

**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
SEX DISCRIMINATION ACT 1984 (Cth)
Section 44(1)**

NOTICE OF REJECTION OF APPLICATION FOR EXEMPTION

By this instrument, the Human Rights and Equal Opportunity Commission ('the Commission') declines to grant to the Lourdes Hill College ('the College') a temporary exemption pursuant to s 44(1) of the *Sex Discrimination Act (Cth) 1984* ('the SDA').

1. BACKGROUND

- 1.1 The College applied, by letter to the President of the Commission dated 17 January 2005, for an exemption to the SDA 'to advertise for a female Dean of Boarding, Assistant Dean of Boarding and Boarding Supervisors' to be employed at the College. The College is described in the application as a 'Catholic, all girls' secondary Boarding School under the care of the Good Samaritan Sisters'.
- 1.2 The application purports to seek an exemption under s 30 of the SDA. However, s 30 provides for a permanent exemption (discussed further below) and the Commission has no relevant power in relation to it. The Commission's power to grant a temporary exemption is granted by s 44 of the SDA and it is accordingly under that section that the application has been considered. Section 44 of the SDA provides as follows:

44 Commission may grant exemptions

- (1) 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.

....

- (3) An exemption, or further exemption, from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e) or paragraph 41B(1)(b):
- (a) may be granted subject to such terms and conditions as are specified in the instrument;
 - (b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and
 - (c) shall be granted for a specified period not exceeding 5 years.

- 1.3 The reasons given by the College for seeking the exemption are set out as follows in the application:

- 1) All supervisors' living quarters are within the confines of the girls' living areas.
- 2) This all girls' environment of shower, toilet and room facilities is totally unsuitable for a male visitor or male staff member. The girls being typical adolescents, comfortable in the all girls' environment can be known to go from room to bathroom in just a towel. When male visitors come to the boarding school, they meet the girls in a separate interview room close to the office of the Dean of Boarding and removed from the living quarters of the girls.

- 3) The college attempts to bring some 'at home' feelings to the regimentation of a boarding school by allowing the girls to visit the dining hall at certain times in their pyjamas and also study in their rooms. This requires constant supervision.
- 4) There are times when the Dean or Assistance Dean in the absence of the Dean may have to search the girls or the girls' rooms in situations of major theft or drugs.
- 5) Boarding Supervisors are required to enter the 'girls only' shower and toilet blocks regularly.
- 6) Boarding supervisors may have to enter the living quarters of the boarders who may or may not be in a state of undress. They have to be able to attend to a student who is sick in the middle of the night. As often happens, the boarding supervisor may have to attend to the physical, bodily needs of the student such as sponging down her feverish body without assistance. Here at the college, the male staff and I at interviews, at induction and at other times often reinforce the unwritten law that a male member of staff is never alone with a student. That has not been imposed but **requested by** the male staff. In the situation of boarding supervisors this unwritten request would not be practical.
- 7) The current financial loss of our Boarding school renders it not financially possible for the college to build suitable separate quarters.
- 8) A consultant has been employed by the College Board to review whether or not this college should continue the Boarding School and so a decision has been taken to expend no further finances on extra boarding provisions until the outcome of this review is known.

1.4 The application goes on to state:

The Boarding School has never had male supervisors but has followed the inclusive philosophy when there has been a male chef and a male Recreation Officer. Neither of these positions require the person to visit the girls' living quarters. When the male Property Manager or Maintenance Staff visit the living quarters of the girls, there are college procedures for ensuring the privacy of the girls and themselves.

1.5 The following further information was provided by the College to staff of the Commission, to assist the Commission in assessing the application:

- The living quarters of the Dean of Boarding ('Dean'), the Assistant Dean of Boarding ('Assistant Dean') and the Boarding Supervisor ('Supervisor') are all within the confines of the living area in which the students reside.
- While the role of the Supervisor is more actively involved in the day-to-day supervision of the students, the Dean and Assistant Dean may be required to fill in for the Supervisor and their duties include doing all things required of the Supervisor.
- All three positions have responsibility for care of the students when they may be in a state of undress.

1.6 The letterhead of the College notes that the College is a company limited by guarantee. No other information about the College's activities is provided with the application.

2. FINDINGS ON MATERIAL QUESTIONS OF FACT

2.1 Based on the evidence referred to in paragraphs 1.3 – 1.6 above, the Commission makes the following findings on material questions of fact in relation to this application:

- 2.1.1 The College is a girls-only secondary Catholic boarding school. As such, students reside at the school in a designated living area.
- 2.1.2 The positions of Dean, Assistant Dean and Supervisor have duties involving care of the students in the students' living area.
- 2.1.3 In particular, the duties of the Dean, Assistant Dean and Supervisor require, amongst other things, the following:
 - entry into all areas of the students' living area, including bedrooms and bathrooms;
 - supervising students in the living area while in states of undress; and

- attending the physical needs of sick students.
- 2.1.4 Those persons holding the positions of Dean, Assistant Dean and Supervisor have living quarters within the confines of the students' living area.
- 2.1.5 The building of separate living quarters, outside the confines of the student's living area, for staff in the positions of Dean, Assistant Dean and Supervisor would impose a financial burden on the College. The College is currently making a financial loss and is reviewing its operations.
- 2.1.6 The College is a company limited by guarantee.

3. CLARIFICATION OF THE NATURE OF THE EXEMPTION APPLICATION

- 3.1 The application states that an exemption is sought to allow advertisement of 'employment of females only' in the relevant positions. The power of the Commission to grant exemptions does not, however, apply directly to the publication or display of advertisements. Rather, the Commission has the power to grant exemptions in relation to substantive acts of discrimination, in relation to which advertisement would otherwise be an offence.
- 3.2 Section 86(1) of the SDA provides as follows in relation to advertisements:
- A person shall not 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 II.
- Penalty:
- (a) in the case of a natural person—\$1,000; or
 - (b) in the case of a body corporate—\$5,000.
- 3.3 In the present case, an advertisement of the type that the College seeks to publish (for 'females only') would seem to indicate an intention to do an act that is unlawful by reason of s 14 of the SDA. Section 14(1)(b) of the SDA makes it unlawful to discriminate against a person on the ground of their sex in determining who should be offered employment.
- 3.4 The Commission has therefore considered whether it should grant the College an exemption under s 44(1) from the operation of s 14 of the SDA.

4. REASONS FOR DECLINING TO GRANT AN EXEMPTION

Introduction

- 4.1 The Commission has developed criteria and procedures to guide the Commission in considering applications for temporary exemption ('the Guidelines'). The Guidelines are published on the Commission's website at www.humanrights.gov.au/legal/sda_exemptions.html. The discussion below follows the structure of the Guidelines.
- 4.2 Amongst other things, the Guidelines state (in section 2):
- The Commission will have regard to the following criteria in exercising its discretion:
1. The applicant must show at least an arguable case that the circumstances or activities might constitute discrimination to which the SD Act applies. If the circumstances are not at least arguably discriminatory within the terms of the [SDA], then there is no need for the Commission to grant an exemption. In considering this question, the Commission will have regard to:
 - Whether the circumstances are within the jurisdiction of the [SDA] (see s.9);
 - Whether any of the permanent exemptions apply (see s.13; ss.30 to 43);
 - Whether the circumstances can be brought within the special measures provision (see s. 7D).
 2. The exemption must be appropriate in light of the objects and scheme of the [SDA]. In considering this question, the Commission will have regard to:
 - Whether the circumstances, while not falling precisely within any of the permanent exemptions to the [SDA], bear a close resemblance to any of those exemptions so as

to be within the spirit or broad scheme of those exemptions. Where an exemption is sought for reasons wholly unrelated to the objects of the [SDA] (such as to gain commercial advantage), an exemption will not be appropriate.

- The particular circumstances of the case; and
- The reasonableness of the exemption sought - the Commission will weigh up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption.

First Criterion: 'Arguable Case of Discrimination'

- 4.3 For the reasons set out below, the Commission is of the view that the application made by the College does not demonstrate an arguable case that the proposed activity constitutes discrimination to which the SDA applies.
- 4.4 As set out above, the Commission regards the application as seeking an exemption from the operation of s 14 of the SDA to allow it to employ females only in the positions of Dean, Assistant Dean and Supervisor.
- 4.5 The Commission notes the following permanent exemptions are provided for in ss 30 and 35 of the SDA and are relevant to the present application:

30 Certain discrimination on ground of sex not unlawful

- (1) Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an employee, commission agent or contract worker, being a position in relation to which it is a genuine occupational qualification to be a person of the opposite sex to the sex of the other person.
- (2) Without limiting the generality of subsection (1), it is a genuine occupational qualification, in relation to a particular position, to be a person of a particular sex (in this subsection referred to as the relevant sex) if:
- (a) the duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of the opposite sex to the relevant sex;
 - (b) the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex;
 - (c) the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;
 - (d) the duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex;
 - (e) the occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex;
 - (f) the occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position and:
 - (i) the premises are not equipped with separate sleeping accommodation and sanitary facilities for persons of each sex;
 - (ii) the premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of the opposite sex to the relevant sex; and
 - (iii) it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex;
 - (g) the occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress; or

- (h) the position is declared, by regulations made for the purposes of this paragraph, to be a position in relation to which it is a genuine occupational qualification to be a person of a particular sex.

35 Residential care of children

- (1) Nothing in paragraph 14(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex in connection with a position as an employee or contract worker, where the duties of the position involve the care of a child or children in the place where the child or children resides or reside.

4.6 In the Commission's view, the exemption in s 35 of the SDA applies to the positions of Dean, Assistant Dean and Supervisor as these positions involve care of children in a place where the children reside. Accordingly, the Commission is of the view that it is not unlawful for the College to discriminate against men on the ground of their sex in connection with those positions.

4.7 The Commission is also of the view that, in the circumstances of this case, it is a genuine occupational requirement that the persons holding the positions of Dean, Assistant Dean and Supervisor be female. Section 30(2)(g) would appear to apply directly to the present case: the occupants of these positions are required, as part of their duties, to enter areas ordinarily used only by girls, while those girls are in a state of undress. Section 30(2)(c), (e) and (f), while not directly applicable in the current circumstances, also tend to support the view that being female is a genuine occupational requirement for these positions.

4.8 The Commission notes also that the SDA is limited in its application by s 9. In the present case, it is uncertain whether or not the SDA applies to the College at all. As the Commission has decided against granting the exemption for the reasons set out above, it is not necessary to reach a conclusion on this issue. However, the Commission notes that the substantive discrimination the subject of this application is against men. For constitutional reasons, the SDA has its widest application in relation to discrimination against women (see s 9(10)). It would seem that the most likely basis upon which the SDA would apply in the present circumstances is if the College is a 'trading or financial corporation'. Whether or not a corporation is a trading corporation is a question of fact and degree and the application does not disclose sufficient information to reach a view on that issue. The Commission notes, however, the following comment of Mason J in *R v Federal Court of Australia; Ex parte WA National Football League Inc* (1979) 143 CLR 190, at 234:

Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is very much a question of fact and degree.

4.9 As there is not, in the view of the Commission, an arguable case of discrimination disclosed in the present application, a temporary exemption under s 44(1) is unnecessary. It is not, in these circumstances, necessary to proceed to consider whether or not such an exemption would be appropriate in light of the objects and scheme of the SDA. The Commission refuses the application by the College for a temporary exemption.

Dated this 12th day of May 2005

Signed by the President, John von Doussa QC, on behalf of the Commission.

Please note

Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of a decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.