



Exceptions in sport

In some circumstances, discrimination in sport is allowed. These circumstances are set out in the *Equal Opportunity Act 2010* and are known as exceptions.

Under the Act, exceptions for sport only apply in relation to competitive sporting activities.

The term 'competitive sporting activity' has its ordinary meaning. The *Equal Opportunity Act 2010* also says that it includes any exhibition or demonstration of a sport. This means that it is not limited to recognised sporting competitions. However, the definition does not include administrative or supporting aspects of a sporting activity like coaching, refereeing, umpiring or administration, or non-competitive sporting activities.

The Act says that a person may restrict participation in a competitive sporting activity to:

- people who can effectively compete
- people of a specified age or age group
- people with a general or particular disability
- except in relation to children under the age of 12, to people of **one sex** if:
- the *strength, stamina or physique of competitors* is relevant to the competitive sporting activity. This exception also applies to excluding people with a gender identity
- participation in the activity and the exclusion of a sex is necessary for *progression to an elite level competition*
- it is intended to *facilitate participation* in the activity by people of a particular sex and the exclusion is reasonable.

If an exception does not apply, in some circumstances, an application can still be made to the Victorian Civil and Administrative Tribunal for an exemption from the *Equal Opportunity Act 2010* on a case-by-case basis (under section 89 of the Act).

Restricting participation to people who can effectively compete

The Act says that a person may restrict participation in a competitive sporting activity to people who can effectively compete. This exception allows a person to refuse or fail to select a person in a sporting team, or to exclude a person from participating in a sporting activity based on their merit.

Mrs Jones, an experienced softball player, had been playing with her local club team for three years. Each year, Mrs Jones had been selected to represent the club in the annual club championship competition. During her fourth year at the club, the coach refused to select Mrs Jones to play in the championship competition because she had sustained a knee injury. While the coach's refusal to let Mrs Jones play was because of her disability, the refusal was not against the law because the coach was able to establish that Mrs Jones would not have been able to effectively compete.

Restricting participation to people of a specified age or age group

The Act says that a person may restrict participation in a competitive sporting activity to people of a specified age or age group.

Mr Psmith's son played in the local under 15's football team. Mr Psmith, who was a keen footballer himself, wanted the opportunity to play with his son so he could teach him some new skills. Mr Psmith asked the coach if he could play in his son's team but was refused. Even though Mr Psmith was excluded from the competition because of his age (a personal characteristic protected by the law), the coach's refusal was not against the law because Mr Psmith was not under 15. To allow Mr Psmith to play would have produced an unfair competition.

Restricting participation to people with a general or particular disability

The Act says that a person may restrict participation in a competitive sporting activity to people with a general or particular disability.

An organisation that provided sporting opportunities for people with disability ran a basketball team for people with paraplegia. Ms Galati, who did not have paraplegia, sought to be selected for the team. The organisation refused to allow Ms Galati to play. Even though the refusal to allow Miss Galati to play was related to a personal characteristic protected by the law, the refusal was not against the law because the sport was being run for the benefit and participation of people with a particular disability.

Restricting participation to people of one sex or gender identity if the strength, stamina or physique of competitors is relevant to the competitive sporting activity

(does not apply to children under the age of 12)

The Act says that a person may exclude people of one sex or gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

The exception applies where the strength, stamina or physique of competitors is relevant to the particular competitive sporting activity. The question is not whether those qualities are relevant to the sport generally. Whether the exception applies will depend on a number of factors, including the nature of the sport, the nature of the competition, the age group of the participants and the standard of the competition.

In the case of *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158 (17 February 2004), Justice Morris set out three criteria that need to be considered when determining when strength, stamina or physique is *relevant* (and therefore whether the exception applies):

- the relative differences between the sexes in strength, stamina and physique
- the nature of the competitive sporting activity (not just the sport, but also the age group of the competitors)
- whether the differences between the sexes are significant, in terms of participation in the competitive sporting activity.

The exception does not apply to competitions for children under the age of 12. So under 12s competitions must be open to people of any sex or gender identity.

An organisation that conducts racewalking competitions organised the 50-kilometre open age racewalking state championship competition and held one event for women and one event for men. A man sought to compete in the women-only competition and the organisation excluded him. The organisation's conduct was not against the law because it was able to establish that the strength, stamina and physique of the competitors was relevant to the particular competition.

Restricting participation to people of one sex if participation in the activity and the exclusion of a sex is necessary for progression to an elite level competition

(does not apply to children under the age of 12)

This is a new exception. The Act says that a person may exclude people of one sex from participating in a competitive sporting activity if:

- participation in the activity is necessary for progression to an elite level competition; and
- the exclusion is necessary to enable participants in the activity to progress to national or international elite level competition.

Participation in a particular competitive sporting activity will be necessary for progression to an elite level competition if participating in that activity is the only pathway to selection. That is, people must participate in that tournament to make the national competition. The necessity requirement sets a high threshold. If the threshold is not met, then the exception does not apply.

The exclusion of a particular sex must also be necessary to enable participants to progress to the national or international elite level competition. This condition will be met if participation of the excluded sex in the activity would have the effect of denying the other sex the ability to progress to that level. Again, the necessity threshold must be met. The exception will not apply if failure to exclude a particular sex only *reduces* the chance of progression; it must have the effect of denying persons of the other sex the ability to progress. This may occur, for example, where a selector for a national men's team selects athletes based on their performance in the state men's team. If the state does not have a men's team, because it does not exclude women, then men will not be able to progress. Another example is that International Olympic Committee rules may, for example, require a single-sex competition to be run to enable progression to the international level.

This exception does not apply to competitions for children under the age of 12. That means that under 12s competitions must be open to people of any sex.

An organisation that conducts archery tournaments organised an annual club championship competition and held one event for women and one event for men. According to national competition rules, the male and female winners of those separate annual club championship competitions each earn the right to represent the state in the national championship competitions. The male and female winners of those competitions then earn the right to represent the nation in international competitions. This is the only way in which a person can be selected to represent the state and the nation. The organisation was not acting against the law by conducting single-sex club championship competitions because participation in that competition and exclusion of the other sex was necessary to enable its participants to progress.

Restricting participation to people of one sex if it is intended to facilitate participation in the activity by people of a particular sex and the exclusion is reasonable

(does not apply to children under the age of 12)

This is a new exception. The Act says that, except in relation to children under the age of 12, a person may exclude or restrict people of one sex from participating in a competitive sporting activity if:

- the exclusion or restriction is intended to facilitate participation in the activity by people of a particular sex; and
- the exclusion or restriction is reasonable.

When looking at what exclusion would be *reasonable*, the Act tells you to consider:

- the nature and purpose of the activity
- the consequences of the exclusion or restriction for people of the excluded or restricted sex

- whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.

This exception draws a distinction between people of a particular sex being excluded from participation and being restricted from participation.

An example of a particular sex being lawfully restricted from participation might be where priority in team selection is given to women and where men are only selected where there is an insufficient number of women to make up the team.

An example of a people of a particular sex being lawfully excluded from participation might be where a small sporting club has previously only had men sign up to play competitive soccer, however, the team is advertised as a mixed team. The club decides that it wants to attract more female members and also branch out into other soccer tournaments. It decides to field a women-only team in addition to its mixed team (that has all male players) to encourage women to participate in the soccer competition.

Exclusion or restriction may be intended to facilitate participation in the activity by people of a particular sex where, for example:

- people of that sex are under-represented in the sport and are more likely to participate if they could participate in a single-sex team or a restricted team where people of one sex are given priority
- people of that sex are not under-represented but are not getting involved because the teams are mixed and they would participate if they could participate in a single or restricted gender team (for example, people may feel uncomfortable or intimidated playing in mixed competitions)
- the participation of people of that sex would be improved if they could join a single-sex or restricted team because, for example, the manner in which the sport is played changes when a certain proportion of any sex is on the team.

In determining whether the exclusion or restriction is reasonable, the following factors must be considered:

- The nature and purpose of the activity – The nature and purpose of some activities may suggest that it is unreasonable for a particular sex to be excluded. For example, it would be contrary to the nature and purpose of a mixed doubles tennis tournament to exclude men.
- The consequences of the exclusion or restriction for people of the excluded or restricted sex – For example: if the exclusion of men from a competition will have the effect of decreasing the participation of men in the sport, then this factor would weigh against a finding that the exclusion or restriction is reasonable.
- Whether there are other opportunities for people of the excluded or restricted sex to participate in the activity – If the mixed gender competition remained available for participation of the excluded sex, then this factor would weigh in favour of a finding that the exclusion or restriction is reasonable.

For example: if running a women-only event was found to be lawful under the exception to facilitate participation, the running of a men-only event does not automatically become lawful. The organisation would need to establish that the exception applies for the men-only competition in its own right, considering each of the relevant criteria.

This exception does not apply to competitions for children under the age of 12. So, under 12s competitions must be open to people of any sex.

A swimming club wants to enter teams in a social water polo competition for teenagers aged 15–18 years and wants to encourage girls to get involved. Until this year they have had an open team but only men signed up to play. The club decides to start a women-only team as there was evidence that more women would then participate. The club's actions fall within the exception (and are not against the law) because the exclusion of men from the women's-only water polo team was genuinely

intended to facilitate participation in water polo by women and was reasonable because:

- *the nature of the sport –it can be played by men and women together or separately*
- *the purpose of the activity – in this case, being a social competition;*
- *the consequences for the men of being excluded –the men may lose the social aspect of playing with women and fewer women may play in the mixed competition in the short term*
- *the other opportunities for men to participate – being to continue to play in the mixed gender competitions.*

For this club there was no evidence to support the need for a men-only competition to facilitate their participation in the sport, so the organisation ran a mixed competition and a women only competition.

Children under the age of 12 years

Only some of the sporting exceptions apply to children under the age of 12 years.

A person may restrict the participation of children under the age of 12 years in a competitive sporting activity to:

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

A person may not restrict participation to people of one sex in a competitive sporting activity for children under the age of 12 years even if:

- the strength, stamina or physique of competitors is relevant to the competitive sporting activity
- participation in the activity and the exclusion of a sex is necessary for progression to an elite level competition
- it is intended to facilitate participation in the activity by people of a particular sex and the exclusion is reasonable.

Eyal, who is 10 years old, wanted to play in his local under 11s club hockey team. He attended trials, but was not selected because he had a disability that affected his ability to play a backhand shot. A complaint was made that the club discriminated against Eyal. The claim was not successful, however, because:

- *the exception that allows restricting participation to people who can effectively compete applies even to sporting activities for children under 12*
- *the club was able to establish that it refused to select Eyal to play on the team because he was unable to effectively compete because of his disability.*

The local tennis club conducted an under 9s girls-only tennis tournament. Flynn, an 8-year-old boy, wanted to play in the girls-only tournament but his application was refused because he was not a girl. A discrimination claim was brought against the tennis club for refusing to let Flynn play in the competition because of his sex. Even though the club was able to establish that having a girls-only competition facilitated the participation of girls of that age in the sport, the claim was successful because that exception does not apply to sporting activities for children under 12 years.

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