



**WESTERN  
AUSTRALIAN  
GOVERNMENT  
Gazette**



ISSN 1448-949X PRINT POST APPROVED PP665002/00041

**PERTH, FRIDAY, 30 DECEMBER 2011 No. 252 SPECIAL**

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 1.45 PM  
© STATE OF WESTERN AUSTRALIA

**EQUAL OPPORTUNITY ACT 1984**

APPLICATION FOR EXEMPTION

Bandyup Women's Prison

Section 136 of the *Equal Opportunity Act 1984* requires the State Administrative Tribunal to publish in the *Government Gazette* a notice of the making of a decision under s135 of the Act, which relates to applications for exemption from the operation of some or all of the provisions of the *Equal Opportunity Act*. The notice must include the Tribunal's findings on material questions of fact, referring to the evidence on which those findings are based, and the reasons for the Tribunal's decision.

The following constitutes the notice published by the Tribunal under s136 of the *Equal Opportunity Act* with respect to an application for exemption by Commissioner for Corrective Services.

- JURISDICTION:** STATE ADMINISTRATIVE TRIBUNAL.
- STREAM:** HUMAN RIGHTS.
- ACT:** EQUAL OPPORTUNITY ACT 1984 (WA).
- CITATION:** COMMISSIONER FOR CORRECTIVE SERVICES and COMMISSIONER FOR EQUAL OPPORTUNITY [2011] WASAT 197.
- MEMBER:** MS D TAYLOR (SENIOR MEMBER).
- HEARD:** DETERMINED ON THE DOCUMENTS.
- DELIVERED:** 30 NOVEMBER 2011.
- FILE NO/S:** EOA 26 of 2011.
- BETWEEN:** COMMISSIONER FOR CORRECTIVE SERVICES Applicant and COMMISSIONER FOR EQUAL OPPORTUNITY Respondent.

*Catchwords*

Application for exemption—Sex discrimination—Exemption sought to allow prison officer positions to be filled by women—Tribunal satisfied exemption would promote the objects of the *Equal Opportunity Act 1984*—Exemption granted.

*Legislation*

*Equal Opportunity Act 1984* (WA), s 11, s 135(1), s 135(2), s 135(3).  
*State Administrative Tribunal Act 2004* (WA), s 60(2).

*Result*

Exemption granted.

*Category:* B

**Representation**

*Counsel*

Applicant : Ms M Paterson  
Respondent : Mr A Macdonald

*Solicitors*

Applicant : State Solicitor's Office  
Respondent : Commissioner for Equal Opportunity

**Case(s) referred to in decision(s)**

ADI Limited and Ors and Commissioner for Equal Opportunity and Ors [2005] WASAT 259.  
Commissioner for Equal Opportunity v ADI Limited [2007] WASCA 261 Raytheon Australia Pty Ltd and Commissioner for Equal Opportunity [2008] WASAT 266.

## REASONS FOR DECISION OF THE TRIBUNAL

### *Summary of Tribunal's decision*

1. The superintendent of Bandyup Women's Prison, on behalf of the Commissioner for Corrective Services, applied for a further exemption from the provisions of s 11 of the *Equal Opportunity Act 1984* (WA). The Tribunal had granted an exemption in 2006 for 5 years to enable 8 positions for senior prison officers to be reserved for female applicants.
2. The superintendent applied for a further exemption of 5 years and to vary the terms on which the exemption was granted so that the number of positions reserved for female applicants could be expressed as a percentage rather than as a set number. She applied for an exemption to permit 50% of senior prison officer positions and 50% of principal prison officer positions at Bandyup Women's Prison to be reserved for female applicants. She also applied for the exemption to be extended to cover Boronia Pre-release Centre for Women.
3. The Commissioner for Equal Opportunity supported the application for a further exemption on the new terms proposed, but for a period of 2 years only. She considered some of the workplace practices within the prison service to be contributing to the ongoing problem of recruiting and retaining female prison officers, and that a review of these practices was more likely to occur sooner if the period of exemption were to be limited to 2 years.
4. The Tribunal accepted the evidence that, as a direct result of the exemption granted in 2006, a significant increase had occurred in the intervening period in the number of women serving as senior prison officers at Bandyup Women's Prison, but not to the extent that had been hoped for. Significant changes had also taken place in the structuring of the Department of Corrective Services, and a strategic plan had been adopted with the aim of providing the female prison population with a range of services suited to its specific needs. Female role models in positions of seniority within the prison structure were considered to be an essential and integral part of the plan.
5. The Tribunal accepted the evidence that it would take ongoing and concerted effort and time to increase the number of women in positions of responsibility and seniority working at Bandyup Women's Prison and Boronia Pre-release Centre for Women.
6. The Tribunal also accepted the evidence that the Department of Corrective Services was alive to the problems of attracting and retaining female staff in the women's prison service and that it would continue to look at the terms and conditions of employment available to prospective employees in order to broaden its base for recruitment.
7. The Tribunal was satisfied that a further exemption for 5 years on the terms proposed would further the objects of the *Equal Opportunity Act 1984*.
8. The Tribunal grants an exemption on the same terms to Boronia Pre-release Centre for Women.

### **Background**

9. On 22 May 2006, the Tribunal granted the Minister for Justice (Minister) an exemption from s 11 of the *Equal Opportunity Act 1984* (WA) (EO Act) which makes it unlawful for an employer to discriminate against an applicant on the ground of their sex. The exemption allowed the Minister to fill 8 of the 13 senior prison officer posts at the prison from a pool of women applicants. The Minister wanted to bring about significant change in the culture at the women's prison, which had been staffed at senior levels mainly by men for a very long time.
10. The core business of the Department of Corrective Services (DCS) remains the same as it was in 2006 when the initial exemption was granted. However, in the intervening period, the Community Development and Justice Standing Committee (Committee) of the Western Australian Parliament (Parliament) inquired into a number of matters relevant to the prison population. It presented 2 reports to Parliament, the second of which, in 2010, *Making Our Prisons Work* (Report No. 6 in the 38th Parliament), made specific reference in *Chapter 5—Women in a Male Culture* to the DCS being dominated by male employees at senior management level and the service having a male-dominated culture. The Committee made reference to a number of strategies having been articulated at policy level with a view to achieving better outcomes for both female staff and female prisoners, but found that in practice there remain significant shortcomings that impinged directly or indirectly on the efficiency and effectiveness of rehabilitation. The Committee recommended that the Minister identify and improve the formal measures the Department took to respond to the specific needs of women (Recommendation 13).
11. In 2009, the DCS adopted a *Strategic Plan for Women 2009—2012* (Strategic Plan). The Strategic Plan took account of a number of matters raised and discussed in a background paper published in July 2009 (*Women's Corrective Services Strategic Plan 2009—2012: Women's Way Forward, Background Paper*). The paper recommended that the DCS take a 'women-centred approach' to its work, and that it develop programs and policies to meet the specific needs of the female prison population. In summary, it says that women and men are different just as much in prison as they are when out of it, and that treating women prisoners as a sub-category of men's imprisonment does them a disservice, as their needs are not met. The Strategic Plan aims to develop a culture in which female prisoners are managed in a supportive environment that is not predominantly male, not least because many of the women have experienced domestic violence and abuse, and have problems of addiction to alcohol or drugs.
12. The application for exemption is made within this context.
13. On 14 June 2011 Ms Chatwin applied for a further exemption to be granted for 5 years so as to enable a number of senior positions in the women's prison service to be reserved for women only applicants. The provisions of s 135(2) of the EO Act permit the Tribunal to grant a further exemption. She sought to vary the terms on which the exemption had been granted in 2006 so positions reserved for female applicants could be expressed as a percentage rather than as a set number. She applied for

an exemption to permit 50% of senior prison officer positions and 50% of principal prison officer positions at the prison to be reserved for female applicants. She also applied for the exemption to be extended to cover Boronia Pre-release Centre for Women (Pre-release Centre).

14. The Commissioner for Equal Opportunity (CEO) is a party to every application for exemption made to the Tribunal unless she indicates that she does not wish to take part in the proceedings. The CEO indicated her wish to be heard in this matter. She supports the application in substance, but for a period of 2 years only.

15. The provisions of s 135(3) of the EO Act require notice of the application for exemption to be made known to the general public.

16. On 9 August 2011, the Tribunal ordered the applicant to place an advertisement in the Public Notices section of *The West Australian* newspaper on Saturday 25 August 2011 notifying the public of the application and advising that any person with an interest in the application is to notify the Tribunal of that interest by 3 September 2011. It also directed the parties to file statements of evidence and written submissions to enable the application to be determined on the papers.

17. No response to the notice was received by the Tribunal.

18. The Tribunal is satisfied that persons who might have an interest in the application have had an opportunity to apply to be joined as parties and to be heard in relation to it.

19. Pursuant to the provisions of s 60(2) of the *State Administrative Tribunal Act 2004* (WA), this application is determined entirely on the documents submitted by the parties.

#### ***DCS objectives***

20. This application is made because the DCS wants to provide women prisoners with a service that best suits their particular needs, in order to address the reasons underlying their offending, with the overall objective of reducing re-offending. The DCS believes its objectives stand a better prospect of success if women are appointed to 50% of senior positions within the service, because this will have a positive impact on the female prison population and be of benefit to the prison environment generally.

21. The application is made also because the DCS seeks to ensure that opportunities for promotion to senior positions exist for women recruited to work in the service.

#### ***Documents filed by the applicant***

22. The applicant filed statements of evidence from female employees in the DCS and written submissions settled by counsel.

#### ***Ms Marie Chatwin***

23. Ms Chatwin is the superintendent at Bandyup Women's Prison (Bandyup). She has worked for the DCS for 25 years. She must be one of the most senior women appointed to a post within the prison service.

24. In 2003, Ms Chatwin took a job as Assistant Superintendent of Prison Management at Bandyup. At the time she says that there were 13 senior officer positions at Bandyup and that 12 of the positions were occupied by men. All the staff employed in the administration section were men. She says that the one female senior officer employed at the time chose to work mainly night shifts and had little support from her fellow officers.

25. Ms Chatwin says that the female prison population is a complex group, with the vast majority of women coming from disadvantaged backgrounds. She says that a high proportion of the women suffer from mental health problems and may have suffered also from both sexual and physical abuse as children or adults. She says that 50% of the female prison population come from indigenous backgrounds.

26. Ms Chatwin thinks that little was understood about the impact on the female prison population of the absence of female members of staff when she was first appointed, and that much more is known now. She thinks that significant gender imbalance in the number of men and women working in a women's prison has a direct bearing and impact on the nature and effect of the services delivered to the women during their imprisonment. She said that the application for exemption made in 2006 was intended to quarantine a number of senior officer positions especially for women in order to achieve, among other things, the presence of strong positive female role models for the inmates.

27. Ms Chatwin says that some progress has been made towards redressing the gender imbalance since the exemption was granted in 2006 in that more female officers have been appointed and the predominantly male culture has gone.

28. Ms Chatwin says she has prioritised the mentoring and training of female prison officers during her appointment. She describes the difficult working environment and the onerous demands of the job. She says that progress has been made in the recruitment of female staff at Bandyup. However, there has been real difficulty in retaining female staff there, as many have transferred either to the male prison service or chosen work elsewhere in the public service. She thinks that as many as 4 or 5 of the women appointed to senior prison officer positions at Bandyup since the exemption in 2006 have since transferred to other prisons. The result is that most of the women who have taken up employment at Bandyup in recent years do not yet have the experience to apply for more senior officer roles within the service.

29. In terms of the conditions of employment, Ms Chatwin describes a shift pattern where officers at Bandyup work 3 12-hour shifts and then have 3 days off. She says this is the preferred shift pattern for staff, although a limited number of 8 and 10-hour shifts are also available, but they are hard to fill. She says that women attracted to the 3 12-hour shift pattern tend to be women with older children, so they are older themselves. She recognises that this rules out a large number of potential

female employees and says that the DCS is considering offering part-time positions which may be appealing to a broader range of women.

#### **Ms Jacqueline Louise Cooper**

30. Ms Cooper commenced work at Bandyup in 2003 as a probationary officer. Her evidence supports the picture painted by Ms Chatwin of the male culture dominant at the time.

31. Ms Cooper says that she found it difficult to find female managers within the hierarchy with whom she could discuss specific issues or take guidance from, and that she did not have a female mentor or role model.

32. Ms Cooper says that her career path changed when the exemption was granted in 2006. She was appointed to a senior officer position in 2009 and has since progressed to her current position as Acting Assistant Superintendent of Prison Services. Ms Cooper believes that the exemption enabled her to gain the experience necessary to progress within the ranks of the prison service.

33. Ms Cooper believes that the environment at Bandyup changed for the better as a result of the exemption because it led to more women being appointed to senior officer roles. She thinks that female senior staff are better able to provide a more supportive and holistic environment for the prisoners. She also believes that prisoners are more comfortable approaching a female officer to discuss personal matters such as sexual abuse, domestic violence and children.

#### **Ms Elizabeth Campbell, the Strategic Plan and the Background Paper**

34. Ms Campbell has worked for the DCS since 2004. She was initially an Equity and Diversity Manager and is now the Principal Human Resources Policy Officer responsible for equal employment opportunity and diversity. Ms Campbell says the following about the exemption—

Since the Exemption was granted for Bandyup in 2006 for 8 Senior Officer positions to be allocated to women as they became available, there has been significant progress towards achieving substantive appointment of women to Senior Officer positions within the Department—

- in 2004, 19% of Prison Officer positions were substantively occupied by women. In 2011, 25% are occupied substantively by women;
- in 2004, 7% of Senior Officer positions were substantively occupied by women (12 of 153). In 2011, this has risen to 15%;
- Bandyup has been able to substantively appoint 6 women to Senior Officer positions, from a base in 2004 of 3; [and]
- Bandyup has also been utilised as a site to develop women into Senior Officer positions, with some Senior Officers being transferred out of Bandyup to other prisons since 2004.

35. Ms Campbell notes that in the *Report from the Office of the Inspector of Custodial Services* (Report No 57, December 2008), the following was noted—

Forty-seven per cent of the uniformed staff at Bandyup were female. Both staff and prisoners felt that this proportion was good and met the needs of all groups involved. Female staff at Bandyup felt supported and valued by their male counterparts and the management team.

36. Ms Campbell tells the Tribunal that the position of Director of Women's Correctional Services was abolished following a departmental review. She makes reference to the adverse comment this has attracted from the CEO and alludes to the possibility of a permanent position being established, subject to funding.

#### **Strategic Plan**

37. Ms Campbell appends a copy of the Strategic Plan adopted by the DCS to her statement. A key focus of the Strategic Plan is to positively influence offender behaviour in order to reduce reoffending. The DCS hopes to achieve this by developing intervention strategies relating to 'employment, education and vocational training, health, life skills and counselling'. The Strategic Plan recognises that many women prisoners who come into the prison system lead lives blighted by physical, sexual and substance abuse. The problems facing women prisoners are said generally to be more acute than those arising in male prison populations. The Strategic Plan aims to implement national and international best practice in the management of women offenders and to imprison them 'as punishment', not 'for punishment'.

38. The Strategic Plan notes a determination to achieve recognition across the State prison system that women prisoners are a distinct and unique cohort and that management needs to be responsive to their specific needs. It recognises the problems faced by indigenous women in particular, who make up a disproportionately high number of women imprisoned. It says that these women represent the most victimised group in our community. It says that the vulnerability of women who are victimised and abused in the community is exacerbated further when they are marginalised in a very male-dominated environment.

#### **The Background Paper**

39. The Strategic Plan drew from issues discussed in the background paper, published in July 2009. Problems identified in the paper are relevant to the Tribunal's decision as they are fundamental to the plans and policies adopted by the DCS to address them. The application for a further exemption is made in the context of the wider plan to improve the service by adopting a 'women-centred approach'.

40. The background paper says that many women offenders have experienced such disadvantage in their lives that they are at risk of continuing to return to prison if their underlying problems are not addressed. The paper notes that this is particularly relevant to Aboriginal women whose experience of life in society is fraught with danger from violent social marginalisation and economic disadvantage. It is said to be critical to their wellbeing and rehabilitation that these women have access to a range



of opportunities and appropriate services during their time in custody in order to help them address their issues (including their offending) and to learn skills to help them cope with life in the community.

41. To the extent that the DCS is seeking to provide women with appropriate services in order to help them utilise their time in custody as best as is possible, seeking to redress a gender imbalance appears to be a reasonable objective.

42. The background paper is informed by the outcome of a survey of women in prisons in Western Australia conducted initially in 2001 and repeated in 2003, 2005 and 2008. The findings are said to be 'fairly consistent'. They noted that there was widespread incidence of child and adult abuse of women in the prison population, that most prisoners were young women under 35 years of age and that a large proportion of them were directly responsible for the care of their own children or another child or a dependent adult prior to their arrest. It noted that many had significant histories of drug and alcohol abuse.

43. The writers of the report concluded that—

- women who offend typically live lives defined by profound social and economic disadvantage, physical and sexual abuse and addiction;
- the conditions and circumstances of these women's lives affect their attitudes, values and general outlook on life and, most significantly, their decreased sense of self-worth;
- the high rates of drug use and alcohol abuse among imprisoned women are often related to underlying abuse and trauma issues, although peer influence also seems to be an important factor;
- the conditions and circumstances of these women's lives often result in dependency on government services and/or dependency on a partner, leaving them open to be abused, exploited and dominated in their independent relationships—women tend to be involved with men like themselves who have a criminal history and drug and alcohol abuse issues; and
- being a mother or carer is extremely important to female prisoners—many of them reflect on their children or family as their main reason for being.

44. The Women Services Directive sees its vision as being to provide a just and equitable custodial service where the diverse and culturally unique needs of women are acknowledged and their potential realised. It wishes to promote safe and effective management of women offenders, with a focus on women-centred rehabilitation and re-entry services that are culturally sensitive to the needs of Aboriginal women and that foster family and community wellbeing.

45. Ms Campbell tells the Tribunal that the *Equity and Diversity Improvement Plan for the period 2010 to 2013* seeks to promote the development of women into leadership positions as a high priority for the DCS. In particular, the *Equity and Diversity Improvement Plan* seeks to maintain and further develop current leadership and mentoring programs for women and to promote and support women to apply for acting promotional positions, secondments and career-enhancing projects across all divisions.

46. Ms Campbell says that permanent part-time positions have been available in the DCS since 2011 and that these positions provide more flexibility for female officers who may wish to accommodate family responsibility and other outside commitments. Ms Campbell notes that the DCS has had what she describes as 'strong feedback' from graduating female prison officers, that they specifically decided to become prison officers due to the 12-hour shiftwork regime. She says that they were attracted to the job by the fact that, on average, prison officers work only 3 12-hour shifts per week, and that this may mean that women prison officers are able to spend more time with their families than they would be able to do, were they to take a job with conventional hours. Ms Campbell notes that there are some shifts available of 8 hours and 10 hours in certain prison officer roles.

### ***The applicant's submissions***

47. In essence, the applicant submits that the Background Paper sets out the women-centred approach that the DCS is now striving to achieve in its delivery of corrective services to a female prison population. It says that what the DCS has learnt in developing a better future for women offenders is that, for something to be women-centred, the approach must be from a women's perspective or world view . . . It must find its origins from the point of view of women's needs, their issues, preoccupations and ways of learning about seeing and experiencing the world. Services provided must be cognisant of the social, economic, familial, cultural and other issues and contacts that determine women's particular experiences of life.

It says—

Women-centred initiatives are being implemented to ensure women offenders have access to purpose designed programs, services and opportunities; representing a significant cultural change in a correctional system which has historically managed women offenders as if they were a sub-category of men's imprisonment, starting from the assumption that male imprisonment would be **gender neutral**. [Author's emphasis]

48. The applicant relies on the evidence from the 3 women currently employed in the prison service to support the proposition that the exemption will assist the DCS to implement a women-centred approach. It relies on the evidence from the women who work at Bandyup about their personal experiences.

49. The applicant submits that a 5 year exemption is necessary because of the nature of the problem, and the fact that experience shows that it takes concerted efforts over time to change an established culture.

50. The applicant accepts, as it did at the hearing before the Tribunal in 2006, that in the absence of an exemption being granted permitting a number of senior prison officer positions at Bandyup to be filled by women only, it would be unlawful discrimination under the EO Act.

51. The applicant seeks an extension of the exemption to cover the Pre-release Centre. It says that the Pre-release Centre is populated predominantly by women and that the same general principles apply. It seeks the exemption to be expressed in terms of a percentage rather than actual numbers in order to accommodate an overall rise in the number of positions available over time.

***The Equal Opportunity Commissioner's submissions in response***

52. The CEO supports the application for a further exemption because she accepts that it is a necessary step in achieving a balance between male and female prison officers in terms of numbers and seniority. She believes this to be in the best interests of the female prison population and the wider community generally.

53. However, the CEO takes issue with the applicant about 2 matters.

54. The CEO is concerned about the decision taken to abolish the post of Director of Women's Prisons. She refers to the Parliamentary committee report that strongly recommended that the position be reinstated: *Making Our Prisons Work: Report No. 6, 'Finding 19'* at [xxv]—

The position of 'Director of Women's Prisons' played a key role in raising the needs of women, both staff and prisoners in what is essentially a male domain. It resulted in effective changes to Bandyup, and it provided female representation on [the] Prison Officer Transfer Committee. The role has notionally devolved to prison superintendents who have little time to meet this extended impost on their day. Its abolition is a cause of concern to stakeholders both internal and external.

55. The CEO questions the wisdom of abolishing the position of Director of Women's Prisons in the context of this application. She links the decision to abolish a senior leadership role in the prison service with this application for exemption. She says that the decision to abolish the position of Director of Women's Prisons would seem to be at odds with the stated aims for women in the Strategic Plan.

56. The CEO also questions the terms and conditions of employment offered to female prison officers. She puts in issue the 12-hour shift regime and wonders whether this requirement deters women with family responsibilities from applying to enter the service. She urges the prison service to review its practices and procedures that deter women from applying for and remaining in senior positions within the women's prison service and, to that end, seeks to limit the period of exemption for 2 years so as to cause the prison service to review its existing employment practices within the timeframe available. She submits that the existing employment practices may actually work against the purpose behind the exemption.

***The law***

57. Section 11 of the EO Act provides that—

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or breast feeding—
  - (a) in the arrangements made for the purpose of determining who should be offered employment; or
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, pregnancy or breast feeding—
  - (a) in the terms or conditions of employment that the employer affords the employee; or
  - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
  - (c) by dismissing the employee; or
  - (d) by subjecting the employee to any other detriment.

58. Section 135(1) of the EO Act provides that—

The Tribunal may, on application by a person, by order, grant to the person an exemption from the operation of a specified provision of Part II, IIAA, IIA, IIB, III, IV, IVA or IVB.

59. Section 135(2) of the EO Act provides that—

The Tribunal may, on application by a person to whom an exemption from a provision of Part II, IIAA, IIA, IIB, III, IV, IVA or IVB has been granted under subsection (1), by order, grant to the person a further exemption from the operation of that provision.

60. An application for a further exemption falls to be considered under the provisions of s 135(2) of the EO Act. Insofar as the application made in 2011 relates to Bandyup, it seeks a further exemption and a variation of the terms upon which the original exemption was granted. The order made in 2006 provided an exemption from the provisions of the EO Act ' . . . for the purpose of filling a number of identified positions for Senior Prison Officers at Bandyup Women's Prison'.

61. The application for a further exemption in connection with the Pre-release Centre is misconceived, as the terms of the original order do not apply to any part of the prison service apart from Bandyup. The application will be treated as an application for an exemption under the provisions of s 135(1) of the EO Act, on the same terms as sought in 2011 in relation to Bandyup.

62. Since the order was made in 2006, the Supreme Court has provided guidance as to the general legal principles governing the scope of the discretion to grant exemption from operation of the EO Act

in *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261. The court disapproved of the restrictive approach taken by the Tribunal in *ADI Limited and Ors and Commissioner for Equal Opportunity and Ors* [2005] WASAT 259 at first instance. Martin CJ said at [55]—

The authorities to which I have referred establish that the discretion conferred upon the Tribunal by s 135 of the Act is to be constrained only by the objects, scope and purpose of the Act and that those matters are to be ascertained from a construction of the Act as a whole.

His Honour went on to observe at [72]—

In summary, in my opinion when exercising the discretion conferred upon it by s 135 of the Act, it is consistent with the objects, scope and purpose of the Act, for the Tribunal to take into account any considerations which it considers would justify the commission of conduct which would otherwise be unlawful under the Act. So, provided there is a rational basis for the discriminatory conduct, it will fall to the Tribunal to determine whether the interests to be served by permitting that conduct outweigh the detriment which flows from discriminatory conduct. Often the interests properly considered by the Tribunal in that context will be public interests, but they need not be so.

63. The effect of s 135 of the EO Act was summarised in *Raytheon Australia Pty Ltd and Commissioner for Equal Opportunity* [2008] WASAT 266. In summary, conduct that would otherwise be unlawful becomes lawful by virtue of the exemption from the anti-discriminatory provisions of the EO Act.

64. Although the applications before the Tribunal in 2006 and 2011 are alike in substance, the facts and submissions in support of the applications in 2011 are not the same as they were in 2006, not least because of the effect of the granting of the exemption. The Tribunal must consider the substance of the applications afresh and determine whether the criteria that the Tribunal found to be met in 2006 are still met in 2011, whether that be for the same or any other reasons.

#### **Reasons for decision**

65. The Tribunal is satisfied that the application for a further exemption is reasonable and made in furtherance of a plan to promote the best interests of women prisoners at Bandyup, the people employed there and the public. This is because there is now greater understanding of the specific problems faced by women prisoners prior to imprisonment and upon their release, which have a direct bearing on their risk of re-offending. Current thinking appears to be that if behaviour that led to imprisonment is to be changed so as to improve the life of the female prisoner and reduce her risk of re-offending, effective intervention needs to take place during any period of imprisonment in an environment intended to meet her needs.

66. The Tribunal is satisfied that an exemption is necessary to enable the DCS to sustain the change away from the male-dominant culture that existed in the women's prison service prior to the granting of the exemption in 2006. It accepts the evidence that the vast majority of senior officer positions at Bandyup were taken by men prior to the granting of the exemption in 2006. It accepts the evidence that the exemption led to a change in the culture at Bandyup because women had the opportunity to be appointed to senior positions, and that this enabled a career path to open up for them, provided they chose to remain in the women's prison service.

67. The Tribunal accepts the evidence that the Strategic Plan aims to provide women prisoners with a service designed to meet their needs and to help them, insofar as they are able to be helped during their period of imprisonment. It accepts that this aim underpins the women-centred approach outlined in the Background Paper and the Strategic Plan, and that an increase in the number of women employed in positions within the prisons, particularly in positions of seniority, will have a marked impact upon the general prison environment.

68. The Tribunal is satisfied that the provision of female role models within the prison system for both staff and prisoners is a reasonable objective that cannot be achieved unless enough women occupy sufficient numbers of positions of seniority and influence within the prison system.

69. The Tribunal is satisfied that the process of change in the culture within the women's prison service is ongoing. It accepts the evidence that a number of women recruited into the service at entry level leave before rising through the ranks to senior positions, for reasons that would appear to have more to do with finding a less onerous and demanding job elsewhere than the lack of options for promotion within the service.

70. The Tribunal accepts the evidence that many women in prison have experienced significant trauma and abuse and that a period of imprisonment may create an opportunity for intervention resulting in improved prospects on release.

71. The Tribunal considers the views of the CEO regarding the abolition of the role of Director of Women's Prisons to be relevant to wider issues concerning the structure of the prison service that are beyond the remit of this application. However it finds her observations regarding the working practices concerning the 12-hour shift pattern to be on point. There is an irony inherent in an application that seeks to promote employment opportunities for women in a workplace on terms that may appear to be less than family friendly, and that may appeal only to a limited class of women. A shift pattern providing for 3 12-hour shifts followed by 3 consecutive days off may well suit many women with family lives that function for lengthy periods in their absence. However, it will not suit many women who cannot be away for such extended periods of time, such as women with responsibilities for young children or elderly relatives.

72. The Tribunal accepts the evidence that the DCS is examining its existing employment practices on an ongoing basis, not least because it is conscious of the need to attract women to employment in

the women's prison service if it is to achieve the objectives set out in its Strategic Plan. For that reason, the Tribunal finds no need to limit the period of further exemption to 2 years.

73. The Tribunal accepts the submission that the exemption apply also to the Pre-release Centre for the same reasons as relate to Bandyup.

**Order**

74. The Tribunal makes the following order—

1. The applicant is granted a further exemption from the operation of s 11 of the *Equal Opportunity Act 1984* (WA) for a period of 5 years from the date of this order for the purpose of filling 50% of identified positions for senior prison officers and 50% of identified positions for principal officers at Bandyup Women's Prison.
2. The applicant is granted an exemption from the operation of s 11 of the *Equal Opportunity Act 1984* (WA) for a period of 5 years from the date of this order for the purpose of filling 50% of identified positions for senior prison officers and 50% of identified positions for principal officers at Boronia Pre-release Centre.
3. By 30 December 2011, the applicant shall cause the publication in the *Government Gazette* of a notice of the making of this decision.

I certify that this and the preceding [74] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

Ms D. TAYLOR, Senior Member.

---