

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
HUMAN RIGHTS DIVISION  
ANTI-DISCRIMINATION LIST**

**Doutta Galla Community Health – exemption application (A204/2012)**

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**Re: Exemption application under section 89 of the *Equal Opportunity Act 2010***

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**SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND  
HUMAN RIGHTS COMMISSION**

**A. INTRODUCTION**

1. By email dated 23 October 2012 and confirmed by email dated 7 November 2012, the Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought leave to intervene in this matter pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**).<sup>1</sup>
2. The Commission does not oppose the granting of an exemption by the Tribunal to Douтта Galla Community Health (**the Applicant**). Rather, the Commission seeks at this stage of proceedings to provide assistance to the Tribunal in the form of general submissions on the following:
  - (a) The proper exercise of the power to authorise an exemption under sections 89 and 90 of the EOA 2010;<sup>2</sup>
  - (b) The application of section 90 of the EOA 2010 to this matter and information which is still required from the Applicant in order for the Tribunal to fully consider the criteria in section 90; and

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<sup>1</sup> Section 159 provides: the Commission may, with the leave of the court or a tribunal, intervene in and be joined as a party to proceedings in the court or tribunal that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.

<sup>2</sup> Noting the Tribunal's obligations to act as a public authority under section 38 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

- (c) Other key considerations that the Commission considers that the Tribunal may wish to take into account when making a decision about whether to grant the exemption application.
3. The Commission seeks to make written submissions in this matter and, if it would assist the Tribunal, brief oral submissions.

## **B. BACKGROUND**

4. The Applicant lodged an application for an exemption under section 89 of the EOA 2010 dated 4 October 2012.
5. The Applicant has sought an exemption from the EOA 2010 to allow it to recruit and employ a male orderly to work at an after hours medical centre run proposed to be run by the Applicant (the **Proposed Measures**).
6. The Commission has assumed for the purpose of these submissions that the Applicant also seeks an exemption in relation to discriminatory advertising under section 182 of the EOA 2010 and seeking information that could be used to discriminate under section 107 of the EOA 2010. Such exemptions would be necessary to enable the Applicant to state in job advertisements that orderly position is for men only and to ask job applicants to disclose their sex.
7. The Applicant made the following points in support of its exemption application:
- (a) The current medical practice is female staff dominated and they would like to bring a gender balance to the practice through the employment of a male orderly;
  - (b) It believes that employing a male orderly would be a culturally sensitive option for its clientele, who will include men from culturally and linguistically diverse backgrounds;
  - (c) The presence of a male staff member is preferred due to unpredictable clients attending the clinic, who may be aggressive and violent; and
  - (d) The presence of a male staff member will prevent escalation of problems and harm to female staff members by clients who may be “drug seeking” or

“marginalised”, that is, experiencing drug, alcohol, mental health issues and homelessness.

8. The Tribunal sought further information from the Applicant by way of letter dated 16 October 2012, including:
  - (a) the number of current positions within the organisation and the current proportion of men and women;
  - (b) details regarding the proportion of patients/clients who are male or female; and
  - (c) any other supporting information.
9. The Applicant provided the information sought by the Tribunal in an affidavit dated 23 October 2012. In that affidavit, the Applicant provided the following information in support of its application:
  - (a) The Applicant employs 330 staff, of which 74 are male and 256 are female.
  - (b) The after hours clinic will consist of three staff members, namely, a female receptionist and a female general practitioner, and a male orderly.
  - (c) Currently the Applicant has 2,237 female clients and 1,804 male clients.
  - (d) However, the Applicant cannot provide information about the breakdown of the after hours clinic’s clients by gender, as it has not yet opened.
10. The Tribunal forwarded this information to the Commission under cover of a notice of directions hearing dated 29 October 2012 and received by the Commission on 5 November 2012.
11. In advising the Tribunal that it intended to seek leave to intervene on 23 October 2012, the Commission noted that it considered further information was required before the Tribunal could be satisfied the criteria in section 90 of the EOA 2010. The Commission suggested the following questions could be asked of the Applicant:
  - (a) What type of medical services are provided at the medical centre and in particular, are they crisis or emergency services limited to particular disadvantaged groups of people?

- (b) How will the employment of a male orderly (as opposed to a male GP) assist in providing “culturally appropriate” services?
- (c) What evidence is there to support the need for such assistance (i.e. the assistance at the clinic of a male orderly as opposed to a female) such as in the form of client feedback or a survey?
- (d) What duties will the orderly perform (for example, a job description) and how or why can the duties be performed most effectively by a man?
- (e) What evidence is there to suggest that staff members or other clients are at risk of violent, aggressive behaviour by drug or alcohol affected clients?
- (f) Is there any evidence of previous incidents of aggression or violence by clients?
- (g) What practices or procedures are already in place to protect staff from violent, aggressive and drug or alcohol affected clients?

12. The Tribunal forwarded these questions to the Applicant by email on 5 November 2012.

### **C. THE EXEMPTION POWER UNDER THE EOA 2010**

13. Section 89 of 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.

14. Section 90 of EOA 2010 outlines the factors to be considered by the Tribunal when deciding exemption applications. Section 90 states:

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.

15. The Commission recognises that even if parts or all of the proposed conduct for which an exemption is sought found to fall within one of the exceptions under the EOA 2010, or constitute a special measure, there may still be policy reasons - such as in the interests of clarity and certainty – for the Tribunal to nevertheless consider the exemption application.
16. The Commission submits that the Tribunal must 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 (the **Charter**).
17. As Justice Bell stated in *Lifestyle Communities (No. 3) (Anti-Discrimination) (Lifestyle Communities)* in relation to the exemption power under section 83 of the Equal Opportunity Act 1995:
- [o]n my reading of the exemption provisions and in the context of the purposes of *the Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights.<sup>3</sup>
18. The Commission submits that this approach is still correct for the application of the exemption power under sections 89 and 90 of the EOA 2010, and is codified in the requirement in section 90(b) to specifically consider whether the exemption would be a reasonable limitation on the right to equality in the Charter.
19. The Commission is concerned that the application makes assumptions about the need for female staff to be protected and the capability of women to protect themselves or others. The Commission submits that choosing a male applicant over a female applicant for any position based on these kinds of assumptions would constitute unlawful discrimination under the EOA 2010 and is exactly the kind of act which the

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<sup>3</sup> [2009] VCAT 1869 at [30]

EOA 2010 aims to address. As Justice Bell warned in *Lifestyle Communities*, “if exemptions are granted too liberally... profoundly important values expressed in the legislation could be undermined”.<sup>4</sup>

20. The Tribunal must therefore consider whether exercising its power by granting an exemption in these circumstances, without further information or justification, would:

- (a) be exercising its discretion in a way to defeat the purpose and objectives of the EOA 2010; or
- (b) constitute an unreasonable limitation on the right to equality under the Charter.

#### **D. APPLYING SECTION 90 TO THIS APPLICATION**

21. The Commission submits that current application lacks evidence to support the granting of an exemption and that further information is required. To assist the Tribunal, the Commission sets out below each section of the section 90 test and the information the Commission considers could be sought.

##### **(a) Subsection 90(a): is the exemption unnecessary?**

22. In accordance with section 90 of the EOA 2010, the first question the Tribunal must consider when examining this application is whether an exemption is unnecessary under section 90(a), either because an exception or exemption applies to the conduct,<sup>5</sup> or because it does not amount to prohibited discrimination.<sup>6</sup>

23. The Commission notes that the Applicant has not sought to rely on any exceptions in their application. However, given the Tribunal is required to consider whether any exceptions apply in applying the criteria in section 90 of the EOA 2010 to the application, the Commission submits that it may be useful to give the Applicant an opportunity to consider whether it does in fact wish to rely on an exception and provide evidence in support.

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<sup>4</sup> At [32]

<sup>5</sup> EOA 2010, ss90(a)(i)

<sup>6</sup> EOA 2010, ss90(a)(ii)

24. The Commission considers there are three exceptions that may be relevant to the Tribunal's deliberations:

- (a) Section 26(2)(d) of the EOA 2010, relating to the genuine occupational requirements of employment whereby the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex;
- (b) Section 28 of the EOA 2010, relating to welfare services; and
- (c) Section 86 of the EOA 2010, relating to the protection of health, safety and property of staff or the public.

25. However, as noted above, further information is required from the Applicant to ensure the Tribunal can fully consider these exceptions (if it wishes). The Commission will outline below what information it considers is required to address each possible exception for the Tribunal's consideration.

26. Ultimately, the Commission understands that it is a matter for the Tribunal to decide whether it requires further evidence and whether it will consider in detail specific exceptions. As such, the Commission will not seek that the information from the Applicant unless the Tribunal is of the view that it will assist.

**(i) Exception - Genuine Occupational Requirements**

27. The first exception, which may be relevant to the application, is section 26, which provides that an employer may limit the offering of employment to people of one sex if it is a genuine occupational requirement to be a person of a particular sex.

28. Subsection 26(2) provides that without limiting the generality of subsection (1), it is a genuine occupational requirement to be a person of a particular sex in relation to employment if:

- (a) the employment can be performed only by a person having particular physical characteristics (other than strength or stamina) that are possessed only by people of that sex;<sup>7</sup>

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<sup>7</sup> EOA 2010, subsection 26(a)

- (b) the employment needs to be performed by a person of that sex to preserve decency or privacy because it involves the fitting of clothing for people of that sex;<sup>8</sup> or
- (c) the employment includes the conduct of searches of the clothing or bodies of people of that sex;<sup>9</sup> or
- (d) the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex;<sup>10</sup> or
- (e) the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress.<sup>11</sup>

29. Notwithstanding that the Applicant has not sought to rely on the section 26, the Commission considers on the information available that section 26(2)(d) may be applicable to the position of an orderly. For example, it may be that the orderly's duties could include cleaning of toilets, assisting clients whilst they are using toilet facilities such as taking urine samples.

30. However, the Commission submits that the Applicant has not provided any information about the duties of the proposed orderly position for the Tribunal to either consider or be satisfied that the occupational requirements fall within the general type of activity that is relevant to section 26 of the EOA 2010.

31. If the Tribunal wants to consider the application of this exception further, the Commission suggests that the Applicant:

- (a) provide the Tribunal with an explanation of the duties of the orderly position, including a position description;
- (b) specifically address whether the employee will be required to enter men's lavatories (or women's lavatories) in the after hours clinic whilst they are in use and what proportion of the job these duties comprise; and

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<sup>8</sup> EOA 2010, subsection 26(b)

<sup>9</sup> EOA 2010, subsection 26(c)

<sup>10</sup> EOA 2010, subsection 26(d)

<sup>11</sup> EOA 2010, subsection 26(e)

- (c) provide an explanation as to why or how it is a genuine occupational requirement that these duties must be performed by a man as opposed to a woman (if it wishes to rely on this exception).

32. The Commission submits that a distinction must be made between a preference for a particular sex (which does not give rise to an exception to undertake otherwise unlawful discrimination), and a genuine occupational requirement. A preference to employ a person of a particular sex does not, without a genuine occupational requirement, invoke the exception. The relevant question is whether an individual, irrespective of their sex, is capable of performing the genuine occupational requirements of the role.

**(iii) Exception - Welfare Services**

33. The second exception of relevance to this application is section 28 of the EOA 2010, which provides that:

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.

34. A special measure under section 12(1) of EOA 2010 is any action taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute. The action must also be:

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

35. A service for special needs under section 88 of the EOA 2010 relates to the establishment of services, benefits or facilities that meet the special needs of people with a particular attribute, and where eligibility for such services, benefits or facilities are restricted to people with the relevant attribute.

36. In relation to whether the services can be provided most effectively by people with the relevant attribute, the Explanatory Memorandum to the EOA 2010 provides:

The circumstances in which a service “can be provided most effectively” by a person with the same attribute as the target group of the services is not defined in the clause, as there are a range of reasons why services may be provided most effectively by a person from the same group as the target group. For example it may be that only a person from the target group may have insight into the particular issues faced by the target group, or it may not be culturally appropriate to have anyone other than a member from the target group providing the services, or the target group may have a fear or mistrust of anyone who is not from the target group because of their experience.<sup>12</sup>

37. The Commission submits that there is insufficient information in the application to determine whether the services of the proposed after-hours medical centre will constitute a special measure or a service for special needs, or whether the services provided would be most effectively provided by a man. None of the criteria in section 28, 88 or 12 have been addressed in the evidence.

38. The Commission notes that the Applicant has not claimed that the services provided by the after hours medical centre will be a special measure, nor have they claimed the section 88 exception in relation to the services provided by the after hours medical centre.

39. However, the application indicates the clinic may be providing medical services to marginalised clients and more information is therefore required to determine whether the services of the medical centre will constitute a service for special needs.

40. In particular, more information about whether the services are specifically directed towards or limited to male clients with drugs, alcohol, homelessness and mental health concerns, which may comprise services for special needs specifically requiring a male orderly, or whether the services will be general medical services.

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<sup>12</sup> Explanatory Memorandum, *Equal Opportunity Bill 2010* (Vic), page 25

41. If the Applicant intends to target its services towards male clients affected by drugs, alcohol, homelessness and mental health problems, the Tribunal may also wish to give the Applicant an opportunity to explain why it seeks to restrict employment to a male orderly position, rather than a male GP who would directly provide the health services.
42. The Commission submits that it is not necessary for every aspect of an organisation's work to be directed to the special needs for the services to fall within section 88.<sup>13</sup> For example, an organisation may employ an accountant or cleaner who do not perform duties directly relevant to the services provided by the organisation. However, it does not follow that because an organisation provides the special needs services to people with a particular attribute, that all employees of the organisation providing the service must also have the attribute. This was the view of Tribunal Member Dea in the exemption application by *Georgina Martina Inc (Anti-Discrimination) (Georgina Martina)*.<sup>14</sup>
43. Rather, the Commission submits that if an applicant is seeking to rely on section 28 it must provide evidence to show how a person with the relevant attribute can perform the position in question most effectively. Practically, the Commission submits that this means that there is an inherent connection or nexus with the role in question and the delivery of the services to people with the same attribute. For example, in *Georgina Martina* the front line staff of a women's emergency refuge were found to fall within the section 28 exception, but not the finance officer. Roles within an organisation, which are ancillary or peripheral to the provision of the section 88 services for special needs, should not, in the Commission's view, have the benefit of the section 28 welfare service exception.
44. Therefore, if the Tribunal decides to consider these issues further, the Commission submits that the following information may help to guide the Tribunal in considering whether the section 28 exception can be satisfied:

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<sup>13</sup> *Georgina Martina Inc (Anti-Discrimination)* [2012] VCAT 1384 (12 September 2012) at [59]

<sup>14</sup> At [69]

- (a) The precise nature and purpose of the services provided at the after hours clinic to determine whether the services are a special measure or service for special needs, and in particular, whether the services are crisis or emergency services limited to particular groups of people with an attribute (i.e. men);
- (b) How the employment of a male orderly will assist in providing culturally appropriate or culturally sensitive services to those groups of people, as opposed to a male GP;
- (c) Whether there is any evidence to support the need for the assistance at the clinic of a male orderly, such as a client feedback or a survey;<sup>15</sup> and
- (d) What duties the orderly will perform (for example, a job description) and how or why a man can perform the duties most effectively.

**(ii) Exception – Health, Safety and Property**

45. The third exception of relevance to the application is section 86.

46. Section 86 of the EOA 2010 allows a person to discriminate on the basis of disability or physical features if the discrimination is necessary:

- (a) To protect the health and safety of any person (including the person being discriminated against) or of the public generally; or
- (b) To protect the property of any person (including the person being discriminated against) or any public property.

47. The application states that the exemption is sought in part because presence of a male employee would prevent escalation of problems and potential harm to female staff given the nature of the clients who will be attending the after hours clinic. The exemption application therefore appears to relate to the protection of health and safety of the staff and public.

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<sup>15</sup> In the decision of *Georgina Martina*, Tribunal Member Dea noted at paragraph 66 that objective evidence was required about the effectiveness of service delivery by one group with an attribute over another, in that case, women over men. Ms Dea noted that evidence could take the form of a survey that shows clients would not wish to interact with any men irrespective of their role.

48. However, the Applicant has not provided any evidence to support its claim that there is a risk of problems and potential harm to female staff.
49. Further, the relevant attribute in the exemption application is sex, not disability or physical features (defined to mean a person's height, weight, size or other bodily characteristics). The Applicant has not provided information as to whether disability or physical features, may also be relevant.
50. If the Tribunal wishes to consider this issue in further detail, the Commission submits that further information is required to establish whether the relevant attribute extends to disability or physical features, and whether there is evidence of a real or threatened risk to health and safety of any person or property at the after hours medical centre.
51. The Commission suggests the following information would therefore be relevant:
- (a) What evidence is there to suggest that staff members or other clients are at risk of violent, aggressive behaviour by drug or alcohol affected clients?
  - (b) Is there any evidence of previous incidents of aggression or violence by clients?
  - (c) What practices or procedures are already in place to protect staff from violent, aggressive and drug or alcohol affected clients?

**(b) Section 90(a)(ii): Does the conduct constitute prohibited discrimination?**

52. The second issue that the Tribunal must consider in deciding whether it is unnecessary to grant an exemption under section 90(a) is whether the conduct amounts to prohibited discrimination.
53. On the information available, the Commission submits that the proposed conduct amounts to prohibited discrimination against female job applicants under section 16 of the EOA 2010. It may also amount to discrimination under section 18 against existing female orderlies who may wish to apply for a transfer to the after hours medical clinic. Further, advertising for and recruiting a male to fill the orderly position would be a breach of section 182, the offence of discriminatory advertising, and section 107, the prohibition against requesting discriminatory information (i.e. asking for an applicant's sex).

54. The Tribunal must also consider whether the conduct does not amount to prohibited discrimination by virtue of section 12 of the EOA 2010 relating to special measures. If an action constitutes a special measure under section 12, it does not constitute unlawful discrimination. As noted above, there is no evidence that the Proposed Measures would constitute special measures. However, the Tribunal may wish to seek further evidence on these issues as outlined above.

**(c) Subsection 90(b): Is the proposed exemption a reasonable limitation on the right to equality?**

55. The next question that the Tribunal must consider is whether the proposed exemption is a reasonable limit on the right to equality under subsection 90(b). Every application for an exemption will engage the right to recognition and equality before the law set out in section 8 of the Charter, in particular subsection (3), which provides:

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.

56. In accordance with *BAE Systems Australia Limited (Anti-Discrimination Exemption)*,<sup>16</sup> has been accepted by the Tribunal that the reasonable limitations test in the EOA 2010 mirrors section 7(2) of the Charter. Section 7(2) provides:

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.

57. An exemption would constitute a limit that is ‘under law’ but it must also be shown by the Applicant to be ‘justified in a free and democratic society based on human dignity, equality and freedom’, taking into account the listed factors. The *Lifestyle*

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<sup>16</sup> [2012] VCAT 349 (28 March 2012) at [77]

*Communities* decision provides a useful discussion of how to apply section 7(2) of the Charter when considering whether to grant an exemption. That decision provides the following guidance:

- (a) The nature of the right and the importance of the purpose of the limitation are ‘foundational’.<sup>17</sup>
- (b) When looking at the importance of the purpose of the limitation ‘the focus is on the underlying values and interests of the purpose, which are considered against the value system of the Charter. The purpose must accord with the values of the Charter and be sufficiently important to warrant the limitation.’<sup>18</sup>
- (c) ‘When the values protected by the rights have been identified and the purpose of the limitation is seen to be important enough to warrant some limitation on those rights, the proportionality of the limitation can be assessed according to the other factors.’<sup>19</sup>
- (d) Finally ‘limitations should impair human rights as little as possible and will not be proportionate and justified if they go further.’<sup>20</sup>

58. The nature of the equality right in section 8 of the Charter is discussed in *Lifestyle Communities*. An extensive quote from this decision is useful because this right is central to the decision that the Tribunal is required to make:

The 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. Equality means substantive equality, not just formal equality. Where differentiation is a measure for redressing disadvantage, it is not discrimination because it furthers equality

...

To treat somebody differently because of an attribute, such as gender, age or political or religious belief, is to make stereotypical assumptions about them personally and their behaviour. When a difference in treatment is not rationally based on individual worth and merit, but on the basis of

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<sup>17</sup> At [327].

<sup>18</sup> At [329].

<sup>19</sup> At [327].

<sup>20</sup> At [332].

such an attribute, the individual is not treated because of who they are. They are treated because of the stigma attached to the attribute ...<sup>21</sup>

59. The *importance of the purpose of the limitation* must then be considered. Any limits on human rights must be justifiable in the context of a free and democratic society based on human dignity, *equality* and freedom (s 7(2) of the Charter). Because the main right that would be limited by the proposed exemption is the equality right, which reflects one of the very qualities that is said to define the society we aspire to live in, the factors weighing in favour of the exemption will have to be of cardinal importance to that same society (one that is based on human dignity, equality and freedom).
60. It is up to the Applicant to *demonstrate* the importance of the purpose of the limitation to the Tribunal. This is generally done by putting evidence of its importance before the Tribunal.<sup>22</sup> The section imposes a 'stringent standard of justification which can be satisfied only when there is a pressing and substantial need for limitation'.<sup>23</sup> The Commission submits that, in accordance with the Tribunal's obligations as a public authority, the Tribunal should give serious consideration to the purpose of the limitation on the equality right, to ensure that any limit imposed by the proposed exemption is warranted having regard to the fundamental nature of the right to equality. The Commission also notes that unlike contested matters, the Tribunal does this in the absence of those whose equality rights are restricted being represented in exemption proceedings.
61. If it is demonstrated to the Tribunal that the purpose of the limitation is important enough to override the right to equality then the proportionality of the limit must be considered by looking at, amongst other things, the factors set out in paragraphs (c), (d) and (e) of section 7(2) of the Charter.
62. The next question to consider is whether there are any less restrictive means that are reasonably available to the applicant that would serve the same purpose as the limitation proposed.

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<sup>21</sup> At [107], [109]

<sup>22</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 at [147]

<sup>23</sup> *Lifestyle Communities* at [324]

63. The Tribunal should take into account the evidence provided by the Applicant in determining whether each proposed measure is a reasonable limitation on the right to equality.

#### **E. CONCLUSIONS**

64. The Commission submits that there is insufficient evidence currently before the Tribunal to determine whether the Proposed Measures fall within the exceptions required to be considered under section 90(a), in particular the exceptions under sections 26, 28 and 88 of the EOA 2010, or constitute a special measure for the purpose of section 12 of the EOA 2010. Therefore, the Tribunal may wish to seek further information from the Applicant in the forms outlined in the Commission's submissions, in order to fully analyse the application.

65. Further, the Commission considers that the Tribunal should focus its attention on whether the application for exemption made by the Applicant is a reasonable limitation on the right to equality set out in the Charter in accordance with subsection 90(b) of the EOA 2010.

66. The Commission submits that, in making this assessment, the Tribunal should be guided by the 'reasonable limitation' test set out in subsection 7(2) of the Charter, and by the reasoning of Justice Bell in *Lifestyle Communities* in relation to the application of subsection 7(2) to exemption applications made under the EOA 2010.

67. The Commission notes that in determining whether to grant the exemption to the Applicant, the Tribunal must consider all the relevant circumstances of the case in accordance with subsection 90(c) of the EOA 2010.

68. Finally, the Commission submits that the Tribunal should consider whether granting an exemption would be in accordance with the purpose and objectives of the EOA 2010.

**12 November 2012**

**Jennifer Jones**

**Legal Officer**

**Victorian Equal Opportunity and Human Rights Commission**