

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
HUMAN RIGHTS DIVISION  
HUMAN RIGHTS LIST

H294/2014

Applicant                      Bowls Victoria, Albert Park Bowls Club Inc  
Intervener                    Victorian Equal Opportunity and Human Rights  
   Commission

SUBMISSIONS IN REPLY OF THE VICTORIAN EQUAL OPPORTUNITY AND  
HUMAN RIGHTS COMMISSION

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**A. INTRODUCTION**

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) files these submissions in reply pursuant to the Tribunal's orders dated 2 May 2016.
2. These submissions are in reply to the following material filed by the Applicants on 10 June 2016:
  - (a) Further Amended Application for Order – Attachment A;
  - (b) Amended submissions dated 10 June 2016; and
  - (c) A further affidavit of Graeme Andrew Bridge, Chief Executive Officer, Bowls Victoria (unsworn) (**Fifth Affidavit**). The Fifth Affidavit summarises and exhibits the details of single gender and mixed gender lawn bowls events conducted at two sample clubs from each region (**Sample Clubs**), and the comments of survey participants from those clubs, derived from the Second Survey results.
3. Following the filing of the above material, the Commission understands that the Applicants:
  - (a) No longer seek a determination by the Tribunal that the competitive sporting activities exception under sub-section 72(1A) of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) applies in relation to certain single gender lawn bowls events (which constitute a 'competitive sporting activity' under Division 7 of Part 4). The Applicants are satisfied that the

exception applies in relation to those lawn bowls events, without the need for a determination by the Tribunal.

- (b) No longer seek a determination by the Tribunal that the competitive sporting activities exception under paragraph 72(2)(b) applies in relation to certain single gender lawn bowls events (which constitute a 'competitive sporting activity' under Division 7 of Part 4) involving competitors under 18, 25 and 60 years of age.
- (c) No longer seek a determination by the Tribunal that the competitive sporting activities exception under paragraph 72(2)(c) applies in relation to certain single gender lawn bowls events (which constitute a 'competitive sporting activity' under Division 7 of Part 4) involving bowlers with a disability.

4. Rather, the Applicants:

- (a) Note that the competitive sporting activities exception under sub-section 72(1B) 'may apply' in relation to certain single gender lawn bowls events (which constitute a 'competitive sporting activity' under Division 7 of Part 4), but not including those events where participation is necessary to progress to an elite level.
- (b) Primarily, the Applicants seek exemptions under section 89 of the EOA 2010 for:
  - (i) Single gender lawn bowls events for women (which constitute a 'competitive sporting activity' under Division 7 of Part 4) including where participants are children under 12 years of age.
  - (ii) Single gender lawn bowls events for men (which constitute a 'competitive sporting activity' under Division 7 of Part 4), including where participants are children under 12 years of age.

The exemption proposed by the Applicants is qualified so that single gender lawn bowls events (which constitute a 'competitive sporting activity' under Division 7 of Part 4) take place on weekdays and only up to four weekend days in a financial year.

**B. SUMMARY OF SUBMISSIONS IN REPLY**

5. In summary, the Commission submits:

- (a) the Tribunal will comply with its obligations as a public authority under the Charter when considering exemption applications if it complies with section 90 of the EOA 2010;

- (b) sub-section 8(4) of the Charter and section 12 of the EOA 2010 were intended to reflect a common international jurisprudence and will generally yield the same results;
- (c) it is questionable whether the Conduct in respect of competitive single gender lawn bowls events for women, on the basis of the evidence before the Tribunal, is a special measure because it is not clear that its purpose is to remedy past discrimination;
- (d) the Conduct in respect of competitive single gender lawn bowls events for men, on the basis of the evidence before the Tribunal, appears to meet the criteria of the first part of the exception in sub-section 72(1B) of the EOA 2010, however it may fail the reasonableness test in the second part of that exception;
- (e) sub-section 72(3) prevents the exceptions in section 72 being relied upon to discriminate against children under 12;
- (f) the Tribunal should take care not to grant exemptions for competitive sporting activities that have the effect of undermining the intended operation of sub-section 72(1B) and the policy settings chosen by Parliament in providing a detailed regime for when discrimination will and will not be lawful in this area.

### **C. RELEVANT STATUTORY FRAMEWORK**

6. As outlined in the Commission's submissions dated 15 April 2016, sub-section 90(a) of the EOA 2010 relevantly requires the Tribunal to consider whether the exemption applied for is unnecessary because the Conduct sought to be exempted would not amount to prohibited discrimination, or because an exception already applies to the conduct.
7. The Applicants raise sub-section 8(4) of the Charter in the context of the Tribunal giving proper consideration to the right to equality when considering the exemption application, pursuant to its obligations as a public authority under section 38 of the Charter. Section 90 was drafted in such a way that if the Tribunal considers a section 89 exemption application in the manner that section 90 of the EOA 2010 commands it to, that process will involve proper consideration of the right to equality under the Charter.
8. The Applicants submit that the conduct may be a special measure under sub-section 8(4) of the Charter,<sup>1</sup> in which case it is also necessary to consider

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<sup>1</sup> Given the breadth of sub-section 72(1B), it no doubt exempts a greater range of sex discrimination in the confined area of 'competitive sporting activities' than section 12 will encompass. For that reason, sub-section 8(4) of the Charter is unlikely to come into play at the point of considering whether to grant an exemption because any conduct that falls under

whether it is a special measure under s 12 of the EOA 2010 and therefore not discrimination at all.

9. Sub-section 12(1) provides:

A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.

10. At sub-section 12(3), a special measure must:

- (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
- (b) be reasonably likely to achieve the purpose set out in subsection (1); and
- (c) be a proportionate means of achieving the purpose set out in subsection (1); and
- (d) be justified because the members of the group have a particular need for advancement or assistance.

11. Sub-section 8(4) of the Charter states that:

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

12. The EOA 2010 was enacted in response to a review of Victorian equal opportunity law by Julian Gardner in 2008 (**the Gardner Report**).<sup>2</sup> Recommendation 4 of the Gardner Report was that:

The existing provision in the Charter that provides that special measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated into the Act.

13. At the time that the EOA 2010 was enacted section 12 reflected the jurisprudence that had developed in relation to the special measures provision in sub-section 8(4) of the Charter, first established in the decision of Justice Bell in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)*,<sup>3</sup> which was decided in the year before the EOA 2010 was enacted. Whilst the two sections are worded differently, they are both sourced in a common international jurisprudence and sub-section 12(3) of the EOA 2010 clearly reflects Justice

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sub-section 8(4) will already be allowed under sub-section 72(1B) and an exemption will not be required for it.

<sup>2</sup> *An Equality Act for a Fairer Victoria*, Department of Justice (2008).

<sup>3</sup> [2009] VCAT 1869, [230]-[275].

Bell's discussion of special measures in the context of sub-section 8(4) of the Charter. It is arguable that their differences reflect their different legislative contexts and the differing terminology adopted in each Act, rather than any intended difference in the nature of what constitutes a special measure under each section. It is not necessary for the purposes of this matter to decide whether the different wording will give rise to different results under the two sections. It is sufficient to observe that generally conduct that is a special measure according to section 12 of the EOA 2010 will also be a special measure under sub-section 8(4) of the Charter.

14. The proper order to consider the various relevant legislative provisions with respect to the present exemption application is therefore:
  - (a) Does section 12 apply in the context of 'competitive sporting activities', with the result that there is no prohibited discrimination?
  - (b) Does the exception in sub-section 72(1B) apply so as to allow any prohibited discrimination?
  - (c) Is any limit on the right to equality in the Charter a reasonable limit under sub-section 7(2) of the Charter?
15. Section 90 then requires the Tribunal to consider 'all the relevant circumstances of the case'.

**D. ARE COMPETITIVE LAWN BOWLS EVENTS FOR WOMEN A SPECIAL MEASURE UNDER SECTION 12 OF THE EOA 2010?**

16. The Tribunal will be assisted in interpreting section 12 by the jurisprudence on 'special measures' that existed prior to its enactment. The section explicitly sets out the indicia that have evolved in other jurisdictions to identify 'special measures' where special measures provisions are less detailed. For that reason, although the section is more detailed than other special measures provisions, this does not mean it should be interpreted differently.
17. As discussed, Justice Bell's application of sub-section 8(4) in the *Lifestyle Communities (No 3)* decision provides useful guidance on what is meant by the phrase 'special measures' in section 12. The decision quotes Justice Brennan in *Gerhardy v Brown*:<sup>4</sup>

A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures. A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality.

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<sup>4</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 130.

18. Justice Bell notes that a measure must be “remedial” to be a special measure.<sup>5</sup> As such, ‘[m]easures taken to redress inequalities arising from past treatment or historical circumstances are not violations of the equality and non-discrimination principles. The provisions of the *Equal Opportunity Act* and the Charter reflect this’.<sup>6</sup>
19. Similarly, one of the four indicia set out by Justice Brennan in *Gerhardy v Brown* is that ‘the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms’.<sup>7</sup>
20. In this case it is not clear how the measure is necessary to allow women bowlers to enjoy their human rights and freedoms equally with men. Equally, it is not clear what past discrimination the proposed measure will remedy.
21. *Lifestyle Communities (No 3)* also provides guidance on the meaning of ‘purpose’ in sub-subsection 12(1) of the EOA 2010:

As to the purpose, the characterisation is governed by the purpose of the measure, not its effect. This must be the objective purpose of providing the specified remediation and be capable of justification by positive proof.<sup>8</sup>

The purpose of a non-legislative measure can be established from any facts which reveal the intentions of those who are taking it.<sup>9</sup>
22. In this case there is evidence that the purpose of the measure is to keep women playing lawn bowls. It is this purpose that must be found to perform the function of remediation that is the hallmark of a special measure. The question for the Tribunal is ‘Does keeping women playing lawn bowls remediate past discrimination that has been suffered by women?’ The question is not ‘Do women like to play Bowls differently to men?’
23. The *Lifestyle Communities (No 3)* decision also considers the indicia that is now included in paragraph 12(3)(d) of the EOA 2010, which bases the process of justification on the fact that the members of the group must have *a particular need for advancement or assistance*:

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<sup>5</sup> [2009] VCAT 1869, [268].

<sup>6</sup> [2009] VCAT 1869, [4]. See also the objectives provision under section 3 of the EOA 2010: ‘The objectives of this Act are – ... (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that— (i) discrimination can cause *social and economic disadvantage and that access to opportunities is not equitably distributed throughout society* ... (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and *the taking of special measures*’ (emphasis added).

<sup>7</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 133.

<sup>8</sup> [2009] VCAT 1869, [262] (footnotes omitted).

<sup>9</sup> [2009] VCAT 1869, [265] (footnotes omitted).

As to the assisting or advancing, to 'assist' is to help a person in doing something and to 'advance' is to move or promote someone forward (OED). To assist or advance persons or groups is therefore to act proactively and beneficially towards them.<sup>10</sup>

It is not clear that the purpose of keeping women playing lawn bowls is a purpose that advances or assists women *in a way that remedies past inequalities*.<sup>11</sup>

24. Section 12 does not allow all measures of any kind in favour of groups who have suffered discrimination in the past. The measures must have the features of a 'special measure', which must aim to remedy the effects of *that past discrimination*. It is questionable whether the Conduct has this feature.

**E. DOES SUB-SECTION 72(1B) OF THE COMPETITIVE SPORTING ACTIVITIES EXCEPTION APPLY?**

***Determining whether sub-section 72(1B) applies***

25. Bowls Victoria continues to rely on the competitive sporting activities exception under sub-section 72(1B). However, Bowls Victoria has not addressed the concerns raised by the Tribunal at the previous hearing on 2 May 2016. As the Commission understands, those concerns related to the Tribunal's ability to determine that the exception applies in relation to the Conduct of Bowls Victoria, which is broad in nature and spans numerous competitive lawn bowls events across Victoria about which the Tribunal does not have all the relevant information.
26. The Commission notes that the concerns raised by the Tribunal would not arise with respect to Albert Park Bowls Club Inc as the Second Applicant, in respect of its competitive lawn bowls events, if all the relevant information were able to be provided about that individual club. However, while members of Albert Park Bowls Club Inc were participants in the Second Survey,<sup>12</sup> the evidence filed by the Applicants has not focused on that Club's competitive lawn bowls events and the views of its members.<sup>13</sup>
27. There is a distinction between the task required of the Tribunal when considering an exemption application under section 89, and the task of determining a complaint of discrimination under section 122. Under section

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<sup>10</sup> [2009] VCAT 1869, [267].

<sup>11</sup> However the Federal Court has taken a different view on this issue in the context of whether women only sessions in a gym could be a special measure aimed at reducing substantive inequality under the *Sex Discrimination Act 1984* (Cth): *Walker v Cormack* (2011) 196 FCR 574, [32].

<sup>12</sup> Second Affidavit of Mr Bridge dated 9 December 2015, [13].

<sup>13</sup> Albert Park Bowls Club Inc is not one of the sample clubs listed in the Fifth Affidavit of Mr Bridge (unsworn).

122, if a respondent claims that an exception applies when defending an allegation that it has contravened the Act, the Tribunal will have to make a determination (which will be confined to the specific facts underlying the complaint).

28. In cases involving an exemption that applies in a broad range of circumstances (and across a number of years in which those circumstances may change) it may not in fact be possible to determine whether an exception will apply. The exemption provision in section 89 allows for exemptions in relation to a *class of people* and a *class of activities*, which suggests the provision may accommodate exemptions of some generality. The question for the Tribunal in any case is whether what is sought by an exemption applicant can be supported by the evidence they have provided.
29. Section 90 requires the Tribunal to consider whether the proposed exemption is unnecessary because an exception applies. If the Tribunal cannot come to a conclusion about the applicability of an exception because of a lack of evidence, it may still make a decision to grant or refuse the exception.

***Competitive single gender lawn bowls events for men***

30. In its initial submissions the Commission observed that sub-section 72(1B) was concerned with facilitating participation in the particular sporting activity by people of a particular sex.<sup>14</sup> The Explanatory Memorandum notes that it will not be available to allow male-only competitions in sports *where continuing male participation has not been an issue*.<sup>15</sup>
31. The Applicants have since submitted that:
  - (a) The Conduct is ‘intended to facilitate participation in the sport by men and women in Victoria, and to prevent a decline in participation in competitive bowls by both men and women’.<sup>16</sup>
  - (b) The ‘number of formal (or registered) playing members of bowls clubs has been decreasing for approximately 30 years at the rate of 2.5% per annum. In the five years prior to 2014, the average annual decrease escalated to 4.3%’.<sup>17</sup>

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<sup>14</sup> The Commission’s submissions dated 15 April 2016, [56].

<sup>15</sup> The Commission’s submissions dated 15 April 2016, [53].

<sup>16</sup> Applicant’s submissions dated 2 May 2016, [5.27].

<sup>17</sup> Applicant’s submissions dated 2 May 2016, [5.28] citing the National Bowls Census Report 2014.



- (c) Bowls Victoria seeks to 'ensure the ongoing viability of lawn bowls in Victoria' by promoting 'participation in the sport' and providing 'members with reasonable choices'.<sup>18</sup>
  - (d) Participation in lawn bowls 'has been declining and is [sic] may well further decline if single gender male events are not offered to lawn bowlers in Victoria, in addition to single gender female events'.<sup>19</sup>
32. It is accepted that the exceptions in the EOA 2010 must be construed narrowly and in a manner that least restricts the rights protected by the Act.<sup>20</sup> Given the breadth of the phrase 'intended to facilitate participation in the activity by people of a particular sex' in paragraph 72(1B)(a) of this exception, it is imperative that the reasonableness test in paragraph 72(1B)(b) be applied rigorously so that the exception operates in harmony with the objects of the Act.
33. In applying the reasonableness test in paragraph 72(1B)(b) the Tribunal should consider the evidence that:
- (a) The Second Survey indicates that a range of only 45% to 57% of male survey participants were in support of single gender lawn bowls events.<sup>21</sup>
  - (b) The Fifth Affidavit summarises the comments of survey participants from the Sample Clubs, stating that 'some' men are interested in and wish to participate in single gender events.<sup>22</sup>
  - (c) It appears that the decline in participation has been sustained over a long period of time, and so cannot be solely attributed to any restrictions on the holding of single gender lawn bowls competitions.
34. The Commission submits that the above evidence is far from compelling and does not provide a satisfactory basis for finding that the exclusion of women/restriction of participation to men in competitive single gender lawn bowls events for men would be 'reasonable' under this competitive sporting activities exception.<sup>23</sup>

### **Under 12s**

35. The Applicants' submissions suggest that the carve out in sub-section 72(3) that prevents the exception in sub-section 72(1B) from being relied on for 'sporting activity for children under the age of 12 years' does not apply unless

<sup>18</sup> Applicant's submissions dated 2 May 2016, [5.30].

<sup>19</sup> Applicant's submissions dated 2 May 2016, [5.34].

<sup>20</sup> *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872, 882. Also see *Wojcik v Roads Corporation* [1997] VADT 75.

<sup>21</sup> Fourth Affidavit dated 2 May 2016, [23].

<sup>22</sup> Fifth Affidavit (unsworn), [14].

<sup>23</sup> Paragraph 72(1B)(b).

the sporting activity is *solely* for children under 12. However, the legislature has made a clear decision that children under the age of 12 years should play in mixed competitions. It would undermine the purpose of this provision if its operation could be avoided simply by allowing 13 years olds into a competition. Sub-section 72(3) has the effect that the exception in sub-section 72(1B) cannot be relied on to allow discrimination in sporting activity involving children under the age of 12 years.

**F. SHOULD THE EXEMPTION BE GRANTED UNDER SECTION 89 OF THE EOA 2010?**

36. If the Tribunal is unable to conclude that the competitive sporting activities exception in sub-section 72(1B) applies to all of the Conduct it must consider whether the proposed exemption would be a reasonable limitation on the right to equality set out in section 8 of the Charter, as well as consider all the relevant circumstances of the case, in determining whether to grant an exemption under section 89.
37. The Applicants submit that the proposed exemption – for both competitive single gender lawn bowls events for women, and competitive single gender lawn bowls events for men – is a reasonable limitation on the right to equality pursuant to sub-section 7(2) of the Charter.<sup>24</sup> Many of the submissions made by the Applicants appear to mirror the submissions they make for competitive single gender lawn bowls events falling within the competitive sporting activities exception under sub-section 72(1B), which also includes a requirement of reasonableness.
38. The legislative history in enacting sub-section 72(1B) is a relevant consideration for the Tribunal under sub-section 90(c) of the EOA 2010.
39. Since each of the single gender lawn bowls events which are the subject of the Further Amended Application are said to constitute a ‘competitive sporting activity’ under the section 70 definition in the EOA 2010, they fall squarely within the subject matter of sub-section 72(1B).
40. As the Commission’s submissions dated 15 April 2016 highlighted, the legislative history generally indicates that sub-section 72(1B) (together with sub-section 72(1A)) were enacted by Parliament to address issues arising from the prohibition of single gender competitions. When it made these amendments, Parliament made detailed and express provision for non-prohibited discrimination in the area of sport. The legislative changes permitted the exclusion of people of one sex in respect of competitive sporting activities if the criteria in sub-section 72(1B) were met. Granting exemptions in this area

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<sup>24</sup> Amended submissions of the Applicants dated 10 June 2016, [7.20]-[7.37].

that go beyond what Parliament has provided for in this detailed subject-specific exception would undermine the policy choices that Parliament has recently made when enacting this provision. Obviously the same cannot be said in relation to exemptions in areas that are not addressed in such specific detail by an exception.

41. If the Tribunal finds that the competitive sporting activities exception under sub-section 72(1B) does not apply, the Commission submits that the Tribunal should be slow to grant an exemption under section 89 in respect of those same competitive sporting activities. Such an exemption may have the effect of undermining the intended operation of sub-section 72(1B) and the intention of Parliament in providing a detailed regime for when discrimination will and will not be lawful in this area.

**Sarala Fitzgerald of counsel**



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**Victorian Equal Opportunity and Human Rights Commission**

**28 June 2016**