

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT Reference No: A189/2009

Re: the Victorian Civil & Administrative Tribunal's consideration of an application by the Travel Sisters for an exemption from various aspects of the prohibition on discrimination in the provision of goods and services contained in the *Equal Opportunity Act 1995* (Vic)

A. BACKGROUND

1. The Victorian Equal Opportunity and Human Rights Commission ('Commission') has the following functions under the *Equal Opportunity Act 1995* (Vic) ('EOA')¹:

- (a) to establish policies and issue guidelines and directions on the manner in which conciliation procedures under this Act should be conducted;
- (b) to receive and investigate complaints on the manner in which conciliation procedures under this Act have been or are being conducted;
- (c) to establish and undertake information and education programs;
- (d) any other functions conferred on it by or under this Act or any other Act, including the Charter of Human Rights and Responsibilities.

2. The Commission performs a range of functions under the *Charter of Human Rights and Responsibilities* ('Charter').² In its performance of those functions the Commission always endeavours to promote the principles underpinning the Charter, that are articulated in its preamble, and include:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;

¹ Section 161 *Equal Opportunity Act 1995* (Vic).

² These are listed in section 40 and 41 of the Charter.

- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
 - human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.
3. Travel Sisters ('the applicant') has applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for an exemption from the operation of the EOA that, if granted, would allow the applicant to refuse to provide services to people on the basis of sex. It appears that this conduct will be unlawful if no exemption is granted.
 4. The application is similar to a previous application to conduct women-only tours in 2005, which was not granted,³ and similar to an application in 2007, which was granted.⁴ Both applications were made before the commencement of Divisions 3 and 4 of Part 3 of the Charter.
 5. The applicant states that the reason for this exemption application is '[t]o offer women (females) a safe and secure environment in which to travel with a group of females, to enjoy relaxing tours, including spa treatments, tailor services; including group change rooms etc.'
 6. The Commission is responding to the Tribunal's call for public submissions in response to this application, and seeks to make submissions that draw upon its unique perspective on both the operation of the EOA, as well as the implications of the Charter for this application.

B. PRINCIPLES RELEVANT TO THE DETERMINATION OF EXEMPTION APPLICATIONS

7. Section 83 of the EOA allows the Tribunal to grant an exemption from the provisions of the EOA on the application of a person, whose interests, in the opinion of the Tribunal, are or may be affected by the exemption.

³ China Birds Pty Ltd, A177/2005.

⁴ *Morris* [2007] VCAT 280.

8. Exemptions have the effect of allowing conduct that might otherwise amount to unlawful discrimination under the EOA. Exemptions are not necessary where it is clear that one of the exceptions to unlawful discrimination in the EOA would apply to the conduct.

9. Section 83 states:

(1) The Tribunal, by notice published in the Government Gazette, may grant an exemption—

(a) from any of the provisions of this Act in relation to—

(i) a person or class of people; or

(ii) an activity or class of activities; or

(b) in the circumstances referred to in section 28; or

(c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.

10. A number of Tribunal decisions on exemption applications have now considered the impact of the Charter on the Tribunal's discretion to grant exemptions.⁵ The recent decision of Justice Bell in *Lifestyle Communities Ltd (No 3)*⁶ comprehensively sets out how section 83 is to be applied within a human rights framework and clarifies that considerations arising under the Tribunal's previous principles now need to be articulated within this framework⁷. This approach is based on the duties imposed on the Tribunal by sections 32 and 38 of the Charter.

11. Section 32 of the Charter requires all statutory provisions to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the provision. Lifestyle Communities confirmed that:

When it comes to applying s 32(1) of the Charter to the interpretation of s 83(1) of the Equal Opportunity Act, the purpose of the Equal Opportunity Act

⁵ See for example *Royal Victorian Bowls Association Inc* [2008] VCAT 2415, *Victorian Netball Association Inc* [2008] VCAT 2651, *Hobsons Bay City Council* [2009] VCAT 1198, *YMCA – Ascot Vale Leisure Centre* [2009] VCAT 765, Victorian Electoral Commission A147/2009.

⁶ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

⁷ Para 82.

*is to promote equal opportunity and prevent discrimination. That purpose is not diluted by the provisions with respect to exceptions and exemptions.*⁸

Justice Bell further indicated that he did not consider the purpose of the EOA permitted the grant of exemptions in order to achieve convenient, economic and practical outcomes⁹.

12. Section 38 of the Charter states that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. While previous decisions of the Tribunal have indicated that the Tribunal is a public authority when acting in an administrative capacity¹⁰, Lifestyle Communities confirms that the Tribunal is a public authority when exercising its discretion under section 83 and is therefore bound to act compatibly with the Charter when considering exemption applications.¹¹

13. Justice Bell explained that exemptions can be granted consistently with the Charter in two ways. The first relates to measures within section 8(4) of the Charter. This section states that:

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

14. Accordingly, if a proposed exemption would satisfy section 8(4) of the Charter, granting the exemption would not impose a limit on the equality rights contained within the Charter.

15. The second way an exemption may be granted is where the exemption would be a reasonable, necessary, justified and proportionate limitation on human rights. Section 7(2) of the Charter articulates the (non-exhaustive) considerations that are relevant to assessing whether a limitation on a human right is or is not reasonable and demonstrably justified.

⁸ Para 96. This approach was subsequently adopted by Judge Harbison in Victorian Electoral Commission A147/2009 at para 94.

⁹ Para 65.

¹⁰ *Kracke v Mental Health Review Board* [2009] VCAT 646 at para 270.

¹¹ Para 46.

16. The Commission notes that the onus of establishing whether an exemption is a measure under s 8(4) or is justified under s 7(2) on the balance of probabilities lies on the applicant.¹²

C. APPLYING THE LIFESTYLE COMMUNITIES TEST TO THE APPLICATION

Does the exemption fall within s 8(4) of the Charter?

17. In *Lifestyle Communities*, Justice Bell noted that '[s]ection 8(4) contains a test with these essential criteria: purpose, assisting or advancing, disadvantaged persons or groups of persons and because of discrimination'.¹³

18. His Honour made a number of observations about these criteria, including:

- The purpose of a measure '...must be necessary, genuine, objective and capable of justification by positive proof. Measures not reasonably likely to achieve the remedial purpose are not regarded as being for that purpose. Nor will measures which are a disproportionate means of achieving that end.'¹⁴
- Assisting or advancing means to act proactively and beneficially towards persons or a group and would include taking affirmative action.¹⁵
- A person or group is disadvantaged whenever they are unable to act with personal autonomy and realise their worth so as to maintain their inherent dignity.¹⁶ Not all persons within an identified group need to demonstrate this disadvantage.¹⁷
- The disadvantage must be because of discrimination (within the meaning of the *Equal Opportunity Act*) and not some other cause.¹⁸

19. Justice Bell also observed that whether a proposed exemption satisfies section 8(4) is a matter of fact and merit and the Tribunal must come to its own view about the application.¹⁹

¹² *Lifestyle Communities*, para 298.

¹³ Para 261.

¹⁴ Para 266.

¹⁵ Para 267.

¹⁶ Para 270.

¹⁷ Para 273.

¹⁸ Para 274.

20. The applicant states that the reasons for making the application are '[t]o offer women (females) a safe and secure environment in which to travel with a group of females, to enjoy relaxing tours, including spa treatments, tailor services including; group change rooms etc'. No further information about the application has been provided to the Commission.
21. The Commission considers the following questions may be relevant the Tribunal's examination of the present application:
- With regard to the purpose of this application, whether it seeks to assist or advance a disadvantaged group
 - Whether the group targeted are disadvantaged because of discrimination
 - Whether there is a demonstrable need for female-only services of this nature based on safety and security considerations
 - How the provision of female-only services will assist or advance females
 - How the provision of female-only tours will achieve a safe and secure environment
 - Why there is a need to exclude male persons from the service to achieve a safe and secure travel environment for females.
22. As noted above, if the Tribunal is satisfied that an exemption would fall within section 8(4), an exemption may be granted and the reasonable limitations test under s 7(2) does not need to be considered.²⁰ In the Commission's view, on the basis of information currently available, the case for granting the application on the basis of section 8(4) appears weak.

¹⁹ Para 275.

²⁰ The Commission notes Justice Bell's observation in *Lifestyle Communities* at para 300, '[a]ssuming the measure is not otherwise incompatible with human rights in the Charter, it will be compatible with human rights by reason of it being a special measure.'

Is the proposed exemption a reasonable limit on human rights – assessed in accordance with 7(2) of the Charter?

23. In seeking to identify the key elements of a reasonable limitations analysis for this application, the Commission has taken guidance from the decision of Justice Bell in *Kracke v Mental Health Review Board* ('Kracke's case').²¹ In Kracke's case Justice Bell emphasised that a reasonable limitations analysis comprises two elements – legality and proportionality. The Commission is of the view that given the framework and procedures governing the exemption application there are no threshold issues requiring consideration in relation to legality.

24. When assessing proportionality, Justice Bell indicated that, it is not a 'tick the box' exercise, and remains a global assessment of whether or not an actual or proposed limitation on a human right is reasonable and demonstrably justified.²² His Honour made the following observations in Kracke's case about the factors identified in section 7(2) of the Charter:

- When considering the nature of the rights that may be limited this must be understood as a threshold or foundational factor rather than a balancing factor in the reasonable limitations analysis. The focus is on the *nature*, not the *importance* of the right.²³
- The purpose of the proposed limitation must accord with the values underpinning the Charter, and must be sufficiently important to justify limiting rights.²⁴
- Analysis of the nature and extent of the limitation requires a precise examination of both how the limitation will limit rights, as well as how much it will limit them.²⁵
- Whether or not the limitation is in fact related to, and will contribute to achieving the intended purpose, requires a factual inquiry or assessment. In other words, are the two rationally connected?²⁶

²¹ [2009] VCAT 646. The Commission notes Justice Bell referred to his analysis in Kracke's case when applying the reasonable limitations test in *Lifestyle Communities*.

²² See *Kracke v Mental Health Review Board* paras 107 and 132-35.

²³ Paras 137-38.

²⁴ Paras 144 and 146.

²⁵ Paras 149-51.

- There is a need to consider the minimum impairment principle. This is not akin to requiring adoption of the least rights-restrictive option for achieving a given purpose. Scrutiny is directed towards whether the chosen approach falls within a range of reasonable alternatives.²⁷

The nature of the rights that may be limited if the exemption is granted

25. The Commission's view is that if granted, the exemption would engage the right to recognition and equality before the law protected by the Charter (section 8). The proposed exemption would limit the rights of members of the community to equal protection without and against discrimination on the basis of sex.

26. With regard to the nature of the above right, the Commission notes it is central to the spirit and objectives of the EOA. In Lifestyle Communities, Justice Bell stated that:

*[t]he human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification.*²⁸

The importance of the purpose of the proposed exemption

27. The Commission notes the applicant's reason for seeking this exemption – '[t]o offer women (females) a safe and secure environment in which to travel with a group of females, to enjoy relaxing tours, including spa treatments, tailor services; including group change rooms etc.'

28. The Commission observes that females typically interact with and alongside males in the provision of goods and services. While a sense of safety and security while travelling sounds like a positive outcome for any person or group, the applicant has not provided information demonstrating the importance of providing female-only services to ensure safe and secure environments. More information from the applicant is needed to establish the importance of the purpose.

29. A mere preference evident within the applicant's target market for women-only tours is unlikely to be an important purpose for seeking an exemption from the

²⁶ Para 153.

²⁷ Paras 156, 158 and 160.

²⁸ Para 107.

EOA. Instead, an exemption predicated on meeting this preference may rest on commercial or expedient grounds.

30. In the circumstances, it is difficult to evaluate the importance of the purpose of the proposed exemption. It is also difficult to determine whether the provision of this service, travel, can be meaningfully distinguished from any other service generally offered to the public.

The nature and extent of the limitation on rights under the proposed exemption

31. The nature of the proposed limitation is extreme in that the applicant may refuse to offer services to males. It would also preclude a person from obtaining redress through a complaint lodged under the EOA. No material has been provided by the applicant about how it may ameliorate the discriminatory effect.

32. It appears that travel services are generally available to both sexes.

Relationship between the exemption and its purpose

33. In the Commission's view, whether the proposed exemption is likely to achieve the applicant's stated reasons for the exemption requires analysis.

34. In the absence of any meaningful rationale connecting the exemption and its purpose, there appears to be no real relationship between the two. It is ostensibly a case of stereotyping:

- a) men's behaviour
- b) women's reaction to the presence of men.

Minimum impairment principle

35. In the present circumstances, the Commission's view is that this aspect of the reasonable limitations analysis requires consideration of the effectiveness of alternative strategies to realise the applicant's objectives.

36. Alternatives might include:

- Communicating and enforcing standards of conduct for all persons accessing the travel services

- Selecting tailoring and spa facilities which have separate male and female change rooms, or otherwise making arrangements to ensure the privacy and safety of male and female participants
- Ensuring persons accessing travel services are encouraged to report any safety concerns.

37. The Commission notes that the tours the applicant intends to offer focus on relaxation, tailoring and spa treatments. On the face of it, this focus is likely to appeal to proportionately more women than men. It appears possible that, absent an exemption, market forces may result in a tour environment which is welcoming and positive towards women.

CONCLUSION

38. The Commission acknowledges the applicant's concern to provide services in a way that promotes a sense of safety and security for female customers. On the information available to it, however, the Commission's opposes the grant of this exemption. Much more information would be required to demonstrate that the proposed exemption can be considered either a measure under section 8(4) of the Charter or is reasonably necessary and demonstrably justified in a free and democratic society based on human dignity, equality and freedom in accordance with section 7(2) of the Charter.

39. If the Tribunal is amenable to granting the exemption, the Commission notes that the application may also raise issues in terms of the gender identity attribute and whether the applicant intends to employ female staff only.