

# Attachment 1

## Background Information

### Background information: necessity for and reasonableness of the exemption

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#### **Power to grant the exemption**

Section 44 of the *Sex Discrimination Act 1984* (Cth) (the **Act**) gives power to the Australian Human Rights Commission (**Commission**) to grant exemptions. This section states that:

*The Commission may, on application by:*

*(a) a person, on that person's own behalf or on behalf of that person and another person or other persons;*

*(b) 2 or more persons, on their own behalf or on behalf of themselves and another person or other persons; or*

*(c) a person or persons included in a class of persons on behalf of the persons included in that class of persons;*

*by instrument in writing, grant to the person, persons or class of persons, as the case may be, an exemption from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e), or paragraph 41B(1)(b), as specified in the instrument.*

#### **The exemption is necessary – there is at least an arguable case of discrimination and no permanent exceptions apply**

It is necessary for the Commission to grant the exemption sought in this case as:

- (a) there is clearly an arguable case of discrimination; and
- (b) there are no statutory exceptions under the Act which apply to the conduct which is the subject of this application.

By advertising for and employing only women to fill certain roles, it is clearly arguable that the Applicant would be engaging in unlawful discrimination based on sex in employment, in breach of sections 14 and 86 of the Act.

See for example: *Crisis Support Services Inc* (12 January 2007) where advertising and employing men only for particular roles was found to arguably give rise to unlawful sex discrimination.

**The exemption will promote the objectives of the Act and is consistent with the spirit of the scheme of the Act**

The objectives of the Act are:

- (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and
- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
- (c) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and
- (d) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- (e) to promote recognition and acceptance within the community the principle of the equality of men and women.

In the second reading speech it was stated by Mr Young that in preparing the exception provisions, the Government was particularly concerned to make clear the importance of the need for a proper balance between various often competing rights.

The exemption sought is consistent with the spirit of the Act and would advance the objectives of the Act, particularly in terms of promoting recognition and acceptance of everyone's right to equality of opportunity.

The Victorian Law Reform Commission states in its 1994 report *'Equality Before the Law: Justice for Women'* that

*'Of all the identifiable groups of women whose concerns were presented to them, Aboriginal and Torres Strait Islander women are least well served by the legal system.'*

The conduct which is the subject of this application is designed to remedy this inequality by redressing the serious disadvantage that ATSI people (and particularly women) are under in relation to accessing the legal system. The responsibilities of people in the positions which are the subject of this application are to try to redress that disadvantage by conducting the following activities:

- to provide targeted and culturally sensitive legal services to ATSI women who are subjected to family violence and sexual assault,

- to institute culturally sensitive programs to increase awareness about and reduce the level of family violence and sexual assault within ATSI communities,
- to relate to community groups and to ATSI women in the broader community, to support them and to encourage them to access legal and other services through the Applicant, and
- to engage in policy development and education among the broader community, in government and community reference groups, to redress the disadvantages faced by these groups.

ATSI women are the most legally disadvantaged group in Australia and specific services that meet their needs are required to address this inequality. The *Consultative Draft National Indigenous Law and Justice Strategy* released by the Commonwealth Attorney General's Department in 2007 states:

*'Lack of attention to their distinct needs may marginalise Indigenous women, and entrenches inequalities in service delivery. Indigenous women need to be targeted, culturally sensitive and more work needs to be done on assessing unmet need.'*

In Victoria, there are no legal services that are dedicated specifically to assist Indigenous women. The granting of the exemption sought will enable the Applicant to promote the objectives of the Act by redressing the disadvantage that ATSI women are under in relation to the legal system.

#### **It is in the public interest to grant the exemption**

There is a broad public interest to grant the exemption sought.

There is a demand for it by ATSI people who have suffered from family violence. The vast majority of victims of family violence in ATSI communities are women. The vast majority of the Applicant's clients are women and these clients have expressed a preference for obtaining services from the Applicant through other women. As the Victorian Civil and Administrative Tribunal has previously accepted in relation to an exemption application granted for similar purposes under the *Equal Opportunity Act 1995 (Vic)*, *'it is unlikely that a woman who has been the victim of such violence at the hands of men will want to discuss her case with men.'* – per McKenzie DP in *Central Highlands Community Legal Centre Inc (exemption)* [2003] VCAT 1687 (12 May 2003).

The issues which the Applicant assists its clients to deal with, including family violence and sexual assault, involve personal sensitivities which other women are best placed to understand and relate to. Clients have expressed a preference for dealing with women workers in the roles which are the subject of this application. In many instances it is extremely difficult for ATSI women to disclose issues relating to family violence and

sexual assault. ATSI women will often not disclose or be open about these issues, except when they are speaking to a woman. For these reasons, the services provided by workers in these roles could not be provided, either at all, or as effectively, by male workers. While male workers can carry out these roles, and training and experience in working with ATSI women can go some way towards assisting them to better understand, relate to and earn the trust of clients, employing women in these roles will ensure better services are provided, consistent with the need and preferences of the Applicant's clients.

The public interest is clearly served by ensuring the most disadvantaged members of our community in this area are provided with access to the services and support they need, offered by the workers these individuals have expressed a preference for working with.

There is not only a demand for the provision of services by the Applicant through women workers, there is also a clear need for it. In Victoria, there are no legal services dedicated specifically to assisting ATSI women. The Applicant fills a critical need for such services, which is not otherwise met by any other organisation.

The public interest is further served by having women employed by the Applicant, as these staff provide positive role models to clients and the wider Indigenous and non-Indigenous communities.

Ultimately, from a broad perspective, taking steps to address and reduce the amount of family violence and sexual assault in one of the communities in which it is most prevalent, is of clear benefit to the broader community – not only in terms of ensuring the reduction of violence overall within the community, but also the corresponding reduction in legal costs and drain on legal, policing, health care, welfare payment and accommodation services which this will help to achieve. There is support for this by members of the ATSI community. There is support from members of reference groups and other organisations which work with the Applicant. There has been no objection voiced by members of the broader community.

#### **The exemption will confer a benefit upon ATSI women**

The proposed exemption will confer a benefit on ATSI women and children who are victims of domestic violence.

It is without doubt that the ATSI group have been severely disadvantaged members of the Australian population, and ATSI women and children suffer significantly higher rates of domestic violence than the non-ATSI population.

The proposed exemption will allow the Applicant to recruit the most appropriate personnel to serve the special needs of ATSI women and children.

**The exemption is necessary in order to achieve human rights and fundamental freedoms**

As set out above, ATSI women and children face difficulties in accessing the legal system, due to legal aid organisations in Victoria being predominantly non-ATSI or predominantly male. The proposed exemption will allow equality in access to the legal system for ATSI women and children by providing services in a culturally sensitive manner and by removing the current impediments to ATSI women seeking legal assistance.

**Specific persons, corporations or organisations that might be affected by the outcome of the Application**

The key group likely to be affected by the outcome of this Application, if successful, are men who may be excluded from available positions. It is submitted however that this exclusion is reasonable and necessary to achieve the aims of an accessible legal and counselling service for ATSI women. It is currently anticipated that this exemption will apply to approximately 22 positions.

**Date: 6 December 2010**