AN APPLICATION FOR EXEMPTION FROM THE PROVISIONS OF THE EQUAL OPPORTUNITY ACT 1984 (VIC.) BY THE CITY OF BRUNSWICK ('THE *BRUNSWICK BATHS* CASE')[1]

Introduction

The Equal Opportunity Act 1984 (Vic.) ('the Act') was implemented with the dual aims of overcoming discrimination against women and other disadvantaged groups, and promoting equality of opportunity. Yet, in recent years, the legislation has been used to the detriment of women. This is well demonstrated by the recent Order of the Board in the *Brunswick Baths* case.

The Law — Equal Opportunity Act 1984 (Vic.)

Discrimination is defined in the Act as less favourable treatment by reason of a person's status or private life.[2] Section 29 makes it unlawful for a provider of goods or services to discriminate against anyone on the grounds of status (which, under s. 4(1), includes 'sex'). The legislation is couched in gender neutral terms and reflects the equal treatment model of anti-discrimination — the idea that everyone should be treated in the same way. As Sheehy points out, this theory calls for the elimination of legal and other distinctions between the sexes and promotes identical treatment of men and women and groups within society.[3] Sheehy notes that one of the problems with this model is that it assumes the continued existence of the current social and political structure and measures 'equal treatment' by the prevailing norms and values;[4] that is, white, middle-class, male values.

The legislation does, however, have an affirmative action component; s. 39(f) provides that a 'bona fide programme, plan or arrangement designed to prevent or reduce disadvantage suffered by a particular class of disadvantaged persons' is not unlawful. The second aim of the Act, then, is to promote equality of opportunity.[5]

1 Unreported, Equal Opportunity Board, 17 March 1992.

2 Equal Opportunity Act 1984 (Vic.) s. 17(1). Section 17(5) deals with 'indirect' discrimination.

3 Sheehy, E. A., *Personal Autonomy and the Criminal Law: Emerging Issues for Women*, Background Paper Canadian Advisory Council on the Status of Women (September 1987) 3.

4 *Ibid.*

5 In his second reading speech, the Attorney-General of Victoria, Mr Cain, said that excluded from the ambit of the Act are genuine positive discrimination or affirmative action programmes. He referred to s. 39 and stated that if a plan, programme or arrangement is for the benefit of previously disadvantaged classes of persons, designed to achieve more equality of opportunity, the discrimination provisions are of no application. See Victoria, *Parliamentary Debates*, Legislative Assembly, 31 May 1983, 4721.

The Facts

The City of Brunswick applied to the Board for an exemption from s. 29 of the Act. Under s. 40, the Board has a wide discretion to grant a temporary exemption. The City wanted to provide women-only sessions at the Brunswick Baths on Fridays between 10.00am and 2.00pm and 6.30 and 8.30pm for a trial period of four months. During this period, it was envisaged that the City would collect statistical data from the users of the pool at the women-only sessions and the other sessions. That data would indicate whether or not there were disadvantaged groups within the women residents of Brunswick in relation to the facilities at the Baths. If, as a result of these surveys, the City concluded that there were disadvantaged groups of women, they would then rely on s. 39(f) to establish a programme, plan or arrangement designed to prevent or reduce that disadvantage.

The Council had already gathered substantial material indicating strong support for women-only sessions from women in the community, and pointing to the disadvantages affecting women. For example, a women-only day held at the Baths in 1991 attracted between eighty and one hundred women and written requests for women-only sessions had been received from a number of individuals and groups including the Arabic Women's Group at the Brunswick Community Health Centre. In a phone-in conducted in January 1992, seventy-nine women registered their support. From its enquiries, the Council concluded that many local women would not attend the Baths for several reasons, including:

(a) religious and cultural reasons — Muslim women in particular were disadvantaged because their religion did not allow them to swim in the presence of men;
(b) concern about body image experienced by many women who perceive themselves as not conforming to the media concept of the 'perfect shape'; and
(c) incidents of sexual harassment at the Baths.

It could be argued that this material clearly demonstrated the disadvantage suffered by women.

Several people objected on various grounds including the principle that to close the complex to men constituted discrimination against them. This principle was held by several objectors regardless of whether they actually wished to use the pool at the times delineated.

The Board's Decision

The Board refused to exercise its discretion under s. 40 to grant a temporary exemption. It was not satisfied that the Council had demonstrated a reasonable likelihood that the trial was necessary in order to establish that a particular disadvantaged class or classes of women reside within the City of Brunswick. Perhaps other, non-discriminatory, methods of gaining the information could be used. The Board stated that there had been no surveys of, interviews with, or approaches to, recognized groups within the community.[6] Neither was the Board

[6] *Brunswick Baths*, *supra* n. 1, 14.

satisfied that a trial period would 'result in information that would allow any of the desired conclusions to be established.'[7]

However, the most important evidence of disadvantage has to come from women in the community and from the women who actually use the Baths. The trial period would encourage women who would not ordinarily use the Baths to come along and to fill in questionnaires. This method could be successful — as demonstrated by the fact that the Women's Only Day in 7 March 1991 was very well attended, with staff at the baths collecting almost two hundred questionnaires on that day.[8] Without actually conducting the trial period, the Council could not say with any certainty how many women would utilize the facilities during women-only periods.

Nevertheless, the Council probably should have submitted a more detailed proposal to the Board. The Board criticized the City for not specifying the form of the statistical data it proposed to collect, in what way the data was likely to indicate to the Council whether or not there were disadvantaged groups within the women residents of Brunswick, and the nature of their disadvantage.[9]

The Board was also critical of the Council for not initiating an educational programme in relation to the supervisors or users of the Baths regarding sexual harassment. While an educational programme should be undertaken, such a programme would not solve the problem in the short-term. It may take some time before the positive effects of educational programmes become clear. In the meantime, women need an environment in which they can feel safe. In addition, education on sexual harassment would not help the women who feel they do not conform to society's image of the acceptable body shape. Neither would it aid Muslim women who make up a significant proportion of the residents of Brunswick. The Board stated that it was not satisfied that Muslim women would be in a position to use the Baths in the presence of non-Islamic women.[10] However, Islamic women's groups supported women-only sessions and fifty-one individual women stated they would use the Baths during the women-only times.

Section 39(f)

The Brunswick City Council did not rely on s. 39(f) in its Application, as it had already conceded that it did not have sufficient material establishing disadvantage. The Board, therefore, did not make a finding on whether women-only periods could be considered a 'bona fide programme, plan or arrangement' within the meaning of s. 39(f). However, the Board has considered s. 39(f) in two previous cases — *Ross v. University of Melbourne*[11] and *Pulis & Banfield v. Moe City Council.*[12]

The facts in *Moe City Council* and in *Ross* are very similar to those in *Brunswick Baths*. In each case, the recreational facility involved had attempted

7 *Ibid.* 6.
8 *Ibid.* 14.
9 *Ibid.* 13.
10 *Ibid.* 14.
11 *Ross v. University of Melbourne* (1989-90) E.O.C. 92-290.
12 *Pulis & Banfield v. Moe City Council* (1986-88) E.O.C. 92-170.

to introduce women-only sessions. In *Ross*, the Board was not satisfied that the programme itself fell within s. 39(f). The Board stated that, despite the wide wording of s. 39(f), it was not satisfied 'that the simple closure of the Light Weight Room can be said to be an arrangement designed to prevent or reduce disadvantage'.[13] It is suggested that the important factor in deciding whether or not an arrangement or programme falls within s. 39(f) is its effectiveness. Thus, if the simple closure of a facility to males for certain periods has the beneficial effect of encouraging women's participation in the sport or activity, it should be deemed to fall within s. 39(f). In *Ross*, the Board considered 'irrelevant' the fact that there was similar equipment in the Main Weight Room which was open to men during the women-only times. According to the Board, in order for the closure not to constitute less favourable treatment of men, there would have to be an identical facility offering men exactly the same exclusive use. The Board refused to give any weight to the fact that the Main Weights Room was generally used by males only and therefore could be considered a place where they enjoyed an advantage.[14]

In *Moe*, as in *Brunswick Baths*, the Board seemed to require that it be specifically demonstrated that there are disadvantaged classes of women within the women users of the pool. However, this is not required by the legislation — s. 39(f) merely refers to 'a particular class of disadvantaged *persons*'. Since women, as a class, are still disadvantaged in society, it should not be necessary to establish that a class of particularly disadvantaged women exists in order to set up affirmative action programmes.

In *Brunswick Baths*, the Board specifically stated that it did not resile from the comments made regarding s. 39(f) in *Moe* and *Ross*.[15] Thus, if the Brunswick City Council had wished to institute women-only periods of use at the baths relying on s. 39(f) then, in all probability, any challenge to that decision would have been successful.

Conclusions

In *Moe*, *Ross* and the *Brunswick Baths* cases, the Equal Opportunity Board appears to be taking a narrow, literal view of legislation which, being remedial in nature, should be interpreted broadly. While the Board states that it recognizes the dual purposes of the legislation,[16] it appears to place great emphasis on the discrimination aspects of the legislation and not enough on the affirmative action aspects. The Board was concerned to make sure that the Council's actions did not result in discrimination against men, even in principle — that is, even if no-one was actually inconvenienced by the trial women-only periods. By contrast, there was strong support for the women-only times from local women who would not use the Baths in the presence of men.

In addition, the Board seems to be looking at formal and not substantive

[13] *Supra* n. 11, 77936.
[14] *Ibid.* 77934.
[15] *Brunswick Baths*, *supra* n. 1, 7.
[16] *Ibid.* 12.

equality. The Board did not look beyond the discrimination aspects to the reasons why women-only times are necessary. It has failed to appreciate the importance of 'women-only' space. Although both men and women have access to the Baths at all times, women, feeling unsafe and insecure in the presence of men or, unable to use the baths for cultural and religious reasons, do not have the same opportunities to use the facilities. It is also suggested that its decision not to allow 'women-only' space is unfortunate in a society which does not generally encourage women to take part in sporting activities.

It should be noted that the Victorian Equal Opportunity Board's interpretation of affirmative action provisions conflicts with that of the Commonwealth Human Rights and Equal Opportunity Commission. In *Proudfoot & Ors v. Australian Capital Territory Board of Health*,[17] the President, Sir Ronald Wilson, considered s. 33 of the Sex Discrimination Act 1984 (Cth). Section 33 provides that it is not unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have opportunities equal to other persons. Although s. 33 is differently worded and does not require a 'bona fide programme, plan or arrangement', like s. 39(f) of the Victorian Act it envisages that affirmative action programmes are outside the ambit of the discrimination provisions. The President held that women's health services fell within that affirmative action provision. He recognized that women are disadvantaged in their personal well-being and stated that it was not necessary for the Commission to determine whether the services are in fact necessary or suitable for the purpose of promoting equal opportunities between women and men in the field of health care. All that is required is that the measures must be undertaken with that purpose in view and that it is reasonable for those who undertake them to conclude that the measures would further the purpose.[18]

The decision in *Brunswick Baths* also highlights problems with the legislation itself. As McKinnon points out, under the sameness standard or the 'equal treatment' model, women are measured according to their correspondence with men.[19] It does not recognize women's experience. The affirmative action provisions are not emphasized in the Act. Section 39 is an exemption provision to the general law prohibiting discrimination — it is not a focal part of the law.

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[17] *Proudfoot & Ors v. Australian Capital Territory Board of Health & Ors* (1992) E.O.C. 92-417.
[18] *Ibid.* 78984.
[19] McKinnon, C., *Feminism Unmodified: Discourses on Life and Law* (1987) 32.

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