

Boys Participation in Grassroots Netball – Resource Document

- Netball Victoria research project findings
- Complying with the *Equal Opportunity Act 2010* (Act)

Introduction

“Netball Victoria is committed to being an inclusive organisation, where every individual has the opportunity to participate at a level and in a manner appropriate to their ability, comfort level and/or personal preference. A strong foundation has been laid in years prior and now a more focused and refined approach is needed to ensure sustainable participation and involvement in our sport continues in years to come across Victoria.” (*Netball Victoria’s Inclusion Strategy 2016 – 2018*).

This document has been developed to help support our Associations, Leagues and ClubsF in an area that some people might not be familiar with or find challenging. It is designed to provide practical guidance and information to the Victorian netball community to support the inclusion of boys in netball as well as helping to prevent discrimination in grassroots netball.

In addition to providing a summary of the findings of research commissioned by Netball Victoria on the differences in adolescent netball between boys and girls, it also provides information on the *Discrimination Do’s and Don’ts in Grassroots Netball* as well as a legal overview relevant to grassroots competitions.

Whilst discrimination legislation applies to a number of attributes and areas, this information is particularly relevant to gender and grassroots netball participation.

Who has this information been written for?

This information has been developed for Netball Victoria affiliated Associations, Leagues and Clubs – their staff, volunteers and participants.

Why is this information important?

We believe inclusive participation in netball is critical to achieving sustainable participation and involvement in our sport for years to come. We want to help support our Associations, Leagues and Clubs to do this.

It is also against the law to discriminate against another person on the basis of their gender identity in sport, unless a statutory exception applies. There are exceptions in the Act and it’s important for all our Associations, Leagues and Clubs to understand these so they can be inclusive and proactive in the prevention of discrimination.

Where can I find more advice and information?

As an initial step, Netball Victoria’s Member Services Team and our Regional Development staff are available to help support Associations, Leagues and Clubs. Netball Victoria also have specialist staff in the area of inclusion who are always willing to provide help, assistance or referral where required.

Outside of Netball Victoria, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) can be contacted.

Discrimination & Gender Differences in Adolescent Netball – Key Research Findings

Background

Netball Victoria (**NV**) and its Associations, Leagues and Clubs (**Netball Affiliates**) are subject to anti-discrimination legislation, both Commonwealth and Victorian. The primary piece of legislation applicable to Netball Affiliates is the *Equal Opportunity Act 2010 (Vic)* (**Act**), which aims to eliminate discrimination, sexual harassment and victimisation in Victoria. The *Sex Discrimination Act 1984 (Cth)* imposes similar obligations in relation to the conduct of sport.

Under the Act¹ it is unlawful to discriminate against another person by either refusing to select them in a sporting team, or by excluding them from participating in a sporting activity. There is an exception to this general prohibition² whereby persons of one sex or gender identity may be excluded from participating in a sporting activity in which the strength, stamina or physique of competitors is relevant. This exception does not apply to children under the age of 12 years³.

The law as it applies in Australia is a combination of statute (legislation passed by the Parliament) and 'common law' (case law decided by the Courts). In 2004 the Victorian Civil and Administrative Tribunal (**VCAT**) applied the above exception⁴ to a junior Australian Rules Football League, and determined that the exception only applies to children aged 14 years and over. As a result, it would be discriminatory (and therefore unlawful) to exclude persons of a certain sex or gender identity from participating in a sporting activity where they were aged 13 years and under.

As a result, the general position at law in Victoria is that for contact sports, the 'strength, stamina and physique' exception only applies to children aged 14 years and above.

Netball Victoria's Research Project

In 2013, Netball Victoria commissioned a research project based on the recommendation of VCAT to investigate the gender differences between the strength, stamina and physique of early-adolescent males and females in netball (**Project**)⁵. The Project was conducted by Professor Geraldine Naughton (ACU), Mr Lyndon Krause (ACU), Dr Stephanie Tibbert (ACU) and Dr Amanda Benson (RMIT).

In commissioning the Project, NV's aims included strengthening the evidence to support its decision making regarding maximising participation, improving retention and minimising injury of participants in netball.

209 adolescents took part in the Project from three co-educational public schools; two in metropolitan Melbourne and one in regional Victoria. Data, which was gathered via surveys, physical testing and in-depth focus groups, was used to compare physical and psychological differences between males and females in early and mid-adolescence.

Project findings

¹ Sections 71(1) & (2).

² Section 72(1).

³ Section 72(3).

⁴ See *Taylor v Moorabbin Saints Junior Football League* [2004] VCAT 158.

⁵ *Gender Differences in Adolescent Sport: A Report for Netball in Australia* (2014)

The results of the Project found there are clear differences in the physical test performances between the strength and stamina of males and females in mid-late teens, however minimal differences arise in children of Year 7 age.

The Project also concluded that forced mixed-gender participation in netball among at least some boys and girls, can have a negative impact on participation in the sport.

To measure the differences in strength, stamina and physique, the Project compared upper body strength, explosive leg power, acceleration and peak velocity through various physical tests conducted in the second half of 2014.

Key findings from the Project include:

- There is no statistically significant difference in the strength, stamina and physique between male and female children of Year 7 age (aged 12 or 13) with minimal differences in almost all physical tests;
- The results of the fastest/strongest/fittest girls across the tests produced very few differences to the fastest/strongest/fittest boys in the Year 7 age group;
- The minimal differences in test results for the Year 7 age group are unresponsive of single-gender competitions for Year 7 aged children;
- There were statistically significant differences in the strength, stamina and physique between male and female children aged between 13 and 15 (but under 16). There were significant differences between males and females in more than 80% of the physical tests undertaken by this age group;
- The results of the fastest/strongest/fittest girls were universally lower than the results of the fastest/strongest/fittest boys in the 13 to 15 age group;
- Equality of participation cannot be guaranteed for mixed gender competitions in the 13 – 15 age group; and
- Psychological research demonstrated that forced mixed gender competition (beginning at 13 + years) could have a detrimental impact to the participation on both girls and boys in netball.

Effect on Netball

As the state sporting body for Netball in Victoria we want to encourage all our Associations, Leagues and Clubs to be inclusive, where every individual has the opportunity to participate at a level and in a manner appropriate to their ability, comfort level and personal preference. We understand that not every competition can achieve this aspiration, however as a collective, we believe Netball can offer a range of participation options for the enjoyment of all Victorians.

In recognising that some Associations, Leagues and Clubs will wish to offer single sex competitions given the differences of strength, stamina and physique of boys and girls, we believe that the minimum age for such a competition should be 14 years of age. We believe this approach is supported by the law and aligns with our research findings.

Further information

For further information regarding this document, please do not hesitate to contact Netball Victoria on (03) 9321 2222 or via mynetball@netballvic.com.au.

1 October 2016

Discrimination Do's and Don'ts in Grassroots Netball

Netball Victoria (NV) is committed to promoting an environment that is inclusive of all people, and preventing discrimination as far as possible. NV strongly recommends that netball Associations, Leagues and Clubs encourage participation of all players in grassroots competitions, regardless of a protected attribute, such as sex and gender identity.

1. Can you discriminate on the basis of strength, stamina and physique?

Yes, but only in limited circumstances. You can only exclude people of a particular sex or gender identity from participating in a netball competition where the strength, stamina or physique of players is relevant. Current case law in Victoria and associated research indicates that differences in the strength, stamina and physique of males and females playing netball only exist when players reach 14 years of age. This means that netball Associations, Leagues and Clubs should not exclude or restrict the participation of boys unless all players in the competition are at least 14 years old.

2. Can you discriminate on the basis of age?

Yes, but in limited circumstances. The law recognises that it may be unfair to have people from different ages playing together, and permits netball Associations, Leagues and Clubs to restrict participation to people of a specified age group. For example, under 15's competitions may have a minimum age of 12.

3. What is the cut-off age at which boys can no longer play in 'girls only' competitions?

A netball Association, League or Club that wants to exclude or restrict males from participating in a grassroots competition should only do so where the competition has a minimum age of 14. Any decision to exclude males from participating in a competition with a minimum age of 14 years should be consistently applied to that competition, i.e. they should not allow some boys to play and exclude others.

4. What should we do if a 14 - 15-year-old boy wants to play, or wants to continue playing, netball in our competition?

We encourage you to include males of all ages to play in grassroots netball competitions. If your organisation still wants to exclude the participation of males, you could advise them that a legal exception applies which allows you to exclude boys from age 14 from girl's competitions on the basis of strength, stamina and physique. Any decision to exclude males from participating in a competition with a minimum age of 14 years should be consistently applied to that competition, i.e. they should not allow some boys to play and exclude others.

5. If we want to have a girls-only competition, why does the minimum age have to be 14?

Case law indicates the strength, stamina and physique exception applies to the entirety of a particular sex, rather than individual boys or girls. Therefore, the exception is only available where the strength, stamina and physique of the class of boys (as a whole) playing in the competition is relevant. NV's research indicates that for 12 and 13 year olds, there is no material difference between the strength, stamina and physique of boys and girls, meaning it is not relevant to competition and therefore boys of 12 and 13 should not be excluded from grassroots competitions. If a netball competition has a minimum age less than 14, it would need to allow boys to participate if requested. Therefore, if a club, association or league wishes to offer a girls-only competition it should only do so where the minimum age is 14.

6. If we want to have a girls only competition, but allow boys younger than 14 to participate, why can't boys just be excluded once they turn 14. Why does the competition need a minimum age of 14 and therefore mean 13-year-old girls can't play?

Where there is no minimum age or a minimum age less than 14, boys and girls aged under 12, 12 or 13 years may play. By only prohibiting boys from playing in such a competition once they turn 14 years old, the exception is unlikely to be available. This is because the strength, stamina and physique of one sex or gender identity playing in the competition as a whole (the boys) is not relevant, as some of the boys playing (those aged under 12, 12 or 13) will not on average be any stronger, have greater endurance or a larger physique than the girls. Only where all the players in a competition are aged at least 14 years or over does the strength, stamina and physique exception apply, as only then does the average boy participant differ to the average girl participant by a statistically significant margin. Where there is crossover in ages in a competition with boys and girls, where there is both boys and girls with no statistically significant difference, and boys and girls where there is a statistically significant difference, the exception does not apply.

7. What should we do if a 13 – 15-year-old girl does not want to play netball against a 13 – 15-year-old boy?

Girls who are 13 years old may be involved in mixed netball competitions. Up until this age grassroots netball competitions must accommodate both girls and boys. Current case law in Victoria and associated research indicates that differences in the strength, stamina and physique of males and females playing netball only exist when players reach 14 years of age. This means that netball Associations, Leagues and Clubs can offer girls only competitions where the minimum participation age is 14 years.

8. Does an exemption apply?

NV previously held an exemption which allowed netball Associations, Leagues and Clubs to restrict or exclude males from playing in netball competitions where they were 12 or 13 years of age. This exemption has expired. This means that Associations, Leagues and Clubs can only rely on a statutory exception as a defence to a claim of discrimination.

NV is committed to promoting an environment that is inclusive of all people, and preventing discrimination as far as possible. As such, NV strongly recommends that netball Associations, Leagues and Clubs encourage participation of all players in grassroots competitions, regardless of their sex or gender identity. This means that grassroots competitions should be open to males and females, not just females.

9. Can we exclude a male if he is stronger, faster or taller than female players?

The law does not allow you to exclude an individual, specifically a male player because he (alone) is stronger than females in the team. Relevant provisions of applicable discrimination legislation are only excluded where there is evidence of a significant difference in strength, stamina or physique of male and female netball players for a particular age group as a whole (ie a difference between males as a class against females as a class).

NV strongly recommends that netball Associations, Leagues and Clubs encourage participation of all players in grass roots competitions, regardless of their sex or gender identity. However, if netball Associations, Leagues and Clubs want to exclude or restrict males from 14 years of age from grassroots competitions on the basis of strength, stamina or physique, they should ensure that there are no players less than 14 years of age participating in that specific competition.

10. What should we say to parents who are not happy with their daughters playing against boys who are stronger and bigger than them?

You cannot discriminate against an individual boy due to his strength, stamina or physique unless there is a substantial difference between boys and girls across an entire age group. Current case law in Victoria and associated research indicates that differences in the strength, stamina and physique of males and females playing netball exist when players reach 14 years of age. This means that netball Associations, Leagues and Clubs can offer girls only competitions where the minimum participation age is 14 years.

11. What should we say to parents of boys who are not happy that their sons cannot play past the age of 13 in netball competitions in our Association, League or Club?

The law has changed, and males should be encouraged to play in grassroots competitions at all ages. Netball Associations, Leagues and Clubs can't refuse to allow males to participate in netball competitions unless a legal exception applies. However, current case law in Victoria and associated research indicates that differences in the strength, stamina and physique of males and females playing netball exist when players reach 14 years of age. This means that netball Associations, Leagues and Clubs can offer girls only competitions where the minimum participation age is 14 years old. Ideally over time Associations, Leagues and Clubs will offer more mixed and boys' competitions to meet this demand.

12. What should we do about the absence of mixed and 'male only' netball Associations, Leagues and Clubs in our local area for boys who have played in our competitions since they were 8 years old?

NV is committed to increasing the number of opportunities for mixed and 'boys only' netball competitions to ensure fairness to all people regardless of sex or gender identity. We will continue to work with our netball Associations, Leagues and Clubs to increase opportunities for everyone to participate.

13. What if parents complain that boys have an unfair advantage?

Boys over the age of 14 only comprise three (3) percent of total participants in netball competitions delivered by NV affiliates (of a total 100,000 participants). Any perceived disadvantage should be kept in perspective.

11.1 How should we respond when parents threaten to remove their daughters from 'girls only' netball competitions if boys are permitted to continue playing?

Very few boys actually participate in our netball competitions and this should not adversely affect your daughter's ability to enjoy playing netball.

14. What if a player has a gender identity that differs to their sex?

Netball Associations, Leagues and Clubs should provide a safe, fair and inclusive netball environment, in which people from all backgrounds can contribute and participate.

Like all players, people who identify as transgender or intersex should be treated with dignity and respect at all times. This includes acting with sensitivity when a person is undergoing a transition.

12.1 What will this mean for us in practice?

NV will not tolerate any discrimination, bullying or harassment of a person on the basis of their sex, gender identity or sexuality. Unlawful exclusion has significant and negative implications for health, well-being and inclusion in community life. NV strongly supports the participation in netball by all people, irrespective of their sex or gender identity.

NV recognises that there is debate over whether a male that identifies as female may obtain a physical advantage over female participants. This debate is reflected in divergent discrimination laws across Australia. If issues with performance arise, NV will support Associations, Leagues and Clubs through this process.

Our focus is on creating an inclusive netball community, and we encourage all netball Associations, Leagues and Clubs to adopt the same approach.

15. What if allowing boys to play turns girls away from netball?

Research indicates that females are more positive about mixed netball competitions than males, with over two thirds of surveyed participants supporting mixed competitions. While we understand that some people may prefer female only competitions, NV is committed to promoting an environment that is inclusive of all people, and preventing discrimination as far as possible. We understand that there may be an adjustment period, and we are committed to working with netball Associations, Leagues and Clubs through this phase.

16. What if our by-laws refer to girls' only competitions or the exclusion of boys over 13?

Conduct that would otherwise be considered to be unlawful discrimination may be permitted if a statutory exception applies, or if you have been granted a temporary exemption from relevant legislation by the Victorian Civil and Administrative Tribunal or Australian Human Rights Commission. There are currently no exemptions in place for netball in Victoria. Research suggests that an exemption is unlikely to be granted again. NV will work with netball Associations, Leagues and Clubs to ensure that by-laws are amended to reflect changes in practice.

17. Our by-laws strictly state that at the age of 13 boys cannot participate in 'girls only' competitions. Should these by-laws be altered to prevent discrimination?

Netball Victoria recommends that this reference be removed from by-laws. Netball Associations, Leagues and Clubs should encourage people of all ages to participate in netball competitions, regardless of their sex, age or gender identity. However, should you wish to run a girls only or boys only competition, your by-laws should state that such competitions will have a minimum age of 14 years.

Legal overview relevant to grassroots competitions

1 INTRODUCTION

1.1 What is discrimination?

Discrimination is treating someone unfairly on the basis of a protected attribute (personal characteristic) under the *Equal Opportunity Act 2010 (Act)* or relevant Commonwealth legislation, including but not limited to gender identity, age, sex, religion, disability. In determining whether a person has discriminated against someone else, the person's motive is irrelevant.

1.2 What is 'Direct' and 'Indirect' discrimination?

Direct discrimination is when you treat, or propose to treat, a person with a protected attribute unfavourably because of that attribute.

Indirect discrimination is when you impose, or propose to impose, an unreasonable requirement, condition or practice – which may appear to treat people equally – that has or is likely to have the effect of disadvantaging a person with a protected attribute. For example, it may be discriminatory to enforce a uniform policy that has the effect of disadvantaging people on the basis of their religion, physical features or gender identity, such as banning head scarves or requiring all females to wear skirts, irrespective of their gender identity.

2 KEY TERMS

2.1 Gender identity

While gender identity has a specific meaning under the Act, it broadly refers to a person of one sex identifying as a member of another sex on a genuine basis. This may be by assuming characteristics of the other sex (through style of dressing, medical intervention or otherwise) or because the person is living or seeks to live as a member of another sex. It also refers to a person of indeterminate sex identifying as a member of a particular sex.

2.2 Sex

Sex refers to a person's physical sex characteristics. Traditionally this has been read as being either male or female, but courts are now recognising that 'sex' can have a broader meaning to specifically apply to people who are intersex, those who may be a combination, or on a spectrum, of being male and female or identify as being physically indeterminate.

3 WHEN IS DISCRIMINATION IN NETBALL UNLAWFUL?

Everybody has the right to participate in sport without discrimination. Under the Act, it is against the law to discriminate against another person on the basis of a protected attribute:

- by refusing or failing to select them in a sporting team; or
- by excluding them from participating in a sporting activity.

This extends to activities of people who are not 'playing' the particular sport, such as, coaching, umpiring or refereeing, or participating in the administration of a sporting activity.

This means that netball Associations, Leagues and Clubs cannot discriminate against a person on the basis of a protected attribute by denying them participation in netball competitions.

Otherwise discriminatory behaviour will be lawful if:

- a permanent *statutory exception* in the Act applies; or
- you have been granted a *temporary exemption* from the law by the Victorian Civil and Administrative Tribunal (VCAT). An exemption is only required if a statutory exception is not available.

4 WHAT ARE THE STATUTORY EXCEPTIONS?

There are two statutory exceptions relevant to grassroots netball competitions in Victoria. The law permits otherwise discriminatory behaviour on the basis of the relevance of strength, stamina, and physique to the sport. It also permits netball Associations, Leagues and Clubs to set age limits for competitions.

4.1 Statutory Exception – strength, stamina and physique

The Act contains a statutory exception which permits the exclusion of people of one sex or gender identity from participating in netball where the strength, stamina or physique of players is relevant to competition in the sport.⁶

The law recognises that differences in strength, stamina and physique don't generally arise until adolescence. Under the Act, it is unlawful to exclude people of one sex from a competition for players under 12 years old. This means that boys cannot be excluded or restricted from playing in netball competitions where any of the players are under 12 years old.

Research commissioned by Netball Victoria (NV) indicates that differences in the strength, stamina and physique of males and females playing netball do not arise until players are 13 - 15 (but under 16) years old.

4.2 Statutory Exception - Age

The Act also contains an exception which permits netball Associations, Leagues or Clubs to restrict participation to people of a specified age or age group.

5 WHAT IS AN EXEMPTION?

VCAT can issue temporary exemptions which permit otherwise discriminatory behaviour in limited circumstances.

Previously, NV has been granted an exemption which permitted its members to exclude males aged 12 or 13 from netball competitions on the basis of differences in strength, stamina and physique. This exemption has expired. To encourage participation in netball and promote an inclusive sporting environment, NV will not be seeking a further exemption.

6 WHO CAN BE HELD LIABLE FOR DISCRIMINATION?

6.1 Individuals can be liable

A person or organisation may be directly liable for discriminating against another person. This means that they can be legally responsible for their behaviour and may be required to pay compensation to the person they discriminated against if the matter proceeds to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), Australian Human Rights Commission (AHRC), or to a court or tribunal.

An individual may also be liable for requesting, instructing, inducing, encouraging, authorising or assisting another person to participate in unlawful conduct.

6.2 Organisations can be liable for the actions of their employees and agents

Organisations may be vicariously liable for the unlawful behaviour of people who act on their behalf. For example, netball Associations, Leagues and Clubs may be responsible for discrimination by its staff (including administrators, coaches and groundskeepers) or its contractors.

⁶ *Equal Opportunity Act 2010* (Vic) s 72 (1)

An organisation may not be liable, however, if it can show that it has taken reasonable and proportionate steps to prevent discrimination from occurring.

7 WHAT IS THE INTERNAL COMPLAINTS PROCESS?

If an individual makes a complaint of discrimination or harassment they should aim to deal with the matter at Club level first, in line with NV's internal Member Protection Policy.

8 WHAT IS THE EXTERNAL COMPLAINT PROCESS?

If the matter is not resolved internally, a person may lodge a complaint of discrimination against the netball Association, League and Club with the VEOHRC or AHRC. A person can also lodge a complaint of discrimination directly with VCAT.

If the complaint is not resolved through conciliation, the individual can take their complaint to the Federal Court or the Federal Circuit Court.

9 WHAT ARE THE CONSEQUENCES FOR UNLAWFUL BEHAVIOUR?

VCAT, the Federal Court and the Federal Circuit Court have the power to make binding decisions that must be complied with (unlike the non-binding decisions of the Commissions).

If the complaint of discrimination is upheld, the tribunal or court may order the person or organisation liable for the discrimination to:

- Stop the discrimination;
- Provide an apology to the victim;
- Pay financial compensation for what has happened; or
- Make various other orders to remedy the damage caused, such as changes in policies.

Orders of compensation for discrimination can be substantial, ranging from a few thousand dollars to over \$100,000.

If a court finds that a netball Association, League or Club has engaged in discrimination, it may also order the Association, League or Club to pay the individual's legal costs.

Any decision made is open to appeal.

Disclaimer: these guidelines provide general legal information only.

Tell us your experiences and feedback

Netball Victoria wants to ensure that this resource stays relevant and useful. As such, we always welcome hearing from our Clubs, Associations and Leagues on this topic. We are interested in your challenges and your solutions. We would like to build on our Q&A section and welcome your feedback via: mynetball@netballvic.com.au or call Member Services Team on (03) 9321 2222.