

**Submission to the Exceptions
Review**

on behalf of

**Royal Victorian Bowls Association Inc
(RVBA)
&
Victorian Ladies' Bowling Association
Inc (VLBA)**

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

18 April 2008

1. Executive Summary

RVBA and VLBA are the peak bodies for the administration of the sport of lawn bowls in Victoria representing a total of more than 65,000 registered bowlers throughout the state. Those bowlers range in age from 10 to 100

Part of the objectives of both organisations is the promotion of and growth in participation in the sport of lawn bowls. Both organisations have had specific experience with the operation of the current provisions of the Act and in particular the exemption available under s.66.

Because of this and the very nature of the objects of each organisation this submission will focus on the exception set out in s.66 of the Act.

Whilst they support the policy of preventing discrimination in all areas of life and particularly in the area of competitive sport they believe that given the physical nature of many sports and recreational activities it can be important for specific restrictions on participation by reference to gender need to be allowed in order to encourage participation by certain groups of participants. Accordingly they submit that the current exemptions available under the Act, in particular s.66, are reasonable limitations on that right to discrimination free sport and should remain.

However for the reasons set out in this submission, they submit that the Act should also allow a range of psychological and social factors which impact on both the physical and emotional well being of sport participants, particularly females, to be taken into account when determining what, if any, exceptions to the human right to be free of discrimination are both reasonable and justifiable on public policy grounds.

2. The Charter

The relevant human rights under the Charter to be considered by the Exceptions Review in assessing whether the current exceptions and exemptions under the Act are compatible are subsections 8(2) and (3) of the Charter:

- (2) *Every person has the right to enjoy his or her human rights without discrimination*
- (3) *Every person is equal before the law and is entitled to equal protection of the law without discrimination and has the right to effective protection against discrimination*

It is instructive to note that when setting out the relevant provisions of part 2 of the Charter, before detailing the specific human rights sought to be protected by the legislation, the parliamentary drafters considered it important to first set out the basis on which the law can limit those human rights. As noted by the Exceptions Review Consultation paper:

*The Charter recognizes that human rights are, in general, not absolute rights and may need to be balanced against each other and competing public interest.*¹

This is consistent with the existence of the various exceptions and exemptions under the Act. As also noted in the Consultation Paper

*...there may be some cases where competing rights need to be appropriately balanced. The intention of the exceptions is to strike a balance between the rights and freedoms of individuals.*²

Therefore, conceptually, the current exceptions and exemptions under the Act are consistent and compatible with the Charter. In order to assess whether they can operate compatibly with the Charter³ it is necessary to test those exceptions and exemptions by reference to the factors listed in s.7(2) of the Charter.

That section provides, in essence, that a limit on the right to be discrimination-free will not be unlawful provided it:

- can be justified in a free and democratic society;
- is based on human dignity, equality and freedom; and,
- takes into account *all relevant factors* including the matters set out in paragraphs (a) - (d).

As we will seek to demonstrate later on in this submission it is important not to limit an assessment of the justification for a limitation on a human right simply to the matters in s.7(2)(a) –(d). The Charter requires *all relevant factors* to be taken into account.⁴

2.1 Assessment of the current exceptions

s.66 of the Act permits exclusion on a gender basis from participation in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

It further permits restriction of participation in a competitive sporting activity to:

¹ Consultation Paper p.8
² Consultation Paper p.8
³ Consultation Paper p.8
⁴ Charter s.7(2)

- people who can effectively compete
- people of a specified age group
- people with a general or particular impairment

A. The nature of the human right

The purpose and values underlying the right to effective protection against discrimination are ones of fairness and equality amongst all citizens.

B Importance of the limitation

It hardly needs saying that in some competitive sporting activities, particularly but not limited to contact sports, differing physical strengths between male and female can make it unsafe to conduct mixed gender competitions. That in itself is an important area of public or social concern.

Further even where safety is not the primary issue, the ability of males and females to effectively compete together and the enjoyment derived from such competition may be diminished significantly where there are differences in physical capacity, leading to decreased participation rates.

The positive value to the physical and mental health of individuals and, by implication, to public health, of participation in sport is well documented and commonly accepted within the community. Accordingly a limitation on a human right which is designed to encourage participation in sport and physical activity can be said to relate to an important area of social concern.

C Nature and extent of the limitation

The current limitation on the right to protection against discrimination is based on physical characteristics and, in general terms, the ability to compete effectively (and by implication, to derive enjoyment from the competition itself as opposed to the outcome).

D. Relationship between the limitation and its purpose

There is no doubt that the connection between the current limitation in s.66 of the Act and its purpose is rational and neither arbitrary, unfair nor based on irrelevant considerations.

E. Available alternatives

Bearing in mind the dual public interest issues of safety of participants and increased participation the current limitation is not excessive and ought to be continued.

2.2 Proposed amendment to the exception

s.66 of the Act does not currently allow consideration of a range of psychological and social factors which can be just as determinative of participation rates in sport and the ability to effectively compete as the physical characteristics already referred to in that section.

Participation in sport can facilitate good mental health, psychological well being through building self esteem, confidence and social integration, as well as help reduce stress, anxiety, loneliness and depression. Adolescent girls in particular are vulnerable to body image issues and anxiety and depressive disorders. They are significantly more likely than boys to have considered suicide by the age of 15.⁵

A recent review of 38 studies revealed an overwhelming majority of findings of a positive relationship between physical activity and psychological well being.⁶ Further research suggests that exercise should be considered as a viable means of treating depression and anxiety and improving mental well-being in the general public.⁷

Sport also provides an avenue for participation in the social and cultural life of a community, promoting interpersonal networks and expands opportunities for developing leadership, communication, teamwork and negotiation skills.⁸

The psychological benefits of active participation in sport can be acquired not only through the enjoyment of the activity but also through self chosen levels of competition and the provision of social support from the family and the community.⁹

Whilst not specifically recognised in the Charter as a human right, the United Nations considers the importance of participation in sport in the following terms:

*The practice of physical education and sport is a fundamental right for all.*¹⁰

The UN has further stated that:

⁵ 'Women, gender equality and sport' published in the December 2007 issue of 'Women 2000' and beyond' by the United Nations Division for the Advancement of Women p.2

⁶ 'Physical Activity, Aging and Psychological Well-Being', Journal of aging an physical activity published January 1995.

⁷ Fox, Kenneth - The influence of physical activity on mental well being, Public Heath Nutrition, Cambridge University Press 1999.

⁸ Ibid p.3

⁹ Oglesby, Carole A, et al 'Positive Embodiment Contributions of Sport, Exercise and Physical Recreation to the Life-long development of Girls and Women' 2006

¹⁰ Article 1 UNESCO International Charter of Physical Education and Sport – adopted by the General Conference at its twentieth session, 21 November 1978, Paris, France.

*access to physical education and sport should...be assured and guaranteed for all human beings*¹¹

Accordingly anything designed to promote access to and participation in sport and recreation relates to a vital area or public policy.

Also it is important to note that the Act also prohibits *indirect discrimination*. This is an acknowledgment that sometimes treating people equally may result in unfavourable outcomes for people with certain attributes. In such a case, provided an exception is reasonable, conduct which would otherwise be considered discriminatory ought to be permissible.

As will be seen in the next section of these submissions the experience of the RVBA and the VLBA as a result of the decision by VCAT in the case of *RVBA v South [ac al 131200] [2001] VCAT 207 (28 February 2001)* is that there is now a real disincentive for many females to continue to play lawn bowls for a range of psychological and social reasons and this has resulted in a declining participation rate amongst female bowlers in particular. Such a decline has potentially serious consequences for the physical and mental well being of the community.

Given that the current exception in s.66 is designed to foster fair and enjoyable competition, which it is submitted by VLBA and RVBA above to be a justifiable limitation, it would also be a reasonable extension of that limitation to allow consideration of psychological and social factors which may restrict or hinder such competition.

For the reasons outlined above the proposed extension is important as these factors impact on the physical and mental health of Victorians. Further there is a clear and rational connection between the suggested limitation and its purpose. Such an extension of the current exception would not be a totally new category of exception but merely recognise factors other than physical characteristics which impact on the opportunities to engage in sporting activities. Accordingly it could not be categorized as an excessive limitation.

3. The experience of RVBA and VLBA

The sport of lawn bowls is traditionally a sport where male bowlers competed against other males in exclusively male events and females competed against other females in exclusively female events. The gender specificity of events has traditionally applied to all games of lawn bowls, except those events that were designated as 'mixed' events of which there has always been a large number.

As a result of the VCAT decision in *South* both RVBA and VLBA amended their respective constitutions to allow both male and female members to be affiliated

¹¹ Ibid

with them. This in turn allows both male and female participation in bowls events administered by VLBA or RVBA.

The male style of playing bowls is commonly more aggressive than the female playing style and a large number of female bowlers find it intimidating. The result is that female bowlers are reluctant to compete in a competition that also allows male bowlers to compete as it is seen as creating an unfair or uninviting game environment. The VLBA has a large file of correspondence from and on behalf of female bowlers expressing that view and its statistics relating to participation rates seem to correspond with such feelings. As one correspondent submitted

It is becoming increasingly difficult to stimulate, inspire and encourage the ladies to be available to play.

And another writes:

Men play a different game than ladies. It can be very threatening and dangerous for those of us who through no fault of our own are not as alert and as physically strong as we would like to be.... Some of us are not prepared to take the risk of injury.

Despite the good intent of opening up bowls competitions to male and female, this has in practice resulted in the unfavourable outcome of reducing participation in the sport.

A large percentage of Victorian bowlers are aged over 55. Quite apart from the physical health benefits of encouraging participation in the sport by such people for many of these bowlers the Bowls Club environment is a vital and sometimes the only social outlet in their lives giving them an important sense of *connectedness*.

This connectedness is increasingly seen as important in the mental well being of individuals. The Victorian Labor Government has also identified this as important. The Department of Sport and Recreation web site www.sport.vic.gov.au includes this:

Sport and recreation plays an important part in the lives of individual Victorians and helps to shape community identity. Sport and recreation opportunities provide settings for social interaction, sharing common interests and enhancing a sense of community.

4. Conclusions

Encouragement of participation in sport is of vital importance to the physical and psychological health of the community. Access to sport opportunities is a fundamental 'right' of all Victorians and should as far as possible be guaranteed.

The existing exception in s.66 is a reasonable limitation on human rights. Not only should it be continued but it should also be expanded to take into account the type of non physiological factors referred to in this submission.

18 April 2008