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EQUAL OPPORTUNITY ACT 1984

**NOTICE OF THE MAKING OF A
DECISION UNDER s135**

**EX PARTE
MINISTER FOR JUSTICE**

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 Ex Parte Minister for Justice—

JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
STREAM	:	HUMAN RIGHTS
ACT	:	EQUAL OPPORTUNITY ACT 1984 (WA)
CITATION	:	RE APPLICATION FOR EXEMPTION UNDER S 135 OF THE EQUAL OPPORTUNITY ACT 1984; EX PARTE MINISTER FOR JUSTICE [2006] WASAT 127
MEMBER	:	MS J TOOHEY (SENIOR MEMBER) MS F CHILD (MEMBER)
HEARD	:	1 MAY 2006
DELIVERED	:	22 MAY 2006
FILE NO/S	:	EOA 16 of 2006
MATTER	:	APPLICATION FOR EXEMPTION UNDER S 135 OF THE EQUAL OPPORTUNITY ACT 1984 EX PARTE MINISTER FOR JUSTICE Applicant

Catchwords—

Application for exemption—Sex discrimination—Exemption sought to allow Senior Prison Officer positions to be filled by women—Tribunal satisfied exemption would promote the objects of the Act—Exemption granted

Legislation—

Equal Opportunity Act 1984 (WA), s 11, s 135, s 135(1) s 135(3), s 135(6)

Equal Opportunity Act 1995 (Vic)

Equal Opportunity Regulations 1986 (WA), reg 24

Result—

Exemption granted.

Category: A

Representation—

Counsel—

Applicant : Ms V Bell and Ms L Campbell (As Agent)

Solicitors—

Applicant : N/A

Case(s) referred to in decision(s)—

Australian Housing and Urban Research Institute Limited [2005] WASAT 148

In the matter of an application for exemption pursuant to s 135 of the Equal Opportunity Act 1984 (WA), unreported, Equal Opportunity Tribunal of WA, 10 November 2004

Minister for Education and Commissioner for Equal Opportunity (1987) EOC 92-198

RMIT—Exemption [2000] VCAT 409

Scarborough Police and Citizens Youth Club [2006] WASAT 38

Stevens v Fernwood Fitness Centres Pty Ltd (1996) EOC 92-782

Case(s) also cited—

Nil

REASONS FOR DECISION OF THE TRIBUNAL

Summary of Tribunal's decision

- 1 These proceedings concerned an application by the Minister for Justice for an exemption from s 11 of the *Equal Opportunity Act 1984* (WA) which makes it unlawful for an employer to discriminate against an applicant for employment on the ground of their sex.
- 2 The exemption was sought in order to increase the number of female Senior Prison Officers at Bandyup Womens Prison by allowing a number of positions to be filled by women applicants only.
- 3 Evidence was given on behalf of the Minister that women prisoners are especially disadvantaged and have special needs that can best be met by an increased number of female Senior Prison

Officers. Evidence was given that efforts in recent years to recruit and promote more women prison officers have had only limited success and more active efforts were now required. The Minister sought to allow 8 of the 13 Senior Prison Officer positions at Bandyup Womens Prison to be filled by women applicants only. Without an exemption, to do so would amount to unlawful discrimination contrary to the Act. The Commissioner for Equal Opportunity supported the application.

- 4 The Tribunal was satisfied that the exemption would further the objects of the Act being the elimination of all forms of discrimination, and the recognition and acceptance within the community of the equality of men and women. It granted the exemption for five years.

Background

- 5 This is an application by the Minister for Justice for an exemption from s 11 of the *Equal Opportunity Act 1984* (WA) (the Act) which makes it unlawful for an employer to discriminate against an applicant for employment on the ground of their sex.
- 6 The exemption is sought to allow a number of Senior Prison Officer positions at Bandyup Womens Prison to be filled by women applicants only.

Parties to the application

- 7 By virtue of reg 24 of the *Equal Opportunity Regulations 1986*, the Commissioner for Equal Opportunity (the Commissioner) is a party to every application for exemption unless she lodges with the Tribunal an affidavit setting out the reasons why she does not wish to be a party to the application.
- 8 By an affidavit dated 23 March 2006, the Commissioner notified the Tribunal that she supports the exemption because, in her view, it falls within the objects of the Act "being the elimination of all forms of discrimination, and the promotion, recognition and acceptance within the community of the equality of women". The Commissioner further advised that she did not wish to be heard in relation to the application.
- 9 Notice of the application, as required by s 135(3) of the Act, was given in an advertisement in The West Australian newspaper on 25 March 2006. The notice invited any person wishing to become a party to the application to notify the Tribunal of their interest in the proceedings. No response to the notice was received by the Tribunal.
- 10 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.

The applicant's submissions

- 11 The Tribunal received written submissions on behalf of the Minister and heard oral evidence from Ms Vicki Bell, Director of Women's Custodial Services, and Ms Liz Campbell, Equity and Diversity Manager, both from the Department of Corrective Services, at a hearing on 1 May 2006.
- 12 Bandyup Womens Prison accommodates approximately 165 prisoners who are housed in three living units, each under the charge of a Senior Prison Officer. The role of the Senior Prison Officer is to ensure the safe and efficient running of the unit including supervising prison officers and prisoners, and ensuring prison policy is put into practice and prison rules and regulations complied with.
- 13 The Tribunal heard evidence that the majority of women prisoners in Western Australia are accommodated at Bandyup. Approximately 45% of the Bandyup population at any time are Aboriginal women. Recent surveys of women prisoners across the State document widespread incidence of past sexual and physical abuse: 77% of the women report abuse as a child and 57% as an adult; 61% report health problems; 51% have previously been diagnosed with a mental health problem; over 80% report frequent drug and alcohol use in the six months prior to their incarceration. It is estimated that over 80% of the prisoners at Bandyup have a personality disorder but they are not managed within the mental health system but, rather, within a corrective facility.
- 14 The Minister submits that women prisoners are distinctly different from male prisoners and have distinctly different needs. Seventy-two per cent of the women at Bandyup are aged under 35, most are mothers and 63% have children under 18. The majority are primary carers. The effects of their imprisonment on their families can hardly be overstated.
- 15 The Tribunal heard evidence that, historically, prisons have been places for custody and containment, and prison officers have been almost exclusively male. More recently, the role of prison officers in the Department of Corrective Services, and at Bandyup in particular, has changed. There is now a focus on what are seen as the four cornerstones of prison management: custody and containment; the care and wellbeing of prisoners; rehabilitation and reintegration of prisoners into the community; and reparation by prisoners to the community. The traditional role of the prison officer is changing to one aimed at the overall wellbeing of the prisoner.
- 16 The Minister submits that the needs of women prisoners can be met most effectively by women prison officers with sound communication skills and an understanding and empathy with issues affecting women generally and women prisoners in particular. Most of the sexual and physical abuse suffered by women prisoners has been at the hands of men. Underpinning the present proposal is the belief that women officers, especially in more senior positions, can best counsel and support the women prisoners and can provide strong and independent role models and help improve their self-esteem and sense of personal control over their lives; further that increased representation of women at the middle management level of Senior Prison Officer provides greater diversity of skills and experience and improves management generally.
- 17 The Tribunal heard evidence that, in 2003, Bandyup initiated reforms aimed at meeting the particular needs of the women in custody there. Increasing the number of women prison officers and Senior Prison Officers is part of this program of reform. However, changing a culture developed over many years is a slow process.

- 18 Until recently, promotion within prison officer ranks was by seniority; in a mostly male workforce this inevitably favoured men. Promotion is now, in principle, based on merit. However, according to Ms Bell and Ms Campbell, the relatively recent shift to promotion based on merit has not of itself overcome barriers to promotion of women within the ranks of prison officer. It does not, for instance, overcome the difficulties in attracting women prison officers at the lower levels in the first place. Further, opportunities to act in higher positions tend, in a male-dominated culture, to go to men, making them more competitive for promotion by virtue of their experience at the more senior level.
- 19 In line with its broader program of reform, the Department of Corrective Services has made various attempts in recent years to increase the number of women prison officers generally. For instance, advertisements for prison officer positions state that women are encouraged to apply and community information sessions aimed at recruiting new officers are conducted with the view to encouraging more women to apply.
- 20 A recent recruitment round was held specifically for Bandyup in the hope that women applicants would have better prospects of promotion from within a smaller field of applicants. However, this strategy resulted in only one woman being promoted to Senior Prison Officer at Bandyup in 2005.
- 21 Two additional Senior Prison Officer positions have recently been created at Bandyup. Female prison officers are selected to act in these positions for a period to give them experience at the higher level and, it is hoped, make them more competitive for future promotion.
- 22 The Tribunal heard evidence that, despite these efforts, by 2004 only 19% of prison officers in Western Australia were women. In 2005, only 24 of 73 new appointments were women. Despite targeting women and encouraging them to apply for promotion to Senior Prison Officer, there has been no significant change in the ratios of male to female officers in the senior positions. Besides the relatively low numbers of women being recruited at the prison officer level, meaning a smaller pool for promotion, structural barriers limit opportunities for promotion to more senior levels. In 2004, of 153 Senior Prison Officers in Western Australia only 12 were women.
- 23 Although some change appears to be happening, the Minister says that, without additional steps being taken now, it will be many years before women generally have the experience and skills needed for promotion to Senior Prison Officer. He seeks the exemption in order to accelerate opportunities for promotion.
- 24 The Minister proposes that 8 Senior Officer Positions of the 13 available at Bandyup be identified for filling by women only. It is anticipated that the number of Senior Prison Officer positions at Bandyup will increase to 16 following a recent staffing review. The proposal would not see involve any currently serving male officers losing their positions: it is intended that, as and when a vacancy arises, it be held open for women only and filled by a woman from a pool of applicants.
- 25 The Minister says that a combined strategy of recruitment drives aimed at women, increased opportunities for women to act in senior positions, and allocating some positions for filling by women will help redress past discrimination and correct historical imbalances in the numbers of women and men in the senior ranks at Bandyup.
- 26 Although the union representing prison officers did not seek to be joined in these proceedings, Ms Bell told the Tribunal that there have been negotiations over a period of time with the Secretary of that union regarding the proposal for the exemption. Negotiations led to some amendments to the proposal but no objection to it.
- 27 The Minister proposes that the exemption apply until such time as the positions identified for filling by women are in fact filled by women. It is estimated that this may take some years given the history and generally conservative nature of the prison system.

The law

- 28 Section 11 of the 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 or pregnancy—
 - (a) in the arrangements made for the purpose of determining who should be offered employment;
 - (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 or pregnancy—
 - (a) in the terms or conditions of employment that the employer affords the employee;
 - (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;
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.
- 29 Section 135 of the Act provides that the Tribunal may grant an exemption from the operation of a specified provision in the Act. An exemption may be granted subject to such terms and conditions as the Tribunal orders; it may be varied on the application of the person to whom it is granted, or at the instance of the Tribunal. It may be expressed to apply only to such circumstances, or in relation to such activities, as are specified in the order, and it may be granted for a period not exceeding five years: ss 135(1) and 135(6).
- 30 The Act offers no guidance as to the exercise of the exemption power. However, the principles to be applied have been considered in a number of cases.
- 31 In the first place, the exemption must be necessary: unless the conduct sought to be exempted would constitute unlawful discrimination within the meaning of the Act, an exemption is not

necessary, and the matter need be taken no further: *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782; *Scarborough Police and Citizens Youth Club* [2006] WASAT 38.

- 32 Exemptions for conduct which of itself promotes the objects of the Act in one way or another have generally been granted. For instance, in *Minister for Education and Commissioner for Equal Opportunity* (1987) EOC 92-198, in circumstances very similar to the present application, an exemption was granted to allow measures favouring the promotion of women to positions as Deputy Headmaster. There was evidence before the Western Australian Equal Opportunity Tribunal that, despite various measures to improve their prospects of promotion, women teachers continued to be seriously disadvantaged in comparison with men. The Minister argued that the exemption was necessary to redress imbalances based on sex that would persist were the exemption not granted. The Tribunal found that it was to the benefit of all students, and the community generally, that women hold, and be seen to hold, positions of authority within the Department of Education. The Tribunal took into account, and gave weight to the fact that the Commissioner supported the exemption.
- 33 In *In the matter of an application for exemption pursuant to s 135 of the Equal Opportunity Act 1984 (WA)*, unreported, Equal Opportunity Tribunal of WA, 10 November 2004, the Western Australian Equal Opportunity Tribunal granted an exemption so that the applicant could offer self-defence classes for women only, designed around special techniques for women, and so they could train without the rigorous physical contact with men which some women preferred to avoid. The Tribunal accepted that women as a class are particularly susceptible to attack by men and that the exemption would promote the objects of the Act.
- 34 In *RMIT—Exemption* [2000] VCAT 409, an exemption was granted to enable the Royal Melbourne Institute of Technology to offer two of ten post-graduate scholarships to women only. The Victorian Civil and Administrative Tribunal was satisfied that the exemption would promote one of the objectives of the Victorian *Equal Opportunity Act 1995* being “the acceptance and recognition of everyone's rights to equality of opportunity” (per Deputy President McKenzie at [30]).
- 35 In *Australian Housing and Urban Research Institute Limited* [2005] WASAT 148 this Tribunal granted an exemption to allow the applicant to offer scholarships to indigenous students to encourage them into the field of housing and urban research. The Tribunal found that the exemption would further the objects of the Act by helping to redress the lack of indigenous people in the field of social science research.

Reasons for decision

- 36 The Tribunal is satisfied that the proposal by the Minister to allow a number of Senior Prison Officer positions at Bandyup to be filled by women only, in preference to men would, in the absence of an exemption, amount to unlawful discrimination. If the proposed approach to recruitment is to proceed, an exemption is necessary if the Minister is not to be in breach of the Act.
- 37 The Tribunal accepts the evidence and submissions of the Minister that employment in the prison system has traditionally been a male occupation. It accepts that an increase in female prison officers generally and Senior Prison Officers in particular will benefit the individual officers, women prisoners and the community generally.
- 38 The Tribunal is satisfied, on the evidence before it, that efforts to date to increase the number of women prison officers generally, and Senior Prison Officers in particular, have had limited success. It accepts that a more active approach is needed to redress the effects of past discrimination and promote equality of opportunity for women prison officers and improve conditions for women prisoners generally.
- 39 The Tribunal is satisfied, on the evidence before it, that the exemption will, in effect, promote the objects of the Act by promoting equality of opportunity for women in employment and acceptance within the community of the equality of women and men. It is satisfied that the Minister will not rely on the exemption alone but that this strategy will operate alongside the other measures aimed at recruiting and promoting more women officers. It accepts that progress may be slow because of the substantial barriers to employment at more senior levels that exist for women and that the maximum period allowed for an exemption under the Act is appropriate.
- 40 The Tribunal has taken into account the position taken by the Commissioner in supporting the granting of an exemption and her view that it falls within the objects of the Act. The Tribunal has also taken into account that no interest in the proceedings has been expressed by any other person in response to the published notice of these proceedings.
- 41 The Tribunal is satisfied that the exemption should be granted and remain in force for the period of five years sought by the applicant.

Decision

- (i) The applicant is granted an exemption from the operation of s 11 of the *Equal Opportunity Act 1984 (WA)* for a period of five years from the date of this order for the purpose of filling identified positions for Senior Prison Officers at Bandyup Womens Prison.
- (ii) The applicant is to pay the cost of publication in the *Government Gazette* of a notice of the making of this decision pursuant to s 136(1) of the Act.

I certify that this and the preceding [41] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

Ms J. TOOHEY, Senior Member.

