

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SEX DISCRIMINATION ACT 1984 (CTH), s 44(1)  
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, under section 44(1) of the *Sex Discrimination Act 1984* (Cth)(SDA), the Australian Human Rights Commission grants an exemption to Aboriginal and Torres Strait Islander Corporation Family Violence Prevention and Legal Service (the Applicant) from the operation of section 14 of the SDA.

The exemption is granted for a period of five years from the date of this instrument and is subject to the conditions outlined below.

**SUMMARY**

The Applicant is an Aboriginal community controlled organisation that provides legal and other related services to Indigenous persons and non-Indigenous parents and carers of Indigenous children who have experienced family violence and/or sexual assault. The Applicant is also involved in policy and law reform activities.

The Applicant requested that the Commission grant an exemption from the SDA to it to allow it to advertise for and employ women only in a range of positions.

The Commission has granted an exemption to the Applicant from section 14 of the SDA to allow the Applicant to employ women only in positions where a substantial component of the job involves:

- provision of legal advice to clients of the Applicant; or
- provision of counselling services to female clients of the Applicant; or
- attendance in interviews or at court with clients of the Applicant; or
- provision of education or training to women only about family violence and/or sexual assault; or
- attendance at women only forums, meetings or other events.

The exemption is granted for a period of five years and is subject to the condition that the Applicant keeps records for each year that the exemption is in effect of:

- the gender of the clients to whom it provides legal services;
- the number of women only education or training sessions that it delivers;
- the number of women only meetings, forums or other like events that its employees attend; and
- any recruitment process that it undertakes that is restricted to women only.

**BACKGROUND**

The Applicant is an Aboriginal community controlled organisation that provides legal advice and representation, counselling, information and referral services and

community legal education to Indigenous persons and non-Indigenous parents and carers of Indigenous children who have experienced family violence and/or sexual assault. The Applicant does not provide services to perpetrators of violence. The Applicant is also engaged in policy and law reform activities related to its areas of operation.

The Applicant is governed by a board of directors. The head office of the Applicant is in Melbourne and it operates regional offices in the Barwon South West, Gippsland and Mildura regions. In the financial year ending 30 June 2012 the Applicant had 28 employees.

### **The Application**

The Applicant seeks an exemption from sections 14 and 86 of the SDA to allow it to advertise for and employ women only in the following types of positions:

- Chief Executive Officer
- Lawyer
- Paralegal support worker
- Family violence and sexual assault counsellor
- Indigenous community education and community development officer
- Community engagement and community legal education workshop program project officers
- Policy development and advocacy employees

The Applicant states that it is anticipated that the exemption will apply to approximately 22 positions.

The Applicant advises that whilst its services are not restricted to women only, the vast majority of its clients are women. The Applicant advises that in the financial year 2008-2009, 72% of its clients were women. In the financial year 2009-2010, 90% of the Applicant's clients were women.

In an affidavit dated 1 April 2010 provided in support of the Application, Ms Shelley Burchfield, Policy officer and Principal Solicitor from 2004 until 2008 states 'while not a women specific service, FVPLS Victoria is the key ATSI organisation providing legal and associated supports to ATSI victims/survivors of family violence and sexual assault in this State, the vast majority of whom are women and children. There is no dedicated legal service for ATSI women in Victoria'.

Ms Rebecca Boreham, Solicitor at the Applicant's Mildura regional office, provided an affidavit dated 31 March 2010 in support of the Application. Both Ms Boreham and Ms Burchfield state that the experience of family violence or sexual assault is a sensitive matter and that, in their opinion, many of their clients would not disclose details of their experience to male solicitors.

Ms Boreham states that it has often been her experience that while receiving instructions from a female client, the client discloses details of sexual assaults and

domestic violence which they have not previously disclosed to their current partner, doctor or to police.

In an affidavit dated 31 March 2010 Ms Antoinette Braybrook, the Applicant's Chief Executive Officer, states:

ATSI women are unlikely to fully disclose detail about violence and/or sexual assaults against them by men to male solicitors. FVPLS Victoria must have female solicitors employed to ensure that women feel comfortable to disclose these crimes against them. Often the nature of the legal process means that the offending needs to be described in some detail and the outcome of some cases relies on full disclosure. Organisations referring women who are victims/survivors of family violence or sexual assault will give women choices as to referral. Referrals are far less likely to an organisation where assistance from a female solicitor is not available.

Both Ms Boreham and Ms Burchfield state that their male clients have not expressed concerns about being assisted by a female solicitor. Ms Boreham states that she is aware of male clients who have experienced sexual abuse who have requested access to a male counsellor. Ms Boreham notes that the Applicant currently outsources counselling services and the male client was referred to a male counsellor.

Ms Burchfield and Ms Boreham note that many of the other services that operate in the area of prevention of family violence and sexual assault are staffed entirely by women. Ms Burchfield and Ms Boreham state that 'this indicates acceptance amongst other community organisations working in this area that women who are victims of family violence/sexual assault prefer to be supported by women.'

Ms Braybrook is of the view that for the same reason that the Applicant needs to employ female lawyers, it also needs to employ female paralegal support workers. Ms Braybrook states that paralegal support workers work closely with lawyers and often support clients in legal interviews and during court proceedings.

Ms Braybrook advises that whilst the Applicant has previously employed counsellors, this service is currently outsourced. Ms Braybrook states that if the Applicant was to again employ counsellors, in order to provide effective services to its client group, at least one counsellor would need to be a woman. Ms Burchfield states that she is aware that all of the clients that she has assisted at FVPLS have requested female counsellors.

Ms Braybrook states that the position of CEO of the Applicant is best performed by an Aboriginal or Torres Strait Islander woman. Ms Braybrook states that many women make initial contact with the service via the CEO and that a male CEO would not be likely to receive these direct approaches for services. Ms Braybrook also states that she is of the opinion that if the CEO of the Applicant was a man, other women's services would be less open to engagement with FVPLS.

In relation to policy development and law reform positions, Ms Braybrook states that some key reference groups relating to policy development are open to Aboriginal and Torres Strait Islander women only.

In relation to community development positions, Ms Braybrook states that individuals employed in these positions are involved in 'Sisters Day Out' and 'Sisters Serenity

Retreats' which are women only forums for wellbeing and provision of community legal education.

### **Submissions received by the Commission**

The Applicant's request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the exemption. The Commission received three submissions in response to the Application.

The Anti-Discrimination Board of New South Wales (ADB) did not express a view on whether the Commission should grant the exemption but noted that it had granted a number of similar exemptions under the *Anti-Discrimination Act 1977 (NSW) (ADA)*. The ADB noted the factors that it takes into account when determining whether to grant an exemption which are found in section 126 of the ADA.

The Equal Opportunity Commission of Western Australia (EOCWA) advised that it had no objection in principle to the Commission granting the exemption. However, the EOCWA noted that the Applicant had extended the range of roles in relation to which it sought an exemption compared to the application that it made to the Victorian Civil and Administrative Tribunal (VCAT). EOCWA stated that the Applicant had not provided any explanation in its application as to why a broader range of roles should be exempted. EOCWA further stated that in particular, it is not apparent why the position of CEO should be exempt.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) did not express a view on whether the Commission should grant an exemption to FVPLS. VEOHRC outlined the approach to exemption applications taken by VCAT.

### **Further information from FVPLS**

In March 2011 the Commission requested further information from the Applicant and in November 2011 the Applicant provided this information.

The Applicant provided position descriptions for each position and advice on why each position would be best performed by a woman.

### **RELEVANT LAW**

#### *The SDA*

The Commission may grant an exemption from the operation of a provision of Division 1 or 2 of the SDA.<sup>1</sup> An exemption may be granted subject to terms and conditions specified in the instrument and may be expressed to apply only in particular circumstances or in relation to particular activities as are specified in the instrument.<sup>2</sup> Exemptions are to be granted for a specified period not exceeding five years.<sup>3</sup> It is not unlawful for a person to act in accordance with an exemption.<sup>4</sup>

It is unlawful to discriminate on the ground of sex in determining who should be offered employment.<sup>5</sup> Section 14 of the SDA is located in Division 1 of Part 2 of the SDA.

It is an offence for a person to publish or display an advertisement or notice that indicates, or could reasonably be understood as indicating, an intention to do an act that is unlawful by reason of a provision of Part 2 of the SDA.<sup>6</sup> This provision is in

Part IV of the SDA. The Commission is not empowered to grant exemptions from Part IV of the SDA. However, given that the Commission has granted an exemption to the Applicant from section 14 of the SDA, it would no longer constitute unlawful discrimination for the Applicant to indicate an intention to employ women only in particular positions involving: provision of legal advice to clients of the Applicant, provision of counselling services to clients of the Applicant, attendance in interviews or at court with clients of the Applicant, provision of education or training to women only about family violence and/or sexual assault or attendance at women only forums, meetings or other events.

### *Relevant jurisprudence*

There has been very little judicial consideration of section 44 of the SDA. In *Broken Hill Associated Smelters Pty Limited v HREOC*,<sup>7</sup> the Administrative Appeals Tribunal held that it should consider whether it was 'reasonable' to grant the relevant exemption.

All State and Territory anti-discrimination acts contain provisions under which persons may apply for a temporary exemption in relation to particular conduct that would otherwise amount to unlawful discrimination. In all jurisdictions except for Western Australia, the relevant anti-discrimination instrument sets out the matters that a decision maker may take into account in deciding whether to grant an exemption. These include factors such as: whether the exemption is necessary, the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination and the public, business, social or other community impact of granting the proposed exemption.

## **REASONS FOR DECISION**

The Commission grants an exemption to the Applicant from section 14 of the SDA to allow the Applicant to employ women only in positions where a substantial component of the role involves:

- provision of legal advice to female clients of the Applicant; or
- provision of counselling services to clients of the Applicant; or
- attendance in interviews or at court with clients of the Applicant; or
- provision of education or training to women only about family violence and/or sexual assault; or
- attendance at women only forums, meetings or other events.

The exemption is granted for a period of five years and is subject to the condition that the Applicant keeps records for each year that the exemption is in effect of:

- the gender of the clients to whom it provides legal services;
- the number of women only education or training sessions that it delivers;
- the number of women only meetings, forums or other like events that its employees attend; and

- any recruitment process that it undertakes that is restricted to women only.

For the last several years, the majority of the Applicants' clients have been women. The Applicant provides a copy of a publication produced by the Victorian Department of Justice which found that the majority of Indigenous victims of family violence were women.<sup>8</sup> The Applicant does not provide services to perpetrators of domestic and family violence. Given this, it seems likely that the majority of the Applicant's clients will continue to be women.

The Commission acknowledges that the experience of sexual assault or family violence is highly traumatic and accepts the submissions of the lawyers employed by the Applicant that many women who have experienced sexual assault or family violence wish to be provided with legal services by women and would not seek assistance from male lawyers.

The Commission considers that it is in accordance with the objects of the SDA and the Convention on the Elimination of Discrimination Against Women that services that are predominantly provided to women who have experienced sexual assault or family violence are provided in a manner that is sensitive and which empowers women to take action in relation to the violence that they have experienced.

The Commission also notes the important role of community education in ending the cycle of family violence. The Commission notes that the Applicant held a number of community events in the 2011-2012 financial year. The Commission accepts that the Applicant requires some female employees to deliver training at women only events.

The Commission accepts that there are forums and meetings in the sector in which the Applicant operates that are restricted to women only. The Commission accepts that Applicant must have some employees who are able to attend such events.

This exemption does not necessarily allow the Applicant to restrict all community engagement and training (Community Legal Education Coordinator, Community Engagement Officer, Workshop Project Officer) and policy (Policy and Development Unit Manager, Policy Development Officer) roles to women only. Rather, it allows the Applicant to employ women only in those roles where a substantial part of the role involves the provision of education or training to women only about family violence and/or sexual assault or requires attendance at women only forums, meetings or other events. This means that before restricting employment in a role to women only, the Applicant must consider the particular requirements of each position.

The Commission received no submissions that recommended that the Commission refuse the Application. The Commission notes that the effect of its decision will be that suitably qualified men will be excluded from obtaining employment with the Applicant in a range of positions. The Commission notes that the Applicant is a relatively small employer and is satisfied that any discrimination that may be experienced by men is outweighed by the benefit to the Applicant's female clients and the women to whom the Applicant provides education and training.

It does not appear that this decision will impact on the Applicant's male clients. It appears that the principal way in which males interact with the Applicant is by receipt of legal advice. The Commission accepts the submission of the Applicant that no male client has expressed concerns about being provided with legal services by a female lawyer. The Commission also accepts the submission of the Applicant that if

the Applicant were to resume providing counselling services, where a male client requests access to a male counsellor, this could be accommodated by referring the client to an external counsellor.

Balancing the discriminatory impact of the exemption against the benefit that will accrue to women who receive services from the Applicant, for the reasons outlined above, the Commission is satisfied that it is reasonable to grant an exemption to the Applicant in the terms outlined above.

## **APPLICATION FOR REVIEW**

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 6<sup>th</sup> day of August 2013.

Signed by the President, Professor Gillian Triggs, on behalf of the Commission.

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<sup>1</sup> Section 44(1) SDA.

<sup>2</sup> Section 44(3)(a) and (b) SDA.

<sup>3</sup> Section 44(3)(c) SDA.

<sup>4</sup> Section 47 SDA.

<sup>5</sup> Section 14 SDA.

<sup>6</sup> Section 86 SDA.

<sup>7</sup> (1990) EOC 92-302 [58].

<sup>8</sup> Victorian Family Violence Database Volume 4: Nine Year Trend Analysis (1999-2008). The updated version of this publication indicates that the majority of adult victims of family violence are women and the majority of Aboriginal and Torres Strait Islander persons presenting at Victorian hospitals with human intent injuries were women. Measuring Family Violence in Victoria. Victorian Family Violence Database volume 5. Eleven Year Trend Analysis 1999-2010 pages 76 and 164.