for which the club was formed.