

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

REASONS FOR DECISION

IN RESPECT OF AN APPLICATION FROM ANNETCO INC FOR A GRANT OF TEMPORARY EXEMPTION UNDER SECTION 44 OF THE *SEX DISCRIMINATION ACT 1984 (SDA)*

1. THE EXEMPTION APPLICATION

1.1 The applicant

The applicant, Annetco Inc (formerly WiN Support Services), is a “government funded not for profit organisation which provides services to people with a disability, the aged and their families/carers. Through the delivery of culturally appropriate specialist support services [the applicant] aims to empower people to live independently in the community and is able to offer support on an individual basis”.

The applicant’s funding comes solely from the Victorian and Commonwealth governments.

The applicant is Victorian based.

The applicant provides its services through nine programs:

1. David House Adult Training Centre
(92 clients – a range of programs delivered to intellectually disabled adults to encourage independence and skill development).
2. Flexible Care service
(20 clients – personal and home care delivered to persons with dementia in their own homes).
3. Community Aged Care Packages
(205 clients – personal, home care and other support for daily living needs delivered to persons with complex care needs in their homes. It is a Commonwealth government funding requirement that 80% of service in the northern metropolitan area and 25% of service in the East and Loddon Mallee region be provided to people from ethnic minorities).
4. Coordinated Support service
(400 clients – a range of personal care, home services, respite care and assistance with daily living needs delivered to aged, disabled and their carers in Melbourne metropolitan area).
5. Shared Supported Accommodation Program
(45 clients – supported accommodation provided to adults with a disability who are unable to live independently, or with a family or carer).
6. Veterans Home Care
(410 clients - assists veterans and war widows/ers to remain living in their homes by providing them with personal care, home care, garden maintenance and respite care).
7. After Hours Response Team
(4000 clients – provides emergency or unplanned service by telephone or in-home support, being personal care and home care).
8. Job Connections
(120 clients – assists persons with a disability to gain employment.)

9. Direct Support Service.

(Support worker staffing unit. Services all programs providing in-house service. This unit comprises 120 support workers. The Shared Supported Accommodation Program has another 55 support workers).

1.2 The specifics of the exemption sought

The applicant seeks the following exemption:

“WiN Support Services seeks to discriminate on the basis of sex in the area of employment in relation to:

1. The advertising of vacant positions and offering employment;
2. Allocation of work to existing employees”

The exemption is sought in respect of “those staff who work directly with clients”.

The specified Position Tasks of these Support Workers include the provision of ‘personal care’ (detailed further in 1.3.1 below) and general household and other related tasks such as cleaning, shopping and assisting clients into transport. These Support Workers must be able to work across the range of programs mentioned above.

1.3 Why an exemption is sought

1.3.1 The client’s need for the support worker to be of a particular gender

The applicant seeks an exemption in order to:

“1. Preserve the privacy and decency of WiN Support Services’ clients in the provision of personal care which includes but is not limited to, assistance with the following:

- a. Fitting of clothing,
- b. Showering/bathing,
- c. Toileting,
- d. Lifting,
- e. Grooming,
- f. Administration of medications into bodily orifices,
- g. Other services provided to clients in a complete or partial state of undress.

These services may be provided within the client’s own home, or at WiN Support Services controlled workplaces where clients may be provided with services. The latter including but not limited to Community Residential Units, and Adult Training Centres.

2. To ensure compliance with State and Federal Government funding and service agreements. WiN Support Services provides services to clients from culturally and linguistically diverse backgrounds, and as such is required to provide services to clients which are culturally appropriate. Some clients for religious or other cultural reasons require services to be provided by a person of a particular sex.”

The applicant notes that sometimes where a request is made by a client for a support worker of a particular gender there may be a blurring as to whether the reason is based on modesty or is culturally based. The applicant also notes that where a support worker is required of a particular gender for culturally appropriate reasons this may extend beyond ‘personal care’ duties to the provision of other domestic duties.

The applicant states that it is not feasible to employ staff purely for ‘personal care’ duties. It says,

“[T]here is a crisis in terms of recruitment and retention of the staff who carry out this type of work. We need to be able to offer them different types of work when we can so that the number of hours that they can be offered is maximised. If we do not do this they leave due to lack of work”.

With regard to the exemption sought for the **allocation of work** to existing employees the application originally stated that:

“The exemption is required as it is possible that some employees of a particular gender, most likely female, will be offered more personal care shifts than male employees as I am advised there is currently a preference for females over males at a ratio estimated to be about 3:1. Where this happens male workers are offered other work in recreation (assisting clients in recreation shifts for example). The latter shifts tend to be longer (between 4 and 8 hours) as opposed to personal care shifts which average 1.5 hours. Our current Support Worker Staff pool has a female to male ratio of 3:1, and WiN Support Services makes every effort to ensure that no employee is disadvantaged in terms of access to work. However it is possible on occasions that female and male employees could be said to have suffered some disadvantage in terms of the number of hours of work they are offered”.

The applicant has subsequently clarified this to state that no employee suffers any disadvantage in relation to access to work. There is much more work available than there are employees to undertake the work. As a consequence no member of staff would claim that they are discriminated against in the allocation of work because of their gender. There is no suggestion this situation is about to change.

1.4 Duration of exemption

The applicant seeks an exemption for the maximum period available under s 44, namely 5 years. It seeks an exemption for this period as “there is no likelihood in the foreseeable future that such an exemption would not be required”.

1.5 Application for an exemption under the Victorian *Equal Opportunity Act 1995*

The applicant is Victorian based and has sought a similar exemption from the Victorian Civil and Administrative Tribunal. On 29 June 2004 the Tribunal granted an exemption to the applicant from various sections of the *Equal Opportunity Act 1995* “to enable the applicant to advertise for and employ from time to time staff members of a particular gender for services operated by the applicant for people with a disability, the aged, their families and carers”. The exemption was granted for the maximum 3 year period, expiring on 8 July 2007.

2. POWER OF THE COMMISSION TO GRANT AN EXEMPTION

Section 44 of the *Sex Discrimination Act 1984* (Cth) (the Act) relevantly provides that the Commission may grant an exemption for conduct that would otherwise be in breach of Divisions 1 and 2 of Part II of the Act, (ie sections 14 to 27). In this case the sections in issue are s 14(1) and (2), discrimination in employment, and possibly s 26, discrimination in the administration of Commonwealth laws and programs.

Section 44 further provides that an exemption shall be granted for a specified period not exceeding 5 years. (However, the Commission may, prior to the expiry of that period, grant a further exemption for up to 5 years).

The section also states that an exemption may be granted subject to terms and conditions.

3. THE COMMISSION’S EXEMPTION GUIDELINES

3.1 The Guidelines

The Commission has formulated “*Guidelines on applications for temporary exemptions under the Sex Discrimination Act*”. The Commission’s consideration of applications for temporary exemptions is undertaken in accordance with these Guidelines.

The Guidelines are accessible at: http://www.humanrights.gov.au/legal/sda_exemptions.html

3.2 Criteria for consideration by the Commission of exemption applications

The guidelines state that the Commission is to have regard to the following criteria in exercising its discretion (emphasis added):

1. *The applicant must show at least an **arguable case** that the circumstances or activities might constitute discrimination to which the [Act] applies. If the circumstances are not at least arguably discriminatory within the terms of the [Act], 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 [Act] (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 [Act]. 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 [Act] (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.*

Relevantly, the Guidelines note that:

Because the [Act] already provides for both permanent exemptions and special measures the circumstances in which temporary exemptions need to be sought are therefore very limited. As a result temporary exemptions are rarely granted.

4. CONSIDERATION OF THE APPLICATION HAVING REGARD TO THE EXEMPTION GUIDELINES

4.1 Whether the circumstances are within the jurisdiction of the Act.

If the circumstances, the subject of this application, do not come within the jurisdiction of the Act then there is no unlawful activity for which an exemption could be required.

Complaint by a male complainant

The application of the Act is subject to certain limitations which are set out in s 9. The application of the Act in respect of discrimination against men is more restricted than it is for discrimination against women. However, s 9 does not restrict a male complainant from bringing a complaint under s 26 (discrimination in the administration of Commonwealth laws and programs). As the applicant administers some of its programs pursuant to Commonwealth government funding it is possible that a complaint may be brought under s 26 by a male who is discriminated against in relation to the offering of employment.

Complaint by a female complainant

The applicant advises that the situation might also arise when it would need to discriminate against a female applicant for employment. For example, where needing to employ a male in preference to a female to maintain the appropriate staff balance. In such a case a complaint might be brought under s 14(1).

Accordingly, it would appear that the circumstances, the subject of this application, come within the jurisdiction of the Act.

4.2 Whether the actions are already covered by the ‘genuine occupational qualification’ exemption in s 30.

The guidelines require consideration of whether the actions sought to be exempted ie (i) advertising of vacant positions, (ii) offering employment and (iii) allocation of work amongst existing employees, are already protected by the genuine occupational qualification exemption in s 30. Section 30 provides:

(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.

4.2.1 Application of s 30 to ‘offering employment’

As a result of s 30(1) the unlawful discrimination provisions contained in 14(1)(a) (‘arrangements made for the purpose of determining who should be offered employment’) and s 14(1)(b) (‘determining who should be offered employment’) will not be available to a complainant where it is a genuine occupational qualification of the position in issue that the occupant of the position be of the opposite sex to the complainant.

‘Genuine occupational qualification’ is not defined. However, s 30(2) sets out, ‘without limiting the generality of subsection (1)’, a number of instances where genuine occupational qualification will arise. Subsections 30(2)(c), (d), (e) and (g), by way of example, indicate that s 30(1) intends to cover employment where decency is centrally in issue. The application for exemption is sought in order to, “1. Preserve the privacy and decency of WiN Support Services clients in the provision of personal care . . .”. The provision of ‘personal care’, as described by the applicant, centrally involves the issue of decency. Duties involved in ‘personal care’ such as toileting and bathing are clear examples. Another of the duties of providing ‘personal care’ is described as the ‘fitting of

clothing'. Section 30(2)(c) provides a specific exemption where a duty of the position is 'fitting of clothing' and a person of a particular sex is required for the sake of decency. Accordingly, it would seem that s 30(1) applies to the circumstances outlined in this application.

The guidelines indicate that before an exemption can be granted the applicant must 'show at least an arguable case that the circumstances or activities might constitute discrimination'. As the permanent exemption provided for under s 30(1) would appear to cover the circumstances outlined in this application, the issue of a grant of an exemption under s 44 does not arise.

The application also refers to the fact that whilst some clients require support staff of a particular gender for reasons of modesty, others require support staff of a particular gender for cultural or religious reasons and that this factor might also determine whether a person of a particular gender is offered employment. As, for the reasons mentioned in the paragraph above, the position of support worker would appear to be covered by s 30(1), then it would seem additional factors such as those relating to culture or religion are not determinative in consideration of the application.

4.2.2 Application of s 30 to 'advertising of vacant positions'

There is no specific ground of discrimination in the Act in respect of 'advertising of vacant positions'. It may come within s 14(1)(a) ('arrangements made for the purpose of determining who should be offered employment') which is considered above.

Section 86 provides an offence of publishing an advertisement that indicates an intention to do an act that is unlawful under Part II of the Act (prohibition of discrimination). Section 44 does not provide for an exemption to be granted in respect of the publication of an advertisement in breach of s 86. However, no issue arises under s 86 where a s 30 exemption applies.

4.2.3 Application of s 30 to 'allocation of work'

Section 30 only relevantly applies in relation to s 14(1)(a) ('arrangements made' for employing someone) and to s 14(1)(b) (determining who should be employed). However, discrimination flowing from the allocation of work would likely come under s 14(2)(a) 'terms and conditions of employment that the employer affords the employee', s 14(2)(b) concerning the provision of benefits associated with employment, or s 14(2)(c) concerning 'subjecting the employee to a detriment'.

Accordingly, the permanent exemption provided for by s 30 will not apply to the 'allocation of work to existing employees'. As the permanent exemption in s 30 does not apply the issue is whether an exemption should be granted under s 44 in respect of 'allocation of work'

The application does not reveal discriminatory treatment on the part of the applicant towards either men or women in the allocation of work. There is more work available than there are staff able to undertake it. There is no suggestion that this situation is about to change. The guidelines indicate that before an exemption can be granted the applicant must 'show at least an arguable case that the circumstances or activities might constitute discrimination'. There is currently no discriminatory treatment in the allocation of work, and no suggestion that is about to change. Accordingly, in these circumstances it is not appropriate to grant an exemption. Should the circumstances change the applicant is able to reapply for an exemption.

5. CONCLUSION

For the reasons set out above it is the view of the Commission that the exemption applied for under s 44 of the *Sex Discrimination Act 1984* (Cth) by Annetco Inc not be granted.

John von Doussa QC
President
Human Rights and Equal Opportunity Commission

24 November 2004