

# BRIEFS

## DISCRIMINATION

# Discriminating — for women

**BRONWYN McNAUGHTON** reports on a discrimination issue in the United States which has parallels in Australia.

The Human Rights and Equal Opportunity Commission (HREOC) recently considered a complaint (made by three men) that a national women's health program, funded jointly by State and Federal Governments, was in breach of the *Sex Discrimination Act* 1984 (Cth).<sup>1</sup> Although HREOC dismissed the complaint, it is far from certain that the proceedings have brought the complaint to a satisfactory conclusion.<sup>2</sup> This may simply be the first step in a protracted series of events that run the gamut from constitutional challenge to proposing amendments to the Act. It is also entirely possible that the success of such claims ultimately could result in the collapse of the health program and subsequent threat to other women-only programs.

Such complaints are not unique to Australia. For example, in July 1991, a complaint alleging unlawful discrimination against a female family law specialist was filed (by a male) with the Massachusetts Commission Against Discrimination. While resolution of that complaint will necessarily take place against the backdrop of the local law, in substance it bears a strong resemblance to the recent Australian complaints.

### The complaint

The Massachusetts complaint raised for the first time the question of whether a lawyer was covered by the Massachusetts State law prohibiting 'discrimination in admission to, or treatment in, a place of public accommodation'. That law provides as follows:



Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, . . . deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement . . . shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for . . . damages . . . All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.<sup>3</sup>

The complaint was laid by a man who had been refused the assistance he had requested from the woman lawyer, J. The man had been in the process of mediating his divorce. The mediation had resulted in a draft separation agreement which the mediator had recommended each party have reviewed by his or her own counsel. To assist the parties in finding suitable counsel, the mediator had provided them with a list of lawyers well qualified in family law. J was named on the list.

J's background includes founding and leading a local women's resource centre, participation in a task force on domestic violence and a lawyers' group monitoring implementation of the *Abuse Prevention Act*, and lecturing from time to time on family law and on the legal rights of women for continuing legal education programs, the bar association and at a community college. She is managing partner at a three partner firm in the small town of Lawrence, just outside Boston, Massachusetts. The firm handles a

range of work, including social security, workers compensation, lead paint litigation, personal injury for plaintiffs, consumer protection for consumers and landlord and tenant work for tenants. J specialises in family law and related matters (i.e. divorce, custody, adoption, wills and estates) and works almost exclusively in the Probate and Family Court. When it comes to matters related to divorce, she represents women only, although in other kinds of matters, such as guardianship, medical emergencies or conservatorships that are dealt with in the Probate Court, she represents both men and women. The other partners in her firm act for both men and women.

When the complainant called her office asking for representation and assistance, J explained her position and offered to recommend other lawyers who could assist. Her offer was refused and shortly afterwards the complaint was filed with the Commission Against Discrimination.

The Commission's policy is to encourage parties to resolve complaints rather than to investigate them formally and to litigate. Thus J was asked to respond to the complaint that had been made against her. In response, she argued, among other things, that the *Public Accommodations Act* (under which the complaint had been made) did not apply to lawyers; that ethically a lawyer could not represent a client when she or he believed that because of a clash of interests she or he was not able to do so zealously; and that limiting one's professional practice to representing traditionally disadvantaged groups was not unlawful discrimination.<sup>4</sup>

### Public accommodation

A 'place of public accommodation, resort or amusement' is defined to include 'any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public'. A lengthy list of examples follows, examples which are obviously intended to be illustrative as they are expressly not intended to limit the generality of the definition (which refers to, for example, hotels, resorts, elevators, gas stations, restaurants, beauty parlours, public libraries, hospitals and public highways).<sup>5</sup>

# BRIEFS

The essence of the definition is the solicitation and acceptance of patronage from the general public<sup>6</sup> and J pointed to the absence of mention of lawyers, law firms, the practice of law or indeed any comparable type of service in the definition. In contrast to the expectation to be treated or served on paying the asking price that was the focus of the definition, there was no such expectation in relation to a lawyer. Not only was there no obligation on a lawyer to accept every client who walked through the door, there were various ethical reasons that could *compel* a lawyer to turn a case away. Accordingly there was no entitlement or expectation on the part of potential clients that a lawyer would automatically accept any particular case. If legislation dealing with public accommodations had been intended to do away with the unfettered discretion of a lawyer in regard to the acceptance of cases, it was argued, surely the legislature would have done so expressly.

## Ethics

The second part of the response dealt with the ethical obligations of the lawyer to represent a client zealously.<sup>7</sup> Ethical rules require a lawyer to decline a case when 'the exercise of his [sic] professional judgment on behalf of his [sic] client will or reasonably may be affected by his own financial, business, property or personal interest' or when the potential client's case 'would be likely to involve him [sic] in representing differing interests'. The definition of 'differing interests' is extremely broad and includes 'every interest that will adversely affect either the judgment or the loyalty of a lawyer to his client, whether it be conflicting, inconsistent, diverse or other interest'.<sup>8</sup>

The particular argument was that, given J's dedication of her divorce practice to advocacy, development of domestic relations law and education of judges and family law mediators in relation to the special interests of women, she would be presented with an 'issue conflict' if she were to represent a man in such proceedings. This was particularly so as she practised almost exclusively in a single court and did not want to be 'talking out of both sides of her mouth' on the host of issues that divided husbands and

wives in divorce proceedings. Zealous advocacy of a husband in these circumstances would be impossible and, moreover, unethical.

It was also pointed out that issue conflict commonly led lawyers to limit their practice to one side or the other of various legal fields. Thus a lawyer working in labour law might represent labour but not management, or in the field of personal injury plaintiffs but not insurance companies.

A further argument was made that forcing a lawyer to represent a client or take a case that the lawyer disagreed with would constitute a violation of the lawyer's own civil rights. Reference was made to a Massachusetts decision that requiring a school teacher to lead a class in the pledge of allegiance would violate the teacher's right of freedom of speech.<sup>9</sup> It was asserted that lawyers did not lose their rights of free speech when they became members of the bar.

## Positive discrimination

J also argued that rather than discriminating against men she was helping women. She pointed out that the law is commonly seen as a means of promoting social justice for various groups who may have been denied their rights at law and that if the act of discrimination in this case were to be found illegal, then the anti-discrimination law itself would only serve to punish a range of public spirited and public interest lawyers and organisations acting in the interests of particular disadvantaged minority groups. Ironically, what it would not be effectively preventing would be truly sexist refusals to represent clients as these could potentially retain their cloak of other, spurious, reasons.

At the time of writing, the complaint and response lie in an in-tray somewhere in the Massachusetts Commission Against Discrimination. It is possible that there they will remain for some considerable time, perhaps in someone's too-hard basket, especially if the heat that animated this particular complainant has died. The issue will not be hidden so readily, however; whatever the fate of this complaint, it will remain to be dealt with.

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## References

1. Note, e.g. the reports 'Legal threat to women's programs' and 'A test case on women's programs' by Margo Kingston, *Age*, 25.11.91, pp.1, 6, 13.
2. See 'Landmark sex discrimination ruling fails to clear the air', *Financial Review*, 19.3.92, p. 5.
3. Massachusetts General Laws, chapter 272, s.98.
4. It is interesting to note that it was this latter point that was the basis on which HREOC dismissed the complaint referred to above.
5. See Massachusetts General Laws, chapter 272, s.92A. See also *Local Finance Co of Rockland v Massachusetts Commission Against Discrimination* (1968) 242 N E 2d 536, 355 Mass 10: enumerated specific examples do not restrict the general statutory language or provide for applying the principle of *ejusdem generis*, and no prior Massachusetts case is conclusive as to the meaning of 'place of public accommodation'.
6. See Opinion of the Attorney-General, 28 April 1964, p. 224.
7. Expressly set out in the Canon of Ethics and reinforced in the case law e.g. see *Commonwealth v Tabor* 376 Mass 811, 817 n 10 (1978).
8. Disciplinary Rules 5-101(A), 5-105(A); Canon of Ethics, rule 3:07, definitions (1).
9. Opinion of the Justices 372 Mass 874 (1977).