

## Anti - Discrimination List

### EXEMPTION

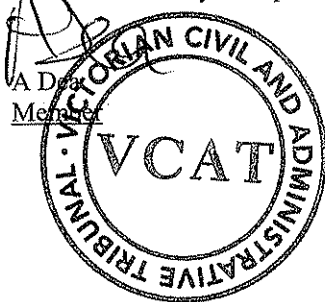
APPLICATION NO A64/2012

The Victorian Civil & Administrative Tribunal has considered an application pursuant to section 89 of the Equal Opportunity Act 2010 (the Act) by Georgina Martina Inc (the applicant). The application for exemption is to enable the applicant to advertise for and employ women only (the exempt conduct).

The Tribunal hereby grants an exemption from the operation of sections 16, 107 and 182 of the Act to enable the applicant to engage in the exempt conduct.

This exemption is to remain in force from 1 November 2012 until 31 October 2017.

Dated this 12<sup>th</sup> day of September 2012



# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### ANTI-DISCRIMINATION LIST

VCAT REFERENCE NO. A64/2012

### CATCHWORDS

Anti-Discrimination - exemption - application for an exemption from prohibition on discrimination on the basis of gender and age in respect to accommodation and services and exemption from prohibition on discrimination on the basis of gender in respect of employment - applicant operates a 24 hour crisis refuge and associated services - whether conduct is a special measure - whether any exceptions apply - Tribunal's power to grant exemptions - whether exemption a reasonable limitation on right to equality - *Equal Opportunity Act 2010* ss 7, 28, 60, 88, 89 and 90 - *Charter of Human Rights and Responsibilities Act 2006* ss 7, 8, 32 and 38.

APPLICANT	Georgina Martina Inc
INTERVENOR	Victorian Equal Opportunity & Human Rights Commission
WHERE HELD	Melbourne
BEFORE	A Dea, Member
HEARING TYPE	Hearing
DATE OF HEARING	3 September 2012
DATE OF ORDER	12 September 2012
CITATION	

### ORDER

1. This application for exemption in respect of advertising for and employing women only is granted.
2. The principal registrar must, as soon as possible, cause a notice of exemption in the form attached to this Order to be published in the Government Gazette.
3. The application for exemption is otherwise struck out under section 75(1)(a) of the *Victorian Civil & Administrative Tribunal Act 1998*.

A Dea  
Member



**APPEARANCES:**

For Applicant

Ms L Dunbar and Ms M Riley

For the Intervenor

Ms K. Leonard

## EXEMPTION

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## REASONS

- 1 The applicant operates as a high security, 24-hour women's refuge program, as part of the Supported Accommodation Assistance Program which is funded by the Department of Human Services. The applicant also provides related services to its clients. These services are provided to women, and in some cases, women accompanied by children, who are escaping family violence.
- 2 The applicant made an application to the Tribunal for an exemption from provisions of the *Equal Opportunity Act 2010* (EO Act) to allow it to employ only women in certain positions within its organisation.
- 3 The matter was listed for a directions hearing to allow for directions to be made for further material to be provided regarding whether the conduct is a special measure under the EO Act or whether an exception of the EO Act applies so that no exemption is required. A copy of the application was sent to the Victorian Equal Opportunity and Human Rights Commission (the Commission).
- 4 At the directions hearing, the applicant clarified that it was seeking an exemption to engage in other conduct also. That conduct is to employ women only, to offer services only to women and their children, to provide accommodation only to women and their children and to advertise these matters (the conduct).
- 5 On 29 May 2012, the Tribunal granted an interim exemption allowing the applicant to engage in the conduct while the application was being considered by the Tribunal. That exemption applies until 31 October 2012.
- 6 The Commission sought and was granted leave to intervene in the proceeding under section 159 of the EO Act. The applicant and the Commission provided submissions to the Tribunal. A further hearing was held on 3 September 2012 so the Tribunal could hear additional evidence.

### The law

- 7 The objectives of the EO Act include the elimination of discrimination to the greatest extent possible.<sup>1</sup> To achieve that objective, the EO Act prohibits certain forms of discrimination. Included in those prohibitions is discrimination on the basis of gender and age.<sup>2</sup>
- 8 The possible breaches of the EO Act raised by this application concern:
  - Discrimination in relation to employment - section 16;
  - Discrimination in relation to the provision of services – section 44;

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<sup>1</sup> See section 3(a) of the EO Act

<sup>2</sup> See section 6 which sets out the list of attributes on the basis of which discrimination is prohibited

- Discrimination in relation to accommodation – section 52;
  - Requests for discriminatory information that could be used to form the basis of discrimination against the person – section 107; and
  - Undertaking discriminatory advertising – section 182.
- 9 Section 89 of the EO Act says that the Tribunal may, by notice published in the Government Gazette, grant an exemption from any provisions of the EO Act in relation to a person or classes of persons or an activity or class of activities or any other provision in any other circumstances specified by the Tribunal. An exemption may be granted for any period of not more than five years. An exemption may be renewed from time to time for a period of not more than five years. Exemptions may be granted or renewed subject to any conditions the Tribunal considers fit.
- 10 When considering an application for an exemption such as this one, section 90 of the EO Act requires that 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.
- 11 If the conduct in question can be shown to be a special measure, as defined in section 12 of the EO Act, the conduct is not discriminatory. It follows that, as the conduct would not be in breach of the EO Act, an exemption would not be necessary.
- 12 Where the conduct does not fall within an exception and is not a special measure and there is no existing exemption in place, in determining whether to grant an exemption, the Tribunal must turn its mind to relevant parts of the *Charter of Human Rights and Responsibilities Act 2006* (Charter) and to all of the circumstances of the application.
- 13 The Charter arises in three particular ways in these matters.
- 14 First, as a consequence of section 32(1) of the Charter, the Tribunal must, so far as it is possible to do so consistently with the purposes of the provisions, interpret the relevant provisions of the EO Act, in a way that is compatible with human rights. The Tribunal is required to undertake the usual interpretative process to identify the meaning of the provisions and then consider whether their purposes can be interpreted compatibly with

human rights.<sup>3</sup> Section 32(1) seeks to ensure that Charter rights are kept in mind when a statute is construed but does not require the language of a provision to be strained to effect consistency with the Charter or allow for the statutory provision to be re-written.<sup>4</sup>

- 15 Secondly, section 90(b) requires the Charter right to equality to be considered. If the conduct in issue is found to limit a human right protected by the Charter, it is necessary to consider whether that limitation is justified by reference to section 7(2) of the Charter.
- 16 Thirdly, under section 38(1) of the Charter, as a public authority when it makes a decision about an exemption, the Tribunal must not fail to give proper consideration to a relevant human right, which might include rights other than the right to equality.<sup>5</sup>

### **The applicant's material and submissions**

- 17 The applicant provided material to the Tribunal in the form of its application, a short affidavit, submissions and supporting documentation and evidence at a hearing on 3 September 2012. That material may be summarised as follows.
- 18 As stated earlier, the applicant operates a high security, 24-hour women's refuge program. That program provides short-term, 24-hour crisis accommodation at two locations, for women escaping family violence. Clients are accommodated in the refuges for up to six weeks. Some of the women clients are accompanied by their children. From time to time those children include young males aged up to 16 or 17 years. Depending on the preference of the family and the availability of accommodation within the refuges, the young men may stay with their mothers or they may be accommodated nearby by other organisations.
- 19 The applicant's offices are located on site where the clients reside. Accordingly, the clients come into contact with all staff from time to time. The applicant engages male contractors from time to time and its practice is to forewarn clients about their presence in what is, at that time, the client's home.
- 20 The applicant has the following staff: a manager, a finance manager, nine case managers, two child support workers and two after hours case managers. The finance manager's role includes working with clients on budgeting and other finance related matters. The manager interacts with the clients due to the office being on site. In addition, she deals with any issues which may arise concerning the relationships between clients, case managers and other staff.

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<sup>3</sup> *Momcilovic v The Queen* [2011] HCA 34

<sup>4</sup> *Momcilovic*

<sup>5</sup> The Tribunal is a public authority for the purposes of making decisions regarding exemptions under the EO Act – see *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869

- 21 The applicant provided background information about refuges and why it seeks to offer services and accommodation to women (and their accompanying children) only and why it seeks to employ women only.
- 22 Refuges were first established in Australia in the 1970's because of a need to provide safe options to women and children trying to escape family violence. At that time, the violence was not recognised and treated as criminal activity and so options for women and children trying to leave those circumstances were limited.
- 23 Now there is a state wide network of refuges and family violence agencies which recognise that gendered services are essential. It is said that the understanding that different services are required for women and men was reached over decades of theory, research and practical experience. There are many organisations which provide services to men and other services for women. The applicant contends that, in order to tackle the complexities of family violence and effectively meet the needs of women and men, gender based services are required. Reference was made to services provided by community health services, Anglicare, Berry Street, Women's Health in the North and the Aboriginal Centre for Males.
- 24 The applicant's core task is to assist women in crisis who are escaping the imminent danger of family violence. The applicant referred to research which indicates that:
- The period immediately after separation is widely cited as the most dangerous for women leaving violent relationships;
  - The process of separation creates specific vulnerability to chronic and dangerous post-separation violence for some women and their children; and
  - In 2009-2010, 54% of all murder victims knew their offender either intimately or as a family member or friend.
- 25 Refuges provide a non-threatening environment where women are safe and can feel secure. It is critical that they feel comfortable when disclosing issues of a sensitive nature, including physical and sexual assault or child abuse. The presence of men, when male violence has been recent and traumatic, is regarded as inappropriate.
- 26 The applicant's clients are often isolated from their communities and families as a result of their life experiences or as a result of sustained violence from their partner. Financial abuse may contribute to women having no option but to remain in or return to violent situations. Accessing a refuge is the first step women take to move away from the power and control of a male partner. The applicant contends that, when women are escaping male violence, they ought not to be asked to turn to men for assistance.



27 For some women there are additional sensitivities to male presence. For example, veiled women may feel intimidated and threatened. Privacy issues and fear of authority are said to assume great significance for women who have survived trauma and torture. Many refugee women have spent time in internment camps where violence against women is said to be “epidemic”. Reference was made to research which estimates that the majority of refugee women and children have suffered repeated rape and sexual assault. Many refugee women are said to have post traumatic stress disorder.

28 The applicant said that the presence of men exacerbates the fears and fragile mental state of new arrivals, refugees, culturally and linguistically diverse women, women without permanent residency and women and children from the African and Asian communities who are in crisis. The applicant then said:

And for anyone, being accepted into refuge represents a critical and sad time in one’s life. Our experience tells us that the women’s and children’s recent experience of male-perpetrated violence leads to a kind of hyper-vigilance to the new and unfamiliar environment of the refuge. Security requirements mean they are isolated from family or friends whilst in refuge, heightening their sense of being alone. It would be insensitive and wrong for them to be confronted by men as they attempt to be accommodated in refuge.

29 The applicant’s position is that the safety of its clients is paramount and that, taking into account the material set out above, it ought to be entitled to accept women only and those women ought not to be required to come into contact with men in doing so.

30 The applicant says that, employing male workers in other roles (understood to be roles which have less direct contact with women in crisis) would seriously impede its ability to operate efficiently. The applicant says:

Staff in every role and at every level must understand how gender is a determinant of health through lived experience and not simply through theoretical education. Decisions must be made in this full awareness.

31 As the applicant operates a small service, all staff may be required, from time to time, to interact with the clients and respond to emergency situations. The crisis service is offered 24 hours a day and so some staff are required to work overnight. Day to day work involves discussing sensitive issues and trying to resolve them via a case plan framework. This involves asking women about their physical and psychological health, and may require staff to photograph injuries. Office staff who speak a language other than English are called upon to help communicate with women who speak that same language. The applicant says that it is entirely inappropriate for men to undertake that work particularly where, for some clients’, cultural traditions prevent women from speaking to men about personal issues.

- 32 The other services offered by the applicant include liaison with organisations and bodies including the Northern Centre Against Sexual Assault, Sexual Offences and Child Abuse Unit, the police, courts, housing providers, medical, legal, immigration and culturally specific services. In addition, the applicant sources counsellors that have the language of the clients, mental health workers, drug and alcohol services, the Department of Human Services, child protection units and the Department of Immigration. In order to provide these services, it is necessary to have the client's trust. The applicant says that it cannot expect women with recent experiences of male violence to trust an unknown man.
- 33 The applicant says that all staff are required from time to time to work with women in crisis and distress and who have had recent experiences of violence at the hands of men, so it is preferable for all staff to be women.
- 34 The applicant says:
- To reach refuge, women and children have not been afforded the protection by society that s their human right. Once in refuge, it should be just that – a safe place, perceived and experienced as that by those in our service. We believe their rights have a higher claim than the right of men to jobs in refuges. Equal Opportunity Exemptions are possible because some claims are more critical. If not for a women's refuge, it is hard to imagine where an exemption could apply.
- The Victorian Charter of Human Rights and Responsibilities sets out 20 fundamental rights, among them the right to life (9), the right to protection from torture and cruel, inhuman or degrading treatment (10), and the right to protection of families and children (17). An exemption to the Equal Opportunity Act that allows the refuge to continue its life saving work *contributes* to these fundamental rights. This exemption will certainly promote the objectives of the Act and will capture its spirit.
- 35 Approximately 5-10% of the applicant's time is spent working on community development and engagement, for example by speaking about the refuge and family violence at schools and other groups. It also participates in the work of Domestic Violence Victoria Inc, the peak body for organisations of its kind. It networks with other organisations including men's groups. It is a member of the Northern Integrated Family Violence Strategic Network whose work includes the development of a three year plan on prevention of violence in the northern area including by working with local councils.

### **The Commission's submissions**

- 36 The Commission's submissions included the following:
- The exception contained in section 60 of the EO Act applies to the applicant, as it provides high security immediate accommodation to

women and their children escaping imminent danger and that amounts to a welfare measure;

- The direct assistance to women and children who have experienced family violence and have immediate need for physical, financial, emotional and psychological support appears to be covered by section 88 and so discrimination in relation to the provision of those services to women and children constitutes lawful discrimination;
- In order to constitute a special measure, the rationale underlying the conduct must be linked to existing inequality experienced by people in the designated group or groups. Here, that requires an analysis to determine whether in goods and services and accommodation, there are practices which do or tend to exclude, disadvantage, restrict or result in an adverse effect on women and children or leave uncorrected the effects of past discrimination against them. It is important to look at the overall effect of current practices and to trace unequal outcomes to their source.

The evidence overwhelmingly demonstrates that women experience family violence to a far greater extent than men. Family violence, is therefore, a very clear indicator of gender inequality in Victoria and a measure taken to address family violence and assist women and children who are experiencing it, may have the purpose of promoting substantive equality for women. It is submitted that the conduct is consistent with the requirements of a special measure under section 12 of the EO Act; and

- Where the conduct is a special measure and falls within exception provisions, it is preferable to formally recognise that the conduct does not constitute discrimination under the EO Act rather than relying on it being lawful discrimination.

37 I will first consider whether an exemption is unnecessary because the conduct is a special measure.

### **Is the conduct a special measure?**

38 Section 12 of the EO Act says:

- (1) 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.
- (2) A person does not discriminate against another person by taking a special measure.
- (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.
- (4) A measure is taken for the purpose set out in subsection (1) if it is taken—
- (a) solely for that purpose; or
  - (b) for that purpose as well as other purposes.
- (5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.
- (6) A person who undertakes a special measure has the burden of proving that the measure is a special measure.
- (7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.
- 39 There is a significant body of Australian and international law regarding special measures and their nature.<sup>6</sup> The Objectives section of the EO Act and the part of the Explanatory Memorandum to the *Equal Opportunity Bill 2010*, which deals with clause 12, summarises much of it effectively. These matters have been discussed by me in recent Tribunal decisions and I take the same approach here.<sup>7</sup>
- 40 Following section 12(1) are three examples<sup>8</sup> which state as follows:
- 1. A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.
  - 2. A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to

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<sup>6</sup> In particular see *Gerhardy v Brown* [1985] HCA 11; 159 CLR 70; *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250; (2004) 140 FCR 149; *Lifestyle Communities (No 3)* [2009] VCAT 1869 which includes a detailed discussion of special measures provisions and Australian and international decisions in the context of the *Charter of Human Rights and Responsibilities Act 2006*; the *International Convention on the Elimination of All Forms of Racial Discrimination* and like conventions

<sup>7</sup> *The Ian Potter Museum of Art, The University of Melbourne* [2011] VCAT 2236; *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237; *Parks Victoria* [2011] VCAT 2238

<sup>8</sup> As a consequence of section 36A of the *Interpretation of Legislation Act 1984*, examples are not exhaustive and may extend, but not limit, the meaning of the provision.

enable Muslim women who cannot swim in mixed company to use the pool.

- 3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

- 41 In order to consider whether conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, it is necessary to identify the inequality which is being sought to be remedied and its cause and then consider how the proposed measure promotes or realises substantive equality.
- 42 In the examples above, the inequality arises from:
  - Aboriginal and Torres Strait Islander people not being equipped to obtain employment in the industry in question as a consequence of disadvantage in respect of education, access to employment and other matters;
  - Some women's inability to use a local swimming pool when it is open to men and women due to religious or cultural beliefs and practices; and
  - Existing counselling services not meeting the particular needs of gay men and lesbians who are victims of family violence.
- 43 The measures taken are designed to overcome or lessen the source of inequality in such a way that members of the group have opportunities or access which is equal to that of the wider community. This is needed because the application of the usual rules for each scenario has unequal results for members of the identified groups. To put it another way, the measures seek to bring the members of the group up to equal standing with the wider community or make their standing less unequal in terms of the opportunities before them or the services they can access.
- 44 I accept that overwhelmingly women make up the majority of victims of family violence and the majority of perpetrators of that violence are men. I also accept that the women who experience family violence require access to support and assistance of the type offered by the applicant. The services offered by the applicant responds to these needs.
- 45 These matters undoubtedly raise very serious gender related questions about the treatment of women by some men in our community. However, identification of inequality of this kind is not all that is required to show that the applicant's services are a special measure. The purpose of a special measure must be to promote or provide a more equal distribution of opportunity or access in order to remedy the identified inequality.
- 46 The counselling example set out above is most relevant here: the usual service which would on its face appear to offer assistance to all members of the community who are victims of family violence in the same way, does

not provide substantive equality because the specific needs of some members of that community are not met. To achieve substantive equality, a similar but more focussed service is created. In this way, the needs of those members of the community are met so that they may equally benefit from counselling.

- 47 On the evidence before me, the current application is not concerned with the creation of a service to meet the needs of women, which are not met by services currently available to men and women, in order to achieve equality between men and women. It is a response to the needs of some women, not for reasons based on inequality in the existing options available to all, but because they have a particular need arising from the violence of some men.
- 48 Unlike the counselling example, this is not a case where there are family violence services available to men and women which better serve the needs of men. Rather than adjusting or improving on an existing service for the purpose of promoting or realising equality for women, on the evidence this and other refuge services were created as a new initiative because there were no other services available.
- 49 For these reasons, I am not satisfied that it can be properly characterised as a special measure.

#### **Does an exception apply?**

- 50 In issue in this case is whether the following exceptions may arise:
- The section 60 exception which allows a person to discriminate in relation to accommodation in a hostel or similar institution which is established wholly or mainly for the welfare of persons, relevantly here, of a particular sex or age;
  - The section 88 exception which allows for discrimination in relation to the establishment of services to meet the special needs of people with a particular attribute and the limiting of eligibility for those services to people with that attribute; and
  - The section 28 exception which allows for employment to be limited to persons with a particular attribute where the employer provides services which are a special measure or for special needs (as discussed in sections 12 and 88) and where the services can be provided most effectively by people with that attribute.
- 51 Where an exception applies, any discrimination which is engaged in will be lawful.<sup>9</sup> In the case of section 88, there is no discrimination in the establishment of the services or the limiting of eligibility of those services.<sup>10</sup>

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<sup>9</sup> Section 13 EO Act

<sup>10</sup> Section 88(2)

52 Given the objectives of the EO Act and the need to interpret legislation consistently with the Charter, the interpretation given to and application of the exception provisions ought to be approached with care. The construction that would promote the elimination of discrimination to the greatest extent possible, is to be preferred.<sup>11</sup> An interpretation which is, so far as is possible without straining the meaning or re-writing the provision, consistent with Charter rights is also preferable. The legislature has included the exceptions as a means of limiting the effect of the broad prohibitions in the EO Act in certain circumstances. However, the words of the exception provisions ought to be read and applied in a limited rather than expansive way. Evidence proving the factual matters which underlie the exceptions must be produced.

53 I will consider each of the exception provisions separately.

#### *Accommodation*

54 Section 60 of the EO Act says:

A person may refuse to provide accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief if the other person is not of that sex, age, race or religious belief.

55 I am satisfied that the evidence before the Tribunal shows that the refuges were established for the welfare of women (sometimes accompanied by their children) fleeing violence who are in need of a secure place to live. As a consequence, I am satisfied that the accommodation provided to women and their children by the applicant falls within the exception contained in section 60 and, accordingly, it is lawful to discriminate against males over the age of 18 years in relation to the provision of accommodation.

#### *Special needs services*

56 Section 88 of the EO Act says:

- (1) 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 the particular attribute.

#### **Example**

A community organisation establishes a support group for single fathers in response to research that shows that single fathers have a need for targeted counselling and support.

- (2) A person does not discriminate by establishing special services, benefits or facilities, or by limiting eligibility for such services in accordance with subsection (1).
- (3) Without limiting the generality of subsection (1)—

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<sup>11</sup> Section 35 *Interpretation of Legislation Act 1984*

- (a) a person may grant a woman any right, privilege or benefit in relation to pregnancy or childbirth;
  - (b) a person may provide, or restrict the offering of, holiday tours to people of a particular age or age group.
- 57 Section 88 requires the special services, benefits or facilities to be identified and for them to be shown to meet the special needs of the relevant group identified by attribute. If the identified special services, benefits or facilities meet special needs, it is lawful to limit eligibility to them to persons with that attribute.
- 58 I have described above the services offered by the applicant. The evidence shows that the majority of services offered by the applicant are directed to the immediate needs of women who are fleeing family violence. Those services include emergency accommodation and case management designed to assist with locating housing and dealing with an array of issues including legal and practical matters. I accept that those services may be described as special in so far as they are offered within a very specific context. I also accept the proposition that the services in fact meet the needs of the applicant's clients which, at times, include providing services to children who accompany their mothers.
- 59 The applicant's networking, community engagement and education related activities might be said to be undertaken to benefit the applicant's clients but they also benefit the wider community of women and men as their focus is on reducing incidents and consequences of violence. In my view, in order for an organisation such as the applicant to be entitled to limit eligibility to services or benefits to women only, it is not necessary for every aspect of the organisation's work to be directed to their special needs. 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 exception may be relied upon. There is no evidence that the applicant wishes to limit eligibility beyond the special services discussed.
- 60 I am satisfied that, in respect of the services and benefits provided by the applicant to women fleeing family violence, section 88 applies so that in providing those services and benefits and limiting eligibility for them to women, the applicant does not discriminate. As a consequence, no exemption is required for that part of the conduct.

### *Employment*

- 61 Section 28 says:

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.

### Examples

- 1 A service that provides in-home support for people who have a mental illness may require that a person who applies for a job as a support worker has previously used mental health services.
  - 2 A support service for women who have experienced family violence may require that its counsellors are female.
- 62 I have discussed the question of special measures above. I am not satisfied that section 28(a)(i) arises here.
- 63 For the reasons given above, I am satisfied that the services provided to the applicant's women clients fall within section 88. I say this mindful that the language used in sections 88 and 28 is not uniform. For example, while section 88 refers to special services that meet the special needs of people, section 28 refers to a service for special needs under section 88. Given the clear intention that section 28 refers to a section 88 service, I place no significance on the fact that the service is described slightly differently.
- 64 The second matter raised by section 28 is whether the service for special needs "*can be provided most effectively by people with that attribute.*" It must be noted that in this case, unlike in the second example which follows section 28, the application deals with all roles in the organisation rather than just counsellors or other front line staff.
- 65 As set out earlier, the applicant relies upon its experience to say that many of its clients feel intimidated and threatened by men. I accept that, for some women, there are cultural or religious reasons why they are unable and unwilling to receive services from men who are unknown and unrelated to them. The evidence shows that all staff members are likely to come into contact with the clients and that, as the women and children are in a crisis situation, the applicant believes it is most appropriate that they are not required to interact with men in respect of the services offered.
- 66 Arguably, the available material does not sufficiently prove that the services *can be provided most effectively* by women rather than men. While the arguments put by the applicant and the Commission appear fair and reasonable, they are not supported by objective evidence about the effectiveness of service delivery by women as compared with men. That evidence could take the form of a survey which shows that clients would not wish to have any interactions with any men irrespective of their role. Evidence that men had been employed and had been less effective in their roles than women might be sufficient.
- 67 I am guided by the examples which follow section 28. In the first the suggested criteria is not just that the potential employee has experienced mental health issues but has used mental health services. It would appear that is important as the support role might include referring clients to appropriate services and assisting them to effectively use those services. In

the second example, the role to be filled is as a counsellor. Given the nature of counselling and the issues for women who have experienced family violence, the capacity to establish trust and empathy are likely to be important.

- 68 While giving weight to the experience of the applicant organisation, it is not necessarily self evident that a male finance officer could not most effectively undertake the work required to contribute to the whole of the service offered by the applicant and, where appropriate, discuss budgeting issues with clients.
- 69 The front line roles whose focus is assisting women who seek refuge in a state of distress and on accessing supports and services in the aftermath of violence would most likely fall within section 28. However, the material before me does not allow me to conclude that *all* roles within the applicant organisation can be provided most effectively by women and so I am not persuaded that section 28 would operate with the effect that the employment of women only throughout the organisation could not be found to involve prohibited discrimination.
- 70 In another case, evidence may be available such that the exception is proven to clearly apply to all roles.

#### *Conclusions on exceptions*

- 71 The subject matter of this application is three fold: accommodation, services and employment.
- 72 I am satisfied that the accommodation provided to women and their children by the applicant falls within the exception contained in section 60. Accordingly, it is lawful to discriminate against men in relation to the provision of accommodation and no exemption would be required for that aspect of the conduct.
- 73 Similarly, as I am satisfied that section 88 applies to the services provided to women by the applicant, there is no discrimination by the applicant in limiting eligibility for those services to women. It follows that no exemption would be required in respect of that matter.
- 74 I am not satisfied that the evidence before the Tribunal shows that the section 28 exception applies to all roles within the applicant organisation – it may apply to many, particularly the front line roles, but necessarily to all.
- 75 The consequence of this last finding is that an exemption would be required in respect of the employment of women only, seeking gender specific information from job applicants and advertising in respect of employment.
- 76 I will make an order striking out the application in respect of accommodation and services under section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1988* as, to the extent that no exemption is required, the application is misconceived.

### **Should an exemption be granted?**

- 77 The plain words of section 89 of the EO Act indicate that the purpose of the section is to empower the Tribunal to exercise a broad discretion to grant, renew or revoke exemptions from provisions of the EO Act. The Tribunal may apply conditions to the exemption and determine its term. Section 90 requires that the Tribunal take into account the listed matters when exercising the discretion. Section 90(b) directs the Tribunal to one of the human rights created by the Charter. As section 90(c) is open-ended, the Tribunal may also take into account any other human rights which arise in the circumstances. In this way, the purpose of section 89 can be interpreted compatibly with human rights. Under section 90(c) it is also appropriate that the Tribunal have regard to the objectives of the EO Act and any other relevant circumstances surrounding the application.

### *The applicant's material*

- 78 I accept the proposition that, for women who have experienced trauma at the hands of men, it is preferable that they are not required to seek assistance from an unknown man, particularly in a time of crisis. I accept that the needs of those women and children would include having access to female workers who can sensitively take their history, discuss personal issues and assist in directing them to other appropriate services.
- 79 The applicant relies upon research which it says establishes that it is accepted that services regarding family violence are best provided in women only and men only frameworks. I accept that the stated position may be accepted given that refuges and other services for men have been operating in this manner for more than 30 years, apparently unchallenged.
- 80 I also accept the evidence about the practical arrangements for the applicant's operations including in relation to the small number of staff, the 24 hour nature of the operations and the fact that the applicant's offices are located within the refuge. These practical matters, in particular, persuade me that it is preferable for the applicant to be granted an exemption to allow it to employ only women in all roles. The interests of the women seeking assistance from the applicant must be paramount and, if it is the case that from time to time office and other staff have incidental contact with the clients or are required to be in attendance, I accept the proposition that some of those clients will be intimidated or threatened by those staff being men. This is the approach the Tribunal has been taken in respect of the applicant and other similar organisations for many years. It is grounded in the experience of applicant organisations and common sense.
- 81 I have explained above that the evidence before me does not establish that the exception in section 28 applies in respect of employment of women only in all roles. In considering whether an exemption ought to be granted in respect of all roles, as permitted by sections 89 and 90 of the EO Act, I have taken a broader approach that takes account of the evidence about the

operations of the applicant and also its representatives' anecdotal experiences. While proof of the basis for exemption applications is always required,<sup>12</sup> consideration of all of the circumstances of the application under section 90(c) allows for the experience and expertise of the applicant to be given weight.

### *The Charter*

82 The Charter right to equality is found in section 8 and says:

#### Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

83 The Charter defines discrimination to mean “*discrimination (within the meaning of the Equal Opportunity Act 2010) on the basis of an attribute set out in section 6 of that Act.*”

84 Human rights should be construed in the broadest possible way.<sup>13</sup> The right to equality contained in section 8 is important and fundamental to human rights. Both national and international laws seek to eliminate discrimination on a range of grounds including gender discrimination.<sup>14</sup>

85 Section 90(b) directs me to consider whether the granting of an exemption which will have that effect is a reasonable limitation on the right to equality. In my view, the effect of the words used in section 90(b) is to import into the EO Act the test contained in section 7(2) of the Charter when it comes to determining the reasonableness of any limit placed on the right to equality.

86 It is clear that, on granting an exemption, men's right to equality in respect to employment by the applicant will be limited. That conclusion requires me to consider whether that limit is justified by having regard to section 7(2) of the Charter. That section says:

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<sup>12</sup> *Lifestyle Communities Pty Ltd (No 3)*

<sup>13</sup> *Re Application under the Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381 per Warren CJ at paragraph [80]

<sup>14</sup> For a discussion of the right, see *Lifestyles Communities Ltd (No 3)* at paragraphs [109] and [110]

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

87 For the same reasons as expressed above in relation to whether an exemption should be granted, I am satisfied that, in circumstances where the services being offered are designed to meet the needs of women fleeing violence and seeking a place of safety and support, it is justifiable to limit men's right to equality in respect of employment, to ensure that those needs are appropriately met. Given that the applicant is a small organisation, I consider the conduct to be proportionate. There is no less restrictive means which can achieve the same outcome of women being provided with services at a time when they are in distress and likely to prefer to be assisted by women.

88 Taking all of the available material together, in my view it is plain that it is justified in a free and democratic society based on human dignity, equality and freedom to limit men's right to equality in these circumstances.

### *Conclusion*

89 For these reasons, I will grant an exemption allowing the applicant to advertise for and employ women only in all roles. The exemption will be for a period of five years commencing on the expiry of the interim exemption, being 1 November 2012.

90 Of course, the applicant is not, by the granting of the exemption, required to exclude men from all employment – rather it gives the applicant the option to so limit employment where it regards it as appropriate. It may be that the applicant finds that there is a role which a man can effectively undertake without any concern on the part of the applicant's clients or its operations. If that were the case, the best candidate, male or female, ought to be sought and employed.

91 I note that the applicant referred to obtaining an exemption in respect of volunteers and students. As a consequence of the definition of employee in the EO Act, the prohibition on discrimination in employment does not apply to unpaid workers or volunteers and so no exemption is required. If

students are paid, the exemption to be granted would allow the applicant to employ women students only.

