

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION
HUMAN RIGHTS LIST

H280/2016

Applicant Berry Street Victoria Inc
Intervener Victorian Equal Opportunity and Human Rights
Commission

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Date of document: 28 February 2017
Filed on behalf of: Intervener CF/17/50181
Prepared by: Phone: (03) 9032 3421
Victorian Equal Opportunity and Human Rights Commission Fax: 1300 286 834
Level 3, 204 Lygon Street Attention: Jennifer Jones
CARLTON VIC 3053 Email: Jennifer.jones@veohrc.vic.gov.au

A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought and was granted leave to intervene in this proceeding under section 159 of the *Equal Opportunity Act 2010* (**EOA**) by Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 31 January 2017.
2. This proceeding is an application pursuant to section 89 of the EOA by Berry Street Victoria Inc. (the **Applicant**) for an exemption to enable the Applicant to advertise for and employ only female staff in their Family and Domestic Violence Services across Victoria (**Relevant Conduct**). The exemption is sought for positions in that service "where the duties require direct contact and support provided to women and children who are victims of (often) male perpetrated violence".¹
3. The Commission notes that the Applicant had a previous exemption with a similar scope, which has now expired, dated 25 January 2012.² That exemption was to enable the Applicant to advertise for and employ only women to work within the Northern Family and Domestic Violence Service (**FVDS**). That exemption did not appear to be limited to staff with direct contact with women and children experiencing family violence, but for all staff within the Northern branch of FDVS.

¹ Affidavit of Christine Pinto dated 13 February 2017.

² Victoria Government Gazette, No. G5, 2 February 2012, 173.

4. The Commission notes that, in circumstances where the Applicant has previously been granted an exemption, the Tribunal must consider each subsequent new application for an exemption having regard to the factors set out in section 90 of the EOA and having regard to the relevant factual circumstances that form the basis of the application.
5. This proceeding raises three issues about the operation and interpretation of the EOA, about which the Commission makes submissions:
 - (a) The need for clarity in identifying the protected attribute relevant to the conduct seeking to be exempted from the EOA;
 - (b) Whether section 28 of the EOA applies to the Relevant Conduct, meaning that an exemption is not necessary; and
 - (c) Whether it is appropriate to grant an exemption in all the circumstances.
6. The Commission notes that there are a number of exemptions relating to women only employment, which expire in 2017 (see Appendix A). Most of these exemptions apply to organisations providing family violence services, like the Applicant. Guidance from the Tribunal about the circumstances in which section 28 (and as a consequence section 88) apply will be beneficial to those organisations and provide clarity for future applicants.

B. STATUTORY FRAMEWORK AND PRINCIPLES

7. Section 89 of the EOA 2010 provides that the Tribunal may grant an exemption from any of the provisions of the Act in relation to certain people or activities or in any other circumstances specified by the Tribunal, subject to any conditions the Tribunal thinks fit.
8. Section 90 of the EOA 2010 sets out the factors to be considered by the Tribunal when deciding exemption applications. Section 90 provides:

In deciding whether to grant, renew or revoke an exemption, the Tribunal must consider—

 - (a) whether the proposed exemption is unnecessary because—
 - (i) an exception or exemption in this Act already applies to the conduct sought to be exempted; or
 - (ii) the conduct sought to be exempted would not amount to prohibited discrimination; and
 - (b) whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter of Human Rights and Responsibilities; and
 - (c) all the relevant circumstances of the case.
9. The Commission submits that the Tribunal is obliged to exercise the exemption powers under section 89 and 90 consistently with the purpose and objectives of

the EOA 2010 and in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

C. IDENTIFICATION OF PROTECTED ATTRIBUTES

10. As outlined above, section 90(a) of the EOA 2010 requires the Tribunal to consider whether the exemption applied for is unnecessary because the conduct does not amount to unlawful discrimination, or because another exception or exemption applies to the conduct.
11. The first question for the Tribunal is therefore whether the conduct amounts to discrimination on the basis of an attribute. This involves identifying the relevant areas of the EOA and the protected attribute/s that are engaged by the Relevant Conduct.
12. The application relates to “women only” recruitment and advertisement of that fact. “Women” is defined by the Applicant to include any person who identifies as female.³ Therefore, the Commission submits that the proposed conduct may amount to direct discrimination on the basis of sex and gender identity in relation to job applicants (section 16), requests for information (section 107), and advertising (section 182).
13. The Commission has identified both sex and gender identity as relevant attributes, as they are separately protected and should not be conflated. Sex is not defined in the EOA and determining a person’s legal sex is complex and contested.⁴ However, the Commission submits that for the purposes of the EOA, ‘sex’ should be interpreted according to its ordinary meaning of referring to a person’s physical (anatomic) or physiological characteristics associated with biological sex.⁵
14. The Commission submits that the ordinary meaning of ‘sex’ for the purposes of the EOA is not confined to male or female. Australian courts have acknowledged that sex is no-longer considered binary and that there are alternative categories of sex, such as non-specific or intersex.⁶ It should include people with an intersex variation, those who may be a combination or on a spectrum of being female and male, or those who identify as being physically indeterminate.⁷ As the High Court said in *NSW Registrar of Births Deaths and*

³ Affidavit of Christina Pinto dated 13 February 2017 [9]

⁴ See e.g. *Births Deaths and Marriages Registration Act 1996* (Vic) s30A which requires a person to undergo sex affirmation surgery in order to apply for an alteration of sex in the Victorian Birth Register. Cf Commonwealth policy which allows a person to change their gender marker on federal documents such as passports without surgical intervention.

⁵ *Secretary, Department of Social Security v "Sra"* [1993] FCA 573 [9]-[11]

⁶ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2013) 250 CLR 490; [2014] HCA 11 [1], [35], [37], citing *AB v Western Australia* (2011) 244 CLR 390, 402; [2011] HCA 42 [23]

⁷ Victorian Equal Opportunity and Human Rights Commission, *Guideline: Transgender People and Sport: Complying with the Equal Opportunity Act 2010*, State of Victoria (2015) (including amendments in a forthcoming revision).

Marriages v Norrie, “not all human beings can be classified by sex as either male or female”.⁸ The EOA definition of sex should therefore be interpreted liberally and beneficially to include intersex and non-binary sex characteristics.

15. On the other hand, gender identity is defined in the EOA as:⁹
- (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—
 - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of the other sex; or
 - (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—
 - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of that sex;
16. The attribute of gender identity is intended to protect a person’s internal sense of self and how they identify, understand or perceive their gender. While ‘gender’ is a term often considered synonymous with sex, it is not a protected attribute under the EOA and should not be referred to as such in the context of section 6 of the EOA.¹⁰ Rather, gender identity is the correct attribute to be used.
17. Given these differences in terminology, the Commission underscores the importance of the Tribunal ensuring its exemption decision and orders reflect the precise nature of the potential discrimination which is being considered, in addition to identifying “the exempt conduct”. A review of previous exemption orders gazetted indicates that this is rarely done. For example, in every exemption decision listed in Appendix A, the orders state “in the absence of an exemption, the exempt conduct would amount to prohibited discrimination”,¹¹ without identifying the attribute as required under the EOA and where the exempt conduct simply refers to women-only employment.¹²
18. The Commission acknowledges that in many of the exemption decisions listed in Appendix A, the Charter analysis under section 90(b) of the EOA refers to

⁸ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2013) 250 CLR 490; [2014] HCA 11 [1]

⁹ *Equal Opportunity Act 2010* (Vic) s4

¹⁰ *Equal Opportunity Act 2010* (Vic) s6(d) and (o); c/f the following cases where ‘gender’ is referred to as the relevant protected attribute: *Whitehorse Community Health Centre Exemption (Human Rights)* [2014] VCAT 1040 [5]; *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [7]; *Cornish College (Anti-Discrimination Exemption)* [2012] VCAT 889 [16]; *The City of Whittlesea Thomastown Recreation and Aquatic Centre (Anti-Discrimination Exemption)* [2011] VCAT 250 [20]; *The City of Monash (Anti-Discrimination Exemption)* [2011] VCAT 111 [21].

¹¹ *C/f Waite Group (Human Rights)* [2016] VCAT 1258 [2].

¹² *Equal Opportunity Act 2010* (Vic) s7(1)(a)

the right to equal and effective protection against discrimination of men. However, noting the above definitions of the attributes sex and gender identity, this analysis does not adequately address the issue of identifying the protected attribute.

19. The Commission therefore submits that any decision and orders relating to this application should correctly identify the attribute and say “on the basis of sex and gender identity”, as the Applicant’s Relevant Conduct relates to limiting employment to people who are physically or physiologically female or whose gender identity is female.

D. IS AN EXEMPTION UNNECESSARY BECAUSE AN EXCEPTION APPLIES?

20. The second question for the Tribunal under section 90(a) is whether an exemption is unnecessary because an exception applies to the Applicant’s Relevant Conduct. The Applicant has acknowledged that its previous exemption has now expired.

21. In this case, the Commission submits that the welfare services exception in section 28 of the EOA is highly relevant, given the narrowing of the application to FDVS employees with direct client contact.

22. Section 28 provides:

An employer may limit the offering of employment to people with a particular attribute in relation to the provision of services for people with the same attribute if those services-

- (a) are either-
 - (i) a special measure under section 12; or
 - (ii) a service for special needs under section 88; and
- (b) can be provided most effectively by people with that attribute.

23. In determining whether the section 28 exception applies, the Tribunal must turn its mind to whether the services which are the subject of the exemption application are a special measure (having regard to section 12); or a service for special needs (having regard to section 88). The Tribunal must then be satisfied that the services can be provided most effectively by people with the same attribute as those people who are receiving the services.

Section 12 – Special measures

24. In relation to whether the Applicant’s services are a special measure under section 28(a)(i), the Commission submits that there is no evidence from the

Applicant of the kind anticipated by the Tribunal in *Waite Group*¹³ which would support a finding that the services are special measures under section 12. In particular, the Applicant has not filed evidence to show its Victorian family violence services relate to promoting or realising substantive equality for people who identify as female, or that the purpose of the service is to promote or provide more equal distribution of opportunity or access.¹⁴

25. In another case, such evidence may be available given the well-established view that the causes of family violence include “gender inequality and community attributes towards women”, and the additional barriers people experiencing family violence from diverse communities face.¹⁵

Sections 88 – Welfare Services

26. If section 12 does not apply, then the Tribunal must consider whether section 88 of the EOA applies to the Applicant’s services. Section 88(1) states:

A person may establish special services, benefits or facilities that meet the special needs of people with a particular attribute and may limit eligibility for such services to people with that attribute.

27. The Commission submits that it is open to the Tribunal to find that the Applicant’s FDVS amounts to a welfare service, being a specialist family violence service meeting the needs of women and children who are experiencing ‘gender based’ family violence in Victoria.

28. This approach is consistent with the Tribunal’s decisions in *Georgina Martina Inc*,¹⁶ and *Women’s Housing Association Ltd*,¹⁷ where the Tribunal found that section 88 applied to services provided to women fleeing family violence (including emergency accommodation, case management, advocacy and assistance).¹⁸ It is not necessary for every aspect of an organisation’s work to be directed at the special needs; the Tribunal has stated in this respect:¹⁹

Provided that eligibility is only limited to the special services or benefits which are provided to meet the special needs of the relevant group, the [section 88] exception may be relied upon.

29. If the Tribunal is not satisfied that the section 88 welfare services exception

¹³ *Waite Group (Human Rights)* [2016] VCAT 1258

¹⁴ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [47]-[49]; *Whitehorse Community Health Centre Exemption (Human Rights)* [2014] VCAT 1040 [25]

¹⁵ See State of Victoria, *Royal Commission into Family Violence: Summary and recommendations*, Parl Paper No 132 (2014–16) 2. Also see State of Victoria, *Royal Commission into Family Violence: Report and recommendations*, Vol V, Parl Paper No 132 (2014–16)

¹⁶ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384

¹⁷ Victoria Government Gazette, No. G48, 1 December 2016, 3000-3001

¹⁸ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [59]-[60].

¹⁹ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [59]

applies wholly to the Applicant's services, and consequently section 28 does not apply to employment for those services, then an exemption will be required. Given the large number of potential exemption application renewals in relation to family violence services (as outlined at Appendix A), the Commission submits that reasons for this conclusion in respect of section 88 of the EOA would be of benefit to improve clarity regarding when applying for an exemption is necessary.

Services provided most effectively by women

30. If section 88 is found to apply, the Tribunal should then go on to consider whether section 28(b) is met, namely, that the services can be provided most effectively by people of the same attribute as those accessing the service. In this case, that is people who are physically or physiologically female or whose gender identity is female.
31. The Commission submits that it is open to the Tribunal to find that section 28 applies to the Relevant Conduct, on the basis of the evidence tendered in the Applicant's affidavits dated 21 December 2016 from Erana Kaye-Berghan, and dated 3 February 2017 from Christie Pinto. Those affidavits provide evidence about the sensitive nature of the work being undertaken, the fear and shame experienced by women accessing the service, and the potential for re-traumatisation to those individuals if they were required to disclose their personal circumstances to a male worker (potentially resulting in people not seeking help at all).
32. This position is again consistent with *Georgina Martina* and *Women's Housing Association Limited*, where it was found that section 28 applied to the employment of women in "front line" positions of that organisation who are directly dealing with and assisting women "in the aftermath of violence".²⁰ In the context of family violence, it was accepted in those cases that the services to women could be provided "most effectively" by women.
33. The Commission notes that in similar applications, applicants often seek an exemption to employ women only in all positions within a family violence organisation, not just front line staff. However, the Tribunal was clear in *Georgina Martina* and *Women's Housing Association Limited* that roles within an organisation which are ancillary or peripheral to the provision of the section 88 services for special needs, do not have the benefit of the section 28 welfare

²⁰ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [69]; Victoria Government Gazette, No. G48, 1 December 2016, 3001. Also see *Equal Opportunity Act 2010 (Vic)* Section 28, Example 2: a support service for women who have experienced family violence may require that its counsellors are female.

service exception and an exemption is needed for that conduct.²¹

34. In this proceeding, and unlike its previous exemption application, the Applicant is limiting its application to those staff with direct contact with clients. It is therefore open to the Tribunal to find that no exemption is necessary as section 28 applies to render the Relevant Conduct lawful.²²

D. SHOULD AN EXEMPTION BE GRANTED?

35. If the Tribunal is not satisfied that section 28 (or any other exception) applies, it should proceed to consider the remaining factors in section 90 of the EOA as to whether the proposed exemption is a reasonable limitation on the right to equality in the Charter (section 90(b)) and all the relevant circumstances of the case (section 90(c)).
36. Where an exemption is to be granted, the Tribunal ought to reflect the protected attributes in its Charter analysis. For example, by considering whether the right to equality of people who are physically or physiologically male, or who identify as male, is reasonably limited (as opposed to simply referring to men). This makes clear that the Applicant will be entitled to refuse employment of a person who might be physically a woman but who identifies as male.

VEOHRE.

Victorian Equal Opportunity and Human Rights Commission
28 February 2017

²¹ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 [69]

²² *Equal Opportunity Act 2010* (Vic), s7

APPENDIX A – “WOMEN ONLY” EMPLOYMENT EXEMPTIONS DUE TO EXPIRE IN 2017

1. Women's Domestic Violence Crisis Service of Victoria (Victoria Government Gazette, No G8, 23 February 2012, 323)
2. Cooroonya Domestic Violence Services Inc. (Victoria Government Gazette, No G10, 8 March 2012, 429)
3. Women's Liberation Halfway House Domestic Violence Service (Victoria Government Gazette, No G9, 1 March 2012, 374)
4. Women's Health Goulburn North East (Victoria Government Gazette, No G12, 22 March 2012, 539-540)
5. Kara House Inc. (Victoria Government Gazette, No G14, 5 April 2012, 707-708)
6. Women's Information Support & Housing in the North (Victoria Government Gazette, No G26, 28 June 2012, 1372-73)
7. Women's Health in the North (Victoria Government Gazette, No G32, 9 August 2012, 1781-1782)
8. Women's Health Grampians Inc. (Victoria Government Gazette, No. G33, 16 August 2012, 1844-45)
9. InTouch Inc. (1876 G 34 23 August 2012 Victoria Government Gazette)
10. Women's Health West Inc. (Victoria Government Gazette, No G35, 30 August 2012, 1930)
11. Flat Out Inc (Victoria Government Gazette, No.G35, 30 August 2012, 1929)
12. Royal Women's Hospital – Sexual Assault Crisis Line (Victoria Government Gazette, No. G36, 6 September 2012, 2007-2010)
13. Quantum Support Services Inc. (Victoria Government Gazette, No. G36, 6 September 2012, 2007-2010)
14. Salvation Army Crossroads Network Mary Anderson Family Violence Service (Victorian Government Gazette, No. G36, 6 September 2012, 2007-2010)
15. Georgina Martina Inc. (Victoria Government Gazette, No. G38, 20 September 2012, 2084);
16. Domestic Violence Victoria Inc (Victoria Government Gazette, No. G38, 20 September 2012, 2084-2085);
17. Multicultural Centre for Women's Health (Victoria Government Gazette, No G40, 4 October 2012, 2188-2189)
18. Women's Health East Inc. (Victoria Government Gazette, No. G41, 11 October 2012, 2235);
19. Eastern Domestic Violence Service (Victoria Government Gazette, No.G43, 25 October 2012, 2392);
20. International Women's Development Agency (Victoria Government Gazette, No. G43, 25 October 2012, 2391);
21. McAuley Community Services for Women (Victoria Government Gazette, No.G47, 22 November 2012, 2641)