Kennedy & Ors v Anti-Discrimination Commission of the NT & Ors
[2006] NTCA 9

PARTIES:	KENNEDY, Robert E INGHAM, Anthony BATH, Sheila M v ANTI-DISCRIMINATION COMMISSION OF THE NORTHERN TERRITORY, NT GOVERNMENT OFFICE OF ETHNIC AFFAIRS AND TOP END WOMEN'S LEGAL SERVICE
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No AP 7/2005 (20417920)
DELIVERED:	3 October 2006
HEARING DATES:	2 May 2006
JUDGMENT OF:	MILDREN, THOMAS & SOUTHWOOD JJ
APPEAL FROM:	*Kennedy & Ors v Anti-Discrimination Commission of the Northern Territory* [2005] NTSC 56

CATCHWORDS:

DISCRIMINATION LAW – whether third respondent's conduct discriminatory – whether Anti Discrimination Act (NT) s 41(2) applies to an Association – whether exemption should be given a beneficial construction – whether conduct protected by s 57(1)

STATUTORY INTERPRETATION – whether "person" includes a body corporate – Anti Discrimination Act (NT) s 41(2)

WORD AND PHRASES – "on behalf of"

VICARIOUS LIABILITY – servants of corporation not liable under Act – whether corporation vicariously liable for acts of servants

Legislation:

Anti-Discrimination Act (NT), s 4(1), s 4(7), s 5, s 19, s 19(1)(b), s 19(1)(r), s 19(2), s 20, s 22, s 27, s 41, s 41(1), s 41(2), s 41(2)(a), s 41(2)(b), s 57, s 57(1), s 64(1)(c), s 74(1), s 91(2), s 102(1)(d), s 106, s 106(2)
Anti-Discrimination Act 1991 (Qld), s 46, s 46(2)
Interpretation Act, s 3(3)
Local Court Act, s 19
Racial Discrimination Act 1975 (Cth), s 8(1)

Citations:

Referred to:

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 115 NTR 25
Darling Island Stevedoring and Lighterage Co Ltd v Long (1956-1957) 97 CLR 36
Deputy Commissioner of Taxation (NSW) v Mutton (1988) 79 ALR 509
Gerhardy v Brown (1984-1985) 57 ALR 472
H L Bolton (Engineering) Co Ltd v T J Graham and Sons Ltd [1957] 1 QB 159
Industry Research and Development Board v Phai See Investments Pty Ltd (2001) 112 FCR 24
Opinion re Women's Legal Service Inc [1996] QADT 21 (16 September 1996)
Tesco Supermarkets Ltd v Nattrass [1972] AC 153
Tracy Village Sports and Social Club v Walker (1992-1993) 111 FLR 32
Wilson v Lowery (1992-1993) 110 FLR 142

Followed:

Brookton Co-Operative Society Limited v The Commissioner of Taxation of the Commonwealth of Australia (1980-1981) 147 CLR 441
Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No. 2) (1986-1987) 162 CLR 153
Pinecot Pty Ltd v Anti-Discrimination Commissioner (2001) 165 FLR 25
Rose v Secretary, Department of Social Security (1990) 92 ALR 521
The Queen v Toohey & Anor; Ex parte the Attorney-General for the Northern Territory of Australia (1979-1980) 145 CLR 374

REPRESENTATION:

Counsel:

Appellant:	M O'Donnell
First Respondent:	T Lisson
Second Respondent:	T Pauling QC
Third Respondent:	P Barr QC

Solicitors:

Appellant:	Anthony Dean Buckland
First Respondent:	Kathryn Ganley
Second Respondent:	Solicitor for the Northern Territory
Third Respondent:	Top End Women's Legal Service

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kennedy & Ors v Anti-Discrimination Commission of the NT & Ors
[2006] NTCA 9
No. AP 7/2005 (20417920)

BETWEEN:

ROBERT E KENNEDY, ANTHONY INGHAM AND SHEILA M BATH
Appellants

AND:

ANTI-DISCRIMINATION COMMISSION OF THE NORTHERN TERRITORY
First Respondent

NT GOVERNMENT OFFICE OF ETHNIC AFFAIRS
Second Respondent

TOP END WOMEN'S LEGAL SERVICE
Third Respondent

CORAM: MILDREN, THOMAS & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 3 October 2006)

Mildren J:

[1] In November 2001 the third respondent, Top End Women's Legal Service (TEWLS), advertised the holding of a free family law workshop aimed at

migrant and refugee women in the Darwin region to be held at the Casuarina Library, Bradshaw Terrace, Casuarina on Saturday 10 November 2001.

[2] The project was funded by the Northern Territory Office of Ethnic Affairs (the second respondent) following an application for sponsorship made to it by the TEWLS. The second respondent is part of the Department of the Chief Minister described as "NT Government Office of Ethnic Affairs" in the heading to these proceedings. It is really the Northern Territory of Australia.

[3] The free family law workshop indicated that "all non-English speaking background women are welcome".

[4] The appellants Kennedy and Ingham alleged that they were excluded from attending the workshop. On 19 December 2001 they lodged a complaint with the first respondent against inter alia the second and third respondents on the grounds that they had been unlawfully discriminated against by them on the grounds of their male sex contrary to s 19 and s 20 of the Anti-Discrimination Act (NT) (the Act).

[5] Complaints were also lodged against the Family Court of Australia, officers of both the second and third respondents and against "others responsible for the event of a family law workshop at Casuarina Library on Saturday 10 November 2001".

[6] The complainant Bath alleged unlawful discrimination arising out of the same circumstances on the basis of her association with the complainants Kennedy and Ingham contrary to s 19(1)(r) of the Act.

[7] On or about 16 January 2002 a delegate of the Commissioner of the first respondent accepted the complaints and notified the second and third respondents to that effect. Under the Act, "acceptance" of the complaints merely means that a complaint appears to fall within the scope of the Act and leads to the necessity for the Commissioner to carry out an investigation pursuant to s 74(1) of the Act.

[8] Originally there was a fourth complainant, a Mr Howard Bailey-Green (hereinafter called "Green").

[9] By letter dated 2 August 2002, the delegate of the Commissioner advised the appellants and Green that she was "discontinuing all complaints derived from actions associated with the conduct of the workshop provided by TEWLS on the grounds that they failed to disclose any prohibited conduct". Section 102(1)(d) enables the Commissioner to, at any stage of proceedings under the Act in respect of a complaint, discontinue the proceedings if the Commissioner reasonably believes that the complaint fails to disclose any prohibited conduct.

[10] Pursuant to s 106 of the Act, a party to a complaint aggrieved by a decision or order of the Commissioner may appeal to the Local Court against the

decision or order. Such an appeal may be on a question of law or fact, or law and fact (s 106(2)).

[11] The appellants and Green lodged an appeal in the Local Court against the decision of the first respondent. The respondents to the appeal named only the second and third respondents.

[12] Subsequently the matter came before the Local Court and on 26 March 2003 a magistrate allowed the appeal, quashed the decision of the delegate to discontinue the complaints against the second and third respondents and remitted the complaints to the Commissioner for further investigation.

[13] The decision of the Commissioner was delivered on 4 June 2004. The essential findings of the Commissioner were that the appellants had been discriminated against on the basis of their male sex and in the case of Bath on the basis of her association with the other appellants in the provision of a service by the second and third respondents. So far as the first respondent was concerned the Commissioner found that even though the second respondent knew about, approved and funded the project and did not actually commit the prohibited conduct, it was properly joined as a respondent because it had "assisted or promoted" the prohibited conduct contrary to s 27 of the Act. However, the Commissioner also found that the prohibited conduct was exempt by virtue of the provisions of s 41(2) that, accordingly the conduct of the respondents "failed to disclose any prohibited conduct" and that the complaints were thereby discontinued. Furthermore,

the Commissioner found in the alternative that the respondents were protected by s 57(1) of the Act which provides that a person may discriminate against a person "in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute".

[14] Following that decision, the appellants and Green filed a further appeal in the Local Court. On 15 February 2005 that appeal was dismissed.

[15] On 4 March 2005 the appellants and Green lodged a notice of appeal to the Supreme Court.

[16] An appeal lies to the Supreme Court pursuant to s 19 of the Local Court Act limited to a question of law only. At the conclusion of the hearing of submissions on 12 September 2005, Martin AJ ordered that the appeal be dismissed. His Honour subsequently delivered written reasons dated 23 September 2005.

[17] The appeal to this Court is from the decision of Martin AJ and is similarly limited to a question of law. There are a large number of grounds. The appellants and Green sought that the orders made by Martin AJ, by the Local Court and by the Commissioner all be set aside and that the Commissioner be ordered to proceed to hear and determine the complaints in accordance with the Act and the decision of this Court.

[18] So far as Green is concerned, counsel for the appellants indicated that at the outset of the hearing that Green wished to discontinue and accordingly the appeal by Green was dismissed.

The legislative provisions

[19] The relevant sections of the Act begin with s 19(1)(b) which provides that subject to s 19(2) a person shall not discriminate against another person on the ground of any of a number of attributes, one of which is "sex". Section 19(2) provides:

> "It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies."

[20] In s 4(1) "attribute" is defined to mean an attribute referred to in s 19.

[21] Section 20 deals with what is discrimination for the purposes of the Act. It is not necessary to go into those provisions as there is no dispute about the fact that the conduct in question amounted to discrimination unless it was protected or exempt.

[22] Section 5 of the Act provides that the Act binds the Crown. Section 27 of the Act provides:

> "27. Prohibition of aiding contravention of Act
>
> (1) A person shall not cause, instruct, induce, incite, assist or promote another person to contravene this Act.

(2) A person who causes, instructs, induces, incites, assists or promotes another person to contravene this Act is jointly and severally liable with the other person for the contravention of this Act."

[23] Section 41 of the Act provides as follows:

"41. Discrimination in goods, services and facilities area

(1) A person who supplies goods, services or facilities (whether or not for reward or profit) shall not discriminate against another person –

(a) by failing or refusing to supply the goods, services or facilities;

(b) in the terms and conditions on which the goods, services or facilities are supplied;

(c) in the way in which the goods, services or facilities are supplied; or

(d) by treating the other person less favourably in any way in connection with the supply of the goods, services or facilities.

(2) Subsection (1) does not apply to a person who supplies goods, services or facilities for or on behalf of an association that –

(a) is established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or other similar lawful purposes; and

(b) does not carry out its purposes for the purpose of making a profit."

[24] Section 57 provides:

> "57. Special measures
>
> (1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.
>
> (2) Subsection (1) applies only until equality of opportunity has been achieved."

[25] Section 4(7) provides:

> "Unless the contrary intention appears, a reference in this Act to a person includes a reference to an unincorporated association."

[26] Section 19 of the Interpretation Act provides that in any Act "person" and "party" include a body politic and a body corporate.

Does s 41(2) apply to the third respondent?

[27] Clearly s 41(2) would apply to a body politic unless the word "person" is given a meaning confined to a living person. It was submitted that the intention of s 41(2) was to provide an exemption for living persons who supply goods, services or facilities for and on behalf of the relevant kind of association, but that there was no intent to also provide an exemption to corporations nor indeed to the association itself.

[28] Subsection 3(3) of the Interpretation Act provides:

> "In the application of a provision of this Act to a provision, whether in this Act or another law, the first mentioned provision yields to the appearance of an intention to the contrary in that other provision."

[29] In *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 79 ALR 509 at 512-513, Mahoney JA discussed the circumstances in which it is permissible for a court to depart from the meaning to be given to a word or phrase by the Interpretation Act because a contrary intention appears. It is clear that a definition section and its application must be considered in the context of the Act as a whole. Clearly a contrary intention may be inferred from a particular provision if the provisions or the procedure established by the section would not appropriately work were the definition to be strictly applied. It is not necessary that the provision would be impossible of appropriate operation; it is sufficient if the result of the application of the definition would result in the operation of the section in a way which clearly the legislature did not intend.

[30] There is however another aid to statutory interpretation which is of assistance in this case. It is a fundamental rule of construction that a word appearing in an Act should be given the same meaning wherever that word appears in the Act, especially where the word concerned appears in the same section of the Act.

[31] The word "person" is used throughout the Act. It is plain that generally speaking the word "person" was intended to include a body corporate and it

was clearly intended to include a body politic, namely the Northern Territory.

[32] The appellants' argument would require giving to s 41(2) a very limited meaning to the word "person" which is specific only to that subsection. Although it has been said that it does not take much to rebut the approach that words within a statute should be given a consistent meaning, I am unable to discern any reason by reference to the provisions of the Act as a whole why s 41(2) should be so confined. Clearly if the word "person" is given the meaning intended by the Interpretation Act, no unusual or unexpected consequences would flow such as to indicate that it was the intention of the legislature that the word "person" should be so narrowly confined.

[33] However, part of the appellants' argument is that s 41(2) does not in fact provide an exemption against s 41(1) for the association itself. It was submitted that only those who are able to bring themselves within the expression "a person who supplies goods, services or facilities for or on behalf of an association" was exempted. Counsel for the appellant pointed out that the words "for or on behalf of" have no strictly legal meaning and may be used in conjunction with a wide range of relationships.

[34] In *Industry Research and Development Board v Phai See Investments Pty Ltd* (2001) 112 FCR 24 Hely J said, at 29 paras [19]-[20]:

> "[19] The phrase "on behalf of" is not an expression which has a strict legal meaning. It may be used in conjunction with a wide range of relationships, "all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing": *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 386. It is necessary to have regard to the context in which the expression "on behalf of" is used in order to determine the scope of the relationships to which it applies: *R v Portus; Ex Parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 438.
>
> [20] In some contexts "on behalf of" does contemplate a representative capacity or agency relationship, see eg, *Metropolitan Waste Disposal Authority v Willoughby Waste Disposals Pty Ltd* (1987) 9 NSWLR 7 at 10. In other contexts the phrase has a wider signification. Thus in *R v Portus* (supra), Qantas, a corporate entity, was held to act on behalf of the Commonwealth because its function was relevantly to act "in the interests of" the Commonwealth."

[35] It may be accepted that whatever may be precisely the meaning of that expression in s 41(2), it would clearly apply to a person who was acting as an agent for the association. Also in my opinion it would also apply to any person, whether an agent or not, who supplied goods, services or facilities for the association or on behalf of the association to another person. What s 41(2) does not cover is a person who supplies goods, services or facilities to the association itself.

[36] In those circumstances, s 41(2) cannot avail the Northern Territory through the NT Government Office of Ethnic Affairs. On the evidence the involvement of the Northern Territory was merely to supply funds to TEWLS for the purposes of the workshop. The Commissioner found that the second respondent was liable pursuant to s 27 of the Act because it "assisted or promoted" the prohibited conduct by the granting of the funds. There is

no appeal from that finding of fact. Therefore if the second respondent is excused it must be on the basis that the discrimination was exempted because of s 57(1).

[37] It was submitted on behalf of TEWLS that s 41(2) applied to TEWLS as well as to any of its servants or agents.

[38] The submission of Mr Barr QC was that if TEWLS was an association which fell within the description given by s 41(2), a person acting as an agent for TEWLS, i.e. by conducting the workshop for and on behalf of TEWLS, refused for and on behalf of TEWLS to supply the service to the appellants that was not unlawful discrimination on their part. If servants or agents of TEWLS were entitled to do as they did it followed, so it was submitted, that the third respondent, which can act through its servants and agents, similarly did not unlawfully discriminate.

[39] I accept that a corporation can only act through individual persons. In order for a corporation to be liable for an act committed by a person, the person must be either acting as an agent for the corporation for whose acts the corporation is vicariously liable or the individual must be the embodiment of the corporation's mind or will within the meaning of those expressions as discussed in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 and *H L Bolton (Engineering) Co Ltd v T J Graham and Sons Ltd* [1957] 1 QB 159.

[40] In *Pinecot Pty Ltd v Anti-Discrimination Commissioner* (2001) 165 FLR 25 I considered whether a corporation could be held liable vicariously for a

breach of s 22 of the Act by the conduct of the corporation's servants. In that case I concluded that the intention of the Act was not to hold a corporation vicariously liable. As that decision shows, there are difficulties in imputing vicarious liability to a corporation for the acts of its servants under this legislation. Clearly s 41(2) was drafted to make it plain that in the circumstances there envisaged a servant or agent of the corporation would not be liable. In those circumstances, it was submitted, nor could the corporation be liable as well. However, as the authorities to which I referred in *Pinecot* at p 30-31 make clear, a master's liability, where it exists vicariously, is not a liability in substitute for that of the servant. It exists not because the servant is liable but because of what the servant has done. The proposition that vicarious liability arises from the misconduct of another, as opposed to the acts of another, was expressly rejected in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1956-1957) 97 CLR 36 per Kitto J at 61 (see also Williams J at 52-53, Webb J at 54 and Taylor J at 67-68).

[41] Therefore the mere fact that a servant or agent of the corporation is not liable under s 41(1) does not necessarily mean that a corporation is not vicariously liable for the acts of its servants or agents.

[42] Mr Barr QC, however, did not restrict his argument to vicarious liability. He also submitted that where a person supplied goods for or on behalf of an association in the circumstances contemplated by s 41(2), subsection (1) does not apply to that person and therefore there was no supply of goods,

services or facilities by any person (including a corporation) within the meaning of s 41(1). I am unable to stretch the language of s 41 this far.

[43] In my opinion s 41(2) does not assist TEWLS even if it is an association contemplated by s 41(2)(a) and s 41(2)(b). If the Legislature had intended that s 41(2) should apply to the association itself it could easily have said so. This is an exception contained in a remedial Act. It is therefore not appropriate to give s 41(2) a beneficial construction: see *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521 at 524.

[44] I turn now to consider the appeal insofar as it turns upon s 57.

[45] Both the second and third respondents relied upon this provision. The Commissioner also found that both respondents were protected by s 57(1).

[46] The approach taken by the learned Commissioner was that in order for a special measure to fall within s 57 four requirements must be met, namely:

1. the measure must confer a benefit on some or all members of a class;

2. the membership of the class is based on race, colour, descent or national or ethnic origin;

3. for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and

4. in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may exercise and enjoy equally with others human rights and fundamental freedoms.

[47] In arriving at these criteria, the learned Commissioner relied upon the judgment of Brennan J, as he then was, in *Gerhardy v Brown* (1984-1985) 57 ALR 472 at 520.

[48] It may be doubted whether the decision of Brennan J in that case, which was a decision concerning the Racial Discrimination Act 1975 (Cth) and in particular s 8(1) of that Act is relevant to a consideration of the meaning to be given to s 57 of the Anti-Discrimination Act. Plainly the wording of these provisions is not in para materia. The judgment of Brennan J had particular reference to the special measure to which paragraph 4 of Article 1 of the International Convention on the Elimination on All Forms of Racial Discrimination applied. That was because s 8(1) of the Racial Discrimination Act provided that the relevant Part of the Act did not apply to or in relation to special measures to which that paragraph of the convention applied.

[49] However, it is not necessary to determine that question here because, assuming that the said criteria did apply, there was ample factual material before the Commissioner to reach the decision he did; and even if the criteria which the Commissioner applied following *Gerhardy v Brown* have no application, arguably those tests are more stringent than the provisions of

s 57 would appear to require on their face. In any event, it was not contended by the appellant that the Commissioner applied the wrong the legal test. In those circumstances I am content to decide this case on the assumption that the legal tests applied by the Commissioner were correct.

[50] As previously noted, the Commissioner found that the project delivered by TEWLS and "promoted" by the Northern Territory Office of Ethnic Affairs was a "program plan or arrangement designed to promote equality of opportunity" for a disadvantaged groups namely, women.

[51] The appellants in their notice of appeal to the Local Court sought to raise by paragraph 4 of their notice of appeal that:

> "the Commissioner was further in error in holding from the whole of the evidence and having regard to the provisions of s 57 [of] the Act that… [he was satisfied] that the second and third respondents have demonstrated on the balance of probabilities that women continue to be a disadvantaged group… and that migrant and refugee women fall within a disadvantaged sub-group of women in general."

[52] Thus it is apparent that the appellants wished to overturn the findings of fact made by the Commissioner and upon which the Commissioner relied in determining that s 57 applied.

[53] The learned Magistrate who heard the appeal in the Local Court rejected the appellants' arguments. No appeal lies to the Supreme Court on a question of fact.

[54] The notice of appeal to the Supreme Court does not complain either in the original grounds of appeal or in the amended grounds of appeal about any

error of fact made by the learned Magistrate. Nor does any specific ground of appeal relate to s 57, either in terms of its meaning or in the application of the facts to that provision.

[55] The appellants' submissions to the Supreme Court, as set out at pages 194 and following of the appeal book, raise a number of complaints. It is not easy to distil those complaints so far as they may relate to s 57. The appellants' submissions were not prepared by lawyers and therefore lack organisation, relevance and probity making it difficult to identify precisely what it is that the appellants are complaining about in a legally relevant way, but it seems to me that the complaint to the Supreme Court, in so far as it dealt with s 57, related to an appeal on the facts.

[56] There was, in any event, ample evidence before the Commission from the material which is contained in the appeal book which would have supported the Commissioner's findings.

[57] It is important to note that TEWLS was funded both by the Commonwealth and Northern Territory governments in relation to this project. TEWLS' objects provide for a variety of functions to be carried out by the association for women only. Two of the objects of its constitution specifically state that its objects include "the provisions of legal services to women, with special concern for women who face additional discrimination for reasons such as, but not limited to; race, culture, language, poverty, age, disability and sexuality"; and "to educate women and the community in general so that

women can participate fully and confidently in legal matters which affect them".

[58] The Commissioner found that the disadvantage and the discomfort experienced by women generally in accessing legal services is "potentially heightened for migrant and refugee women because they may need to contend with such issues as:

- linguistic and cultural barriers in accessing legal services;
- difficulties in gaining recognition of overseas qualifications;
- ethnic stereotyping;
- lack of family/ethnic community support if they wish to separate;
- poor understanding of the Australian legal system – especially in areas of no fault divorce and entitlements on separation;
- fear of speaking out in the presence of men."

[59] Such findings are hardly surprising. The attitude of many migrant men towards their spouses seeking advice on family law matters is notorious.

[60] Counsel for the appellants submitted that in *Gerhardy v Brown* Brennan J said:

> "The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement."

[61] It was submitted that there was no evidence to satisfy this "essential legal requirement" as to the existence of a special measure under s 57 of the Act and to this extent the Commissioner's decision was in error.

[62] Counsel for the appellants has misquoted what Brennan J said and taken it totally out of context. The actual quotation is at (1984-1985) 57 ALR 524 between lines 42 to 44:

> "To determine the matter, it is necessary to apply any relevant legal criteria, for example, that the wishes of the beneficiaries for the measure are of great importance in satisfying the element of advancement."

[63] However, this point was made in the context of a number of questions which his Honour discussed in relation to the third and fourth indicia in respect of which his Honour said at 523:

> "Whether a measure is needed and is likely to alter the circumstances affecting a disadvantaged racial group in such a way that they will be able to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of society equally with others if they wish to do so is, at least in some respects, a political question. A court is ill-equipped to answer a political question.
>
> In the first instance, of course, a political branch of government determines whether an occasion exists for taking a particular measure. An obligation to take a special measure "when the circumstances so warrant" is imposed by Art 2(2) of the Convention. …The obligation to take special measures falls to be performed by a political branch of government. If a political branch of government decides that a racial group is in need of advancement to ensure that they attain effective, genuine equality and that a particular measure is likely to secure the advancement needed and that the circumstances warrant the taking of the measure, a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure therefore has the character of a special measure under the

> Convention. But when the legal rights and liabilities of individuals are in issue before a municipal court and those rights and liabilities turn on the character of the Land Rights Act as a special measure, the municipal court is bound to determine for the purposes of municipal law whether it bears that character. But the character of a special measure depends in part on a political assessment that advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed. When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment…"

[64] The context therefore of the observation of Brennan J upon which the appellants relied is quite different from the context which is being discussed in this case. This is not a case where a government has passed a law, such as the Land Rights Act, where it is necessary to determine whether that is a special measure.

[65] Nevertheless, the fact that government funding from both the Territory and the Commonwealth has been made available to TEWLS is relevant because it demonstrates political support for the objectives which TEWLS seeks to serve. Those objectives are relevant to a consideration of whether or not the project was protected by s 57. There is no doubt that government support for such a project might reasonably be made.

[66] The appellants raised a number of reasons why this Court could not dismiss the appeal on the basis that the Commissioner's decision based on s 57 could not be challenged.

[67] Some of those arguments raised are grounds of objection which had not previously been raised by the appellants to the Local Court or from the Local Court to the Supreme Court and therefore I do not propose to consider them. Moreover they raise only matters of fact. In this case there is no reason, notwithstanding the appellants' submissions, why this Court ought not to dismiss the appeal on the basis that it has not been demonstrated that the Commissioner had erred by relying upon s 57.

[68] It is clear that s 57(1), if it applies, would apply in favour of both the second respondent and TEWLS.

Not all of the parties in the complaints had been included, considered and dealt with under the Act

[69] The complaints as lodged by the appellants allege that they had been discriminated against by the Family Court of Australia as well as by the respondents and also by "others responsible for the event of a family law workshop at Casuarina Library, etc".

[70] So far as the alleged failure to consider the complaints against the Family Court of Australia and others are concerned, that was not a ground of appeal pursued in the Local Court and therefore it was not a matter capable of being raised in the Supreme Court.

[71] As Martin AJ pointed out, the delegate of the Commissioner rejected the complaints against the Family Court and the "others responsible" on the grounds that it was more appropriate that the complaint against the Court be directed through the Human Rights and Equal Opportunity Commission of the Commonwealth, and as to the 'others' on the ground that a complaint should specify the respondent to the complaint as required by s 64(1)(c) "so far as practicable". As his Honour correctly found, there was no appeal against those decisions either on the first occasion to the Local Court or on the second. There was a later attempt to join the Family Court of Australia in the appeal process, but that attempt was rejected and again, that decision has not been made the subject of appeal.

Not all of the grounds of discrimination against all of the parties had been included, considered and dealt with under the Act

[72] It is not always necessary for every issue which a party wishes to raise to be dealt with by a Commissioner or by the Court on appeal. It may be that there is an overriding consideration which means that it is not necessary to deal with some of the issues that are raised. For example, in this case once a decision had been reached that the Northern Territory and TEWLS were protected by s 57(1) in the circumstances of this case, that was a complete answer to the objection. For the same reasons, I do not propose to deal with all of the points agitated in this Court. Much was made in submissions by all of the parties on whether or not TEWLS fell within s 41(2)(a) and s 41(2)(b) – or perhaps more accurately whether there was an error in finding that it

did. Because I am satisfied that s 41(2) does not apply in the circumstances of this case, for a reason which was touched upon although not developed by the parties, it is not necessary to deal with all of the reasons which were raised by the parties.

[73] In the end result the appeal must be dismissed.

Thomas J:

[74] This is an appeal from a decision of Martin (BF) AJ who, on 23 September 2005, made an order dismissing an appeal from Mr Cavanagh SM sitting as the Local Court. The appeal to the Supreme Court was pursuant to s 19 of the Local Court Act. The appeal was limited to questions of law as it is from a single Judge of the Supreme Court to the Court of Appeal.

[75] At the commencement of the appeal to the Court of Appeal, Mr O'Donnell who represented the appellants, advised that Mr Howard Bailey-Green intended to withdraw his appeal. Accordingly, this Court made an order that the appeal by Mr Bailey-Green be dismissed for want of prosecution.

[76] The proceedings involve complaints made to the Anti-Discrimination Commission by each of the appellants. The complaint concerned their exclusion by the third respondent from attending a family law workshop targeted at migrant and refugee women. This workshop was organised and presented by the third respondent. It was funded by the second respondent.

[77] The appellants each made a written complaint to the Commissioner.

[78] Robert Kennedy attended the workshop with his partner Sheila Bath. He complained that he was refused entry because he was told it was a women's only meeting. He was refused entry because of his gender.

[79] Ms Bath confirmed that she attended at the location for the workshop with Mr Kennedy. She was told she could go in. Ms Bath did not accept the invitation to attend the workshop because she objected to Mr Kennedy being treated differently because of his gender.

[80] Anthony Ingham telephoned the office of the third respondent to advise them he would be attending the advertised workshop. He was told that the information was for women only and he would not be allowed admission. Not wanting to have a confrontation at the workshop, he stayed away.

[81] This matter has a considerable history. On 15 February 2005, Mr Cavanagh SM dismissed an appeal from Mr Tony Fitzgerald, the NT Anti-Discrimination Commissioner, delivered on 4 June 2004.

[82] On 4 June 2004, Mr Fitzgerald delivered written reasons for his decision in which he discontinued the appellants' complaints pursuant to s 102(1)(d) of the Anti-Discrimination Act, on the basis they failed to disclose any prohibited conduct. The decision of the NT Anti-Discrimination Commissioner followed a successful appeal by the appellants to the Local Court from a decision made by a delegate of the NT Anti-Discrimination Commissioner, Ms Jacqui Burke. On 2 August 2002, Ms Burke forwarded a letter to each of the complainants, who are the appellants in these

proceedings, advising them that for the reasons which were expressed in some detail, she was taking the following action:

> "I am therefore discontinuing all complaints that have derived from actions associated with the conduct of the workshop provided by Top End Women's Legal Service on the grounds that they fail to disclose any prohibited conduct."

[83] This decision went on appeal and came before Mr Gillies SM sitting in the Local Court. On 26 March 2003, Mr Gillies delivered reasons for his decision. He stated that he suspected the delegate of the Commission had a bias, possibly an unconscious bias. In the course of his reasons for decision, Mr Gillies stated as follows (AB 38):

> "The delegate is a female and she received submissions signed by females. Those submissions concerned a workshop that was aimed at migrant and refugee women. I suspect she made a decision by virtue of identity as a female and her upbringing as a female which was based on an assumption that the validity of her submissions she received was unassailable."

[84] Mr Gillies then proceeded to set out what he considered to be deficiencies of the investigation made by the delegate. He made orders allowing the appeal, quashing the decision of the delegate to discontinue the complaints and remitting the matter to the Commissioner for further investigation. He recommended that the Commissioner allocate the matter to a delegate, other than Ms Burke, for further investigation.

[85] The matter was further investigated by the Commissioner who gave the complainants an opportunity to make further submissions to him. The

Commissioner delivered his decision on 4 June 2004. It is this decision which is the basis for the subsequent appeals.

[86] The Commissioner found discrimination had been shown under s 41(1) of the Anti-Discrimination Act which provides as follows:

> "(1) A person who supplies goods, services or facilities (whether or not for reward or profit) shall not discriminate against another person –
>
> (a) by failing or refusing to supply the goods, services or facilities;
>
> (b) in the terms and conditions on which the goods, services or facilities are supplied;
>
> (c) in the way in which the goods, services or facilities are supplied; or
>
> (d) by treating the other person less favourably in any way in connection with the supply of the goods, services or facilities."

[87] The Commissioner discontinued proceedings on the basis that s 41(1) did not apply to the third respondent by reason of the operation of s 41(2) of the Anti-Discrimination Act which provides as follows:

> "(2) Subsection (1) does not apply to a person who supplies goods, services or facilities for or on behalf of an association that –
>
> (a) is established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or other similar lawful purposes; and
>
> (b) does not carry out its purposes for the purpose of making a profit."

[88] He also held that the second respondent was not caught by s 27 of the NT Anti-Discrimination Act because the third respondent had not contravened the Act. Section 27 provides as follows:

> "(1) A person shall not cause, instruct, induce, incite, assist or promote another person to contravene this Act.
>
> (2) A person who causes, instructs, induces, incites, assists or promotes another person to contravene this Act is jointly and severally liable with the other person for the contravention of this Act."

[89] The Commissioner gave detailed reasons for his decision which included findings that:

- The third respondent is incorporated as an "association" under the Northern Territory Associations Act.

- By application dated 24 April 2001, the second respondent, who is the third respondent on the appeal to the Northern Territory Court of Appeal, successfully sought funding for a Legal Access and Equity Project for Migrant Refugee Women. The project had certain objectives and sought to "build on previous work done by the Top End Women's Legal Service in this area".

- One of the project initiatives was a workshop held on Saturday 10 November 2001, designed to raise awareness about family law issues among migrant and refugee women. It was promoted by way of an article in the NT News on 8 November 2001 and a flyer which was circulated to interested groups.

- The complainants read the article. With the exception of the complainant Mr Ingham, they attended at the location of the workshop at the advertised time and date.

- The complainant, Mr Robert Kennedy, was refused entry to the workshop by the Top End Women's Legal Service because it was a “women only” event. The complainant, Ms Bath, refused to attend because her male associate was not allowed to accompany her. The complainant, Mr Ingham, did not attend the event after he was advised by the third respondent on the telephone beforehand that he would not be admitted because of his male gender.

- The complaints were investigated by the Commissioner’s delegate pursuant to the powers in sections 74-76 inclusive of the Act and powers in respect of discontinuance of a complaint in s 102 of the Act.

- The delegate interviewed the parties, received submissions and considered the relevant authorities and provisions of the Act. The delegate conveyed the decision to discontinue the complaints on the basis that they failed to disclose any prohibited conduct pursuant to s 102(1)(d) of the Act which states as follows:

> “(1) The Commissioner may, at any stage of proceedings under this Act in respect of a complaint, discontinue the proceedings if the Commissioner reasonably believes that the complaint is –
>
> …
>
> (d) fails to disclose any prohibited conduct.”

- The Commissioner then related the details of the subsequent appeal to the Local Court which I have previously outlined.

- The Commissioner found there had been discrimination. He noted that under s 19(2) of the Act that discrimination is not unlawful if an exemption [under Part 4 or 5] applies.

- The Commissioner found the third respondent does not operate for the purpose of making a profit on the basis that it was funded by the Commonwealth Government Community Legal Centres Program and documentation from the Australia Tax Office 19 June 2000 stating the third respondent is an income tax exempt charitable entity.

- The third respondent is an association as defined under s 4(a)(i) of the Associations Act and also an association that falls within the exemption of s 41 of the Anti-Discrimination Act. Thus, the discrimination in which the third respondent has engaged, is lawful.

- Accordingly, as the conduct of both respondents (who are the second and third respondents to the Northern Territory Court of Appeal) fails to disclose any "prohibited conduct" the complaints are hereby discontinued – s 102(1)(d).

- The Commissioner noted that under the provisions of s 91(2) of the Act, the respondent must show on the balance of probabilities that the exemption applies. He considered the third respondent had passed that test.

[90] The Commissioner then went on to address certain matters that had been raised by Mr Gillies who had heard the appeal from the decision of the delegate and referred the matter back to the Commissioner. The Commissioner considered the provisions of s 57 of the Anti-Discrimination Act as it applied to the facts in this case. He found that the project delivered by the third respondent and promoted by the second respondent is a "program plan or arrangement designed to promote equality of opportunity" for a disadvantaged group, namely migrant refugee women. This means that by virtue of the operation of s 57 of the Act, the conduct of the first and second respondents are not unlawful discrimination.

[91] The Commissioner stressed that he was specifically considering the position of migrant and refugee women as distinct from women who had managed to achieve equality of opportunity with men. I will deal further with the Commissioner's findings relevant to s 57 of the Act under ground (d) of the grounds of appeal.

[92] The magistrate who heard the appeal from the Commissioner essentially adopted the Commissioner's decision and dismissed the appeal. It is relevant to note that pursuant to s 106 of the NT Anti-Discrimination Act, an appeal

to the Local Court against a decision or order of the Commissioner may be on a question of law or fact or law and fact. Because the appeal to the Local Court could be on a question of fact or law, there was a great deal more material before the Commissioner and the Local Court, than was presented to the Supreme Court or the Court of Appeal, relevant to the factual findings made by the Commissioner. This material was not reproduced on appeal to the Supreme Court because the appeal, from the Local Court, was solely on a question of law. During the course of the hearing of the appeal to the Northern Territory Court of Appeal, Mr Pauling QC, on behalf of the second respondent, handed up documents including a submission from the Top End Women's Legal Service relevant to and s 57 of the NT Anti-Discrimination Act, to demonstrate the factual matrix before the Commissioner. His Honour, on appeal from the Local Court, stated that there was evidence to support the findings of fact to bring the third respondent within s 41(2) of the Anti-Discrimination Act. His Honour dismissed the appeal from the decision of the Local Court.

[93] The appellants filed a notice of appeal and set out the following grounds:

> "1. The appellants appeal from the whole of the order of His Honour Acting Justice B.F. Martin made on the 23 September 2005 at Darwin that the appeal before that Court in proceeding number LA1/05 (20417920) be dismissed.
>
> 2. His Honour Acting Justice Martin:
>
> (a) erred in the interpretation and application of section 41(2) of the Anti-Discrimination Act of the Northern Territory in that he found:

(i) that discrimination had been established under section 41(1) of the Act but that it did not apply to the third respondent by reason of the operation of section 41(2). In particular, His Honour erred in finding that section 41(1) did not apply to an association by virtue of section 41(2) instead of finding that it did not apply to a natural person who supplies goods, services or facilities **for or on behalf of** an association.

(ii) that the third respondent was an association for community service purposes.

(iii) that the Commissioner and the Local Court had sufficient evidence before them to be satisfied as a matter of law that the third respondent was an association for community service purposes and that it did not carry out its purposes for the purpose of making a profit.

(iv) that as the third respondent had not contravened the Act because of section 41(2) then the second respondent was not caught by section 27 of the Act in aiding contravention of the Act.

(b) erred by not addressing the appellants grounds of appeal which included that the second respondents were principals in the discrimination under section 41 of the Act and not just caught by section 27 of the Act as aiding the third respondents and therefore further erred in not finding that the Commissioner and Local Court should have dealt with the second respondent on that basis.

(c) erred by not addressing the appellants grounds of appeal which included that the Commissioner had not investigated the complaints of the appellants fully in that:

(i) not all of the parties in the complaints had been included, considered and dealt with under the Act.

(ii) not all of the grounds of discrimination against all of the parties in the complaints had been included, considered and dealt with under the Act.

The complaints by the appellants were made against:

- The Family Court of Australia and Officers.
- Top End Women's Legal Service and Officers.
- NT Office of Ethnic Affairs and Officers.
- Others responsible for the event of a Family Workshop at Casuarina Library on Saturday 10 November 2001.

The Commissioner in his decision of the 4th June 2004 never considered the complaints in relation to the Family Court and Officers, the Officers of the Top End Women's Legal Service and Officers of the NT Office of Ethnic Affairs nor the 'Others' responsible for the event of the Family Law Workshop. In relation to the last point the Commissioner never considered or used his powers under sections 13(n) and 73 of the Act to assist the appellants in refining and clarifying their complaints, and

(d) erred by not addressing the appellants grounds of appeal which included that the Commissioner erred in finding that the conduct of the second and third respondents was not unlawful discrimination because of the operation of section 57 of the Act.

(e) erred in making the order to dismiss the appeal."

[94] Dealing with these grounds seriatim.

[95] Ground 1 is a general statement, particulars of which are set out under Ground 2.

Appeal Ground 2(a)(i)

[96] Mr O'Donnell, on behalf of the appellants, argued that the meaning of "person" in s 41(2) of the Act refers to a person separate from the association. Mr O'Donnell's submission is that the provision does not

exempt the association, it exempts, or more correctly states, that s 41(1) does not apply to a "person" who supplies goods and services for and on behalf of the Association. Mr O'Donnell contrasted s 41(2) in the NT Anti-Discrimination Act with the equivalent section in the Queensland Anti-Discrimination Act. Section 46 of the Anti-Discrimination Act 1991 (Qld) was considered in *Opinion re Women's Legal Service Inc* [1996] QADT 21 (16 September 1996). Section 46(2) in the Queensland Act clearly includes an association as a person and then explicitly states that the prohibition against discrimination by that person does not include an association.

[97] Mr O'Donnell further submitted that support for his argument is found from the inclusion of the words "for or on behalf of" in s 41(2).

[98] I accept Mr O'Donnell's argument that the words "for or on behalf of" are to be determined by the context in which they are used in the Act and do not have a strict legal meaning – see *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No. 2)* (1986-1987) 162 CLR 153 at 165 and *The Queen v Toohey & Anor; Ex parte the Attorney-General for the Northern Territory of Australia* (1979-1980) 145 CLR 374, Barwick CJ at 381:

> "It is, of course, quite true, as has been submitted, that the words "on behalf of" are words of varying significance and must necessarily take their particular meaning from the context in which they are used. …"

and at 386:

> "… Context will always determine to which of the many possible relationships the phrase "on behalf of" is in a particular case being applied; "the context and subject matter" (per Dixon J in the Federated Clerks' case, at 438) will be determinative.

[99] Mr O'Donnell's argument is that in the context of the NT Anti-Discrimination Act there is a clear intent to separate responsibility for discrimination from the natural person acting for or on behalf of the association, from the association itself. He points out that there is no such distinction in the Queensland legislation where it is made clear in s 46(2) that reference to a person includes an association.

[100] Mr O'Donnell maintains that in the Northern Territory legislation, the association as a person in s 41(1) is responsible for any breach of s 41(1) and s 41(2) provides an exemption from responsibility to a person acting on behalf of the association which does not act on behalf of itself.

[101] The argument advanced by Mr Barr QC on behalf of the third respondent is that the practical effect of s 41 in the NT legislation is the same as s 46 in the Queensland legislation. Section 41(2) specifically provides that the prohibition against discrimination does not apply to a person who is an agent acting for or on behalf of an association that is established for "community service purposes" then that person may lawfully discriminate. The discrimination takes place, but is permitted by law and accordingly is not unlawful.

[102] The third respondent's submission is, as there is no unlawful refusal by the agent then there can be no unlawful refusal by the principal, as the association is only vicariously liable for the actions of its officers. If the officers are not liable then the association cannot be liable.

[103] It was argued on behalf of the third respondent that when s 41(1) and (2) are read together, the actions of the agents are not unlawful, in that event, then the association cannot have committed an unlawful act of discrimination.

[104] Subsequent to the hearing of this appeal, my attention was drawn to a decision of Mildren J in *Pinecot Pty Ltd v Anti-Discrimination Commissioner* (2001) 165 FLR 25 at 30. Mildren J refers to the remarks of Kitto J in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1956-1957) 97 CLR 36 at 61:

> "… The master's liability, when it exists, is not a liability substituted for that of the servant. It exists, I think, not because the servant is liable, but because of what the servant has done. It is a separate and independent liability, resulting from attributing to the master the conduct of the servant, with all its objective qualities, but not with the quality of wrongfulness which, in an action against the servant, it may be held to have because of considerations personal to the servant. …"

[105] This supports Mr O'Donnell's submission on behalf of the appellant that s 41(2) does not exempt the association. I accept this submission.

Appeal Ground 2(a)(ii)

[106] I agree with his Honour's conclusion based on the finding of fact by the Commissioner, that the third respondent is an association incorporated under

the Associations Incorporation Act. Included in the additional documents provided to the Court of Appeal is copy of a certificate of Incorporation of the Top End Women's Legal Service under the Associations Incorporation Act dated 16 April 1996.

Appeal Ground 2(a)(iii)

[107] There was evidence before the Commissioner that the Top End Women's Legal Service, which was the second respondent before the Commissioner and the third respondent on this appeal, is a Commonwealth funded community legal service. A condition of funding is that the third respondent provide services in accordance with an "approved plan". The approved plan had a number of objectives which are similar to the objects under the third respondent's constitution. These included:

- community legal education
- protection of legal rights, and
- access to justice for women.

[108] A copy of the constitution for the Top End Women's Legal Service was provided to the Court of Appeal. This document supports the finding of fact made by the Commissioner.

[109] There was evidence before the Commissioner to support a finding that the third respondent was an association for community service purposes.

[110] Mr O'Donnell, on behalf of the appellants, submits that the Commissioner did not apply the appropriate legal test or the components of that test to enable the Commissioner to conclude that the third respondent was an Association established for "community service purposes". Mr O'Donnell argues that the magistrate in the Local Court adopted the findings of the Commissioner without evaluating them and, subsequently in the appeal to the Supreme Court, the judge concluded that the Commissioner's finding of fact and law are not properly open to be called in question.

[111] Mr O'Donnell submits the correct legal test requires consideration of:

a) the objects of the Association;

b) the activities of the Association;

c) during the relevant period, or the test is to be applied from time to time.

Brookton Co-Operative Society Limited v The Commissioner of Taxation of the Commonwealth of Australia (1980-1981) 147 CLR 441 at 451:

> "The Federal Court proceeded, in conformity with authority in this Court, according to the view that in ascertaining the purpose for which a company 'is established' it is necessary to look, not only to circumstances existing at the time of incorporation, but also to the activities of the company at the time when its status as a co-operative company is to be determined. No doubt it was the presence of the words "is established" and the purpose of the section that led Fullagar J. in *A. & S. Ruffy Pty. Ltd. v. Federal Commissioner of Taxation* (1958) 98 CLR 637 at 656; and Menzies J. in *Renmark Fruitgrowers Co-operated Ltd. v. Federal Commissioner of Taxation* (1969) 121 CLR 501 at 506; to adopt this approach. To my mind it is evidently correct, allowing, as it does, that the purpose for which a company is established may change in the course of time and that with the change of purpose there may come a change in status as a co-operative company. Moreover, in *Ruffy* (1958) 98 CLR 637 the

> Court explicitly rejected the suggestion that the objects of the business were to be gathered solely from the objects clause in the memorandum. In that case the Court, in characterizing the object of the business, looked to the business activities of the company after its incorporation as well as to the purpose of its incorporation — see the joint judgment of Dixon C.J., Williams and Webb JJ, (1958) 98 CLR at 649–650; see also Gibbs J. in *Social Credit Savings and Loans Society Ltd. v. Federal Commissioner of Taxation* (1971) 125 CLR 560 at 567. In *Revesby Credit Union Co-operative Ltd. v. Federal Court of Taxation* (1965) 112 CLR 564; McTiernan J. said at 576: 'The main test to be adopted in ascertaining the primary object is to ask what the actual activities of the appellant society indicate it to be.'"

[112] The third respondent put before the Commissioner its constitution which contained the objects and further submissions as to its activities at the relevant time. The Commissioner made reference to this when he stated in the course of his reasons (AB 62):

> "By application dated 25/4/01 (AB19) the Second Respondent successfully sought funding (AB35) for a 'Legal Access and Equity Project for Migrant and Refugee Women' ('the project'). The objectives of the project were (AB22):
>
> - to provide migrant and refugee women with greater awareness of their legal rights and the range of legal, government and non government services which are available;
>
> - to develop best practice in working with migrant and refugee women on legal issues and to act as a resource for other agencies providing legal services to migrant and refugee women;
>
> - to provide a point of first contact and referral for migrant and refugee women on legal issues;
>
> - to provide high quality ongoing community legal education for migrant and refugee women and other agencies working with such women."

[113] The project sought to “build on previous work done by the Top End Women's Legal Service (Second Respondent) in this area” (AB 21).

[114] The application cited two other recent projects for women from a non-English speaking background (‘NESB’) completed by the third respondent:

- a legal information project containing multi-lingual radio promotions; and
- a legal resource kit.

[115] The workshop on 10 November 2001 was in accordance with the objects of the Association. It was a community service.

[116] I am satisfied the Commissioner applied the correct legal test. On the material before him the third respondent was established for the purposes set out in its objects and the activities it pursued, including this workshop, were in pursuance of these objectives. The third respondent was established for the purpose of providing a community service and its activities at the relevant time were in accordance with this purpose.

[117] The Commissioner made a finding that the third respondent does not operate for the purpose of making a profit. This finding was based on documentation from the Australian Taxation Office that the third respondent is an income tax exempt charitable entity and the fact that it is funded by the Commonwealth Government Community Legal Centres Program. I agree with his Honour’s conclusion that there was evidence to support a finding

that the third respondent was an Association for community services purposes and that it did not carry out its purposes for the purpose of making a profit. Evidence for this is contained in the submission made by the Top End Women's Legal Service to the Anti-Discrimination Commissioner with supporting documentation from the Taxation Office. In addition to this, the Constitution for Top End Women's Legal Service provides in s 27 that upon dissolution and winding-up of the Association, property shall not be paid or distributed to members but shall be given or transferred to another organisation with similar objectives and approved by the Commissioner of Taxes. The objects as set out in the Constitution do not provide for making a profit.

[118] In his affidavit sworn 27 July 2005, Mr Kennedy conceded in par 25 (AB 191) that the third respondent is not a profit making organisation:

> "Notwithstanding that Top End Women's Legal Service is a fully Commonwealth Attorney-General funded taxpayer resource. The Anti-Discrimination Commission I/we say were erroneous in permitting in this instance Top End Women's Legal Service an exclusion from the Anti-Discrimination Act of the Northern Territory. As the Commission did at section 41(1) of the Act and aligning it with Top End Women's Legal Service constitution doing community work under a discriminatory plan with its taxpayers' resources. For which Top End Women's Legal Service held no permission to discriminate against the appellants in applying taxpayer's resources. The Anti-Discrimination Commission erred."

[119] Apart from this concession there was evidence before the Commissioner including evidence as to the activities of the third respondent to enable the

Commissioner to make a finding that the third respondent does not operate for the purpose of making a profit.

Appeal Ground 2(a)(iv)

[120] I have agreed with the submission on behalf of the appellants that the third respondent did not come with the exemption provision in s 41(2) of the Act.

Appeal Ground 2(b)

[121] There was evidence before the Commissioner that the second respondent "assisted or promoted" the prohibited conduct by granting funds to the third respondent. Section 41(2) does not exempt the second respondent.

Appeal Ground 2(c)(i) and (ii)

[122] Other than the three respondents to these proceedings, no other organisation or persons are parties to these proceedings. Earlier applications by the appellant to join the Family Law Court were rejected. There was no appeal from that decision. Neither the Family Court of Australia, Steven Ralph or any other person, have ever been respondents in these proceedings. The delegate of the Commissioner in her letter dated 14 January 2002 (AB 24-25) advised the appellants that for jurisdictional reasons, which were explained in her letter, the complaint against the Family Court would not be accepted for investigation by the Commission. The delegate also advised that the complaint against "other organisers of the Saturday November 10

event" was not sufficiently specific. The appellants were further informed that the acceptance of the complaint for the purpose of investigation by the Commission was "on the basis of sex alone" as none of the complainants had been refused entry for any other reason.

[123] It is conceded by Mr O'Donnell, on behalf of the appellants, that there was no appeal from the decision of the delegate in her letter dated 14 January 2002 not to accept the complaint made against the Family Law Court or "other organisers of the Saturday November 10 event".

[124] In this letter, the delegate of the Commissioner refused to accept the complaints against the Family Law Court or other persons for the reasons specified in her letter (AB 24):

> "As discussed, for jurisdictional reasons, I reject the complaint made against the Family Law Court. As the Family Law Court is a Federal Government agency it is more appropriate that your complaint against the Court should be addressed to Human Rights and Equal Opportunity Commission (commonly referred to as HREOC).
>
> I also reject the complaint made against 'other organisers of the Saturday November 10 Event'. Under s 64(c) a complaint shall so far as practicable, specify the respondent or each respondent. I consider that 'other organisers' as insufficient to specify whom those other organisers may be."

[125] There was no need, nor would it have been appropriate, for the Commissioner to consider the complaints in respect of the Family Court or "other organisers of the Saturday November 10 event".

Appeal Ground 2(d)

[126] His Honour did not consider it necessary to deal with the finding by the Commissioner that the conduct of the second and third respondent was not unlawful discrimination because of the operation of s 57 of the Act. This was because his Honour had already dismissed the appeal by applying s 41(2) of the Act.

[127] In his reasons for decision, the Commissioner noted that although he discontinued the complaint pursuant to s 102(1)(d) by applying s 41(2) of the Act, he would nevertheless consider whether s 57 applied to the facts of this case. He did this because of the uncertainty expressed by Mr Gillies SM who heard the first appeal from the delegate of the Commissioner about whether women are a "disadvantaged group" for the purposes of s 57 (Special Measures) of the Act.

[128] The Commissioner then proceeded to give detailed reasons as to why he found that, by reason of the operation of s 57 of the Act, the conduct of the second and third respondent is not discrimination.

[129] The application of s 57 has always been an issue in these proceedings. The delegate of the Commissioner stated in her letter dated 2 August 2002 (AB 26-28 p 3):

> "As the workshop falls within the requirements of section 57 of the Act, the exemption contained within that section would apply. Once the exemption applies the Act has no application. In this case the Act

has no application to the workshop. It thus follows that any acts associated with the workshop would also be exempt."

[130] The original submission by Top End Women's Legal Service addressed this issue. In particular in Part 4 under the heading "Special Measure – Workshop for migrant and refugee women", the Top End Women's Legal Service advised that the workshop to be held on 10 November 2001 was to be about family law and was aimed at migrant and refugee women in the Darwin region.

[131] The submission then referred to a range of reports which specifically addressed the difficulties for women from non-English speaking backgrounds in accessing legal services and information. This submission was before the Commissioner.

[132] The appeal to the Local Court from the decision of the Commissioner was on questions of fact and law. The appellants did not point to any errors on the facts or the law to be corrected by the Local Court. In his ex-tempore decision delivered 15 February 2005, the learned stipendiary magistrate also considered this issue and stated (AB 165-166):

> "The Commissioner went further in dismissing the complaints on the basis of exemptions contained in Division 1 of Part V of the Act, that is to say he found that the family law workshop as organized by the Top End Women's Legal Service was a special measure designed to advance women and especially migrant and refugee women, towards equal opportunity.
>
> It apparently troubled another Magistrate dealing with another – a previous appeal by the present appellants in respect of a previous decision by a delegate of the Commissioner in relation to the same

matters. It apparently troubled the previous magistrate about whether or not there was a general exemption, that magistrate wondering whether women generally and some groups of women were in today's age – could be described as disadvantaged.

I have no trouble at all in agreeing with Mr Tony Fitzgerald that migrant and refugee women especially are disadvantaged such that measures such as a Family Law workshop targeting migrant and refugee women ought to be exempted under the Anti-Discrimination Act despite there being some discrimination in excluding the male complaints and the female complainant."

[133] The decision by the magistrate sitting in the Local Court was then appealed to the Supreme Court. The appeal to the Supreme Court is limited to questions of law - *Wilson v Lowery* (1993) 110 FLR 142 at 146 and *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32. The appellants did not argue that there had been an error of law.

[134] The application of s 57 of the Act was the subject of submissions before his Honour. His Honour was advised by Mr Barr QC that the Commissioner dealt with s 57 in the alternative.

[135] I consider it is appropriate for this Court to make findings with respect to the application of s 57 of the Act.

[136] Section 57 of the Anti-Discrimination Act provides as follows:

"(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.

(2) Subsection (1) applies only until equality of opportunity has been achieved."

[137] The word "attribute" "means an attribute referred to in section 19", as defined in s 4 of the Act. Section 19 provides:

> "(1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
>
> .....
>
> (b) sex;"

[138] In *Gerhardy v Brown* (1984-1985) 57 ALR 472, the High Court was asked to consider the Racial Discrimination Act 1975 (Cth) and the application of "special measures", in particular, the Pitjantjatjara's Land Rights Act 1981. At 519 Brennan J established the indicia for a "special measure":

> "The sole purpose of a special measure is to secure such 'adequate advancement' or 'adequate development and protection' of the benefited class as is necessary to ensure 'equal enjoyment or exercise of human rights and fundamental freedoms'. The occasion for taking a special measure is that the circumstances warrant the taking of the measure to guarantee that the members of the benefited class shall have "the full and equal enjoyment of human rights and fundamental freedoms". From these conceptions, the indicia of a special measure emerge. A special measure (1) confers a benefit on some or all members of a class; (2) the membership of which is based on race, colour, descent, or national or ethnic origin; (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."

[139] It has not been shown that the Commissioner was wrong when he applied these principles when considering the provisions of s 57 of the Anti-Discrimination Act, as it relates to the aspect of discrimination on the basis

of sex (gender) as provided in s 19 of the NT Anti-Discrimination Act.

Section 91 of the Act provides as follows:

> "(1) Subject to this section, it is for the complainant to prove, on the balance of probabilities, that the prohibited conduct alleged in the complaint is substantiated.
>
> (2) Where a respondent wishes to rely on an exemption, it is for the respondent to raise and prove, on the balance of probabilities, that the exemption applies."

[140] Accordingly, the onus was upon the second and third respondents on the balance of probabilities to demonstrate that the workshop held on 10 November 2001 was a "program plan or arrangement" within the provisions of s 57 of the Act.

[141] In *Gerhardy v Brown* (supra) Brennan J at 523.10 stated:

> "… To determine whether the measure in question is intended to remove and is necessary to remove inequality in fact (as distinct from formal inequality), the circumstances affecting the political, economic, social, cultural and other aspects of the lives of the disadvantaged group must be known and an opinion must be formed as to whether the measure is necessary and likely to be effective to improve those circumstances. The objective circumstances affecting the disadvantaged group are matters of fact, capable of ascertainment albeit with difficulty. …"

[142] The Commissioner referred to the objects of the Top End Women's Legal Service. The objects are set out in clause 3 of their constitution as follows:

> "(1) the objects of the Association are –
>
> (a) to provide legal services to women, with special concern for women who face additional discrimination for reasons such as, but not limited to, race, culture, language, poverty, age, disability and sexuality;

(b) to educate women and the community in general so that women can participate fully and confidently in legal matters which affect them;

(c) to research and evaluate the impact of existing laws and legal processes on women's access to justice and work toward law reform in areas of particular relevance to women; and

(d) to work toward the empowerment of all women within the legal system and consequently within society.

(2) The Association supports and upholds the principles of the UN Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and the UN Draft Declaration on the Elimination of Violence Against Women."

[143] The Commissioner noted the submission by the third respondent concerning the difficulties and disadvantages experienced by migrant and refugee women in accessing legal services.

[144] The Commissioner had regard to a variety of reports put before him. These included a report from the Australian Law Reform Commission entitled "Equality Before the Law: Justice for Women". This report made a number of findings and concluded that "women of non-English speaking backgrounds experience serious difficulties with the legal system". The report then identified reasons for this and proposed various legislative and non-legislative measures to advance the equality of women before the law. This report was dated 1994.

[145] The Commissioner received further reports to satisfy himself that the findings and recommendations made in the report from the Australian Law Reform Commission are still sound and current.

[146] The Commissioner made the following findings (AB 71):

> "I am also satisfied that migrant and refugee women fall within a 'disadvantaged sub-group' of women in general. The disadvantage and discomfort experienced by women generally in accessing legal services is potentially heightened for migrant and refugee women because they may need to contend with such issues as:
>
> - linguistic and cultural barriers in accessing legal services;
> - difficulties in gaining recognition of overseas qualifications;
> - ethnic stereotyping;
> - lack of family/ethnic community support if they wish to separate;
> - poor understanding of the Australian legal system – especially in areas of no fault divorce and entitlements on separation;
> - fear of speaking out in the presence of men."

[147] In his concluding remarks at paragraph 5.3 (AB 73) the Commissioner stated:

> "Finally, I believe that no unfairness to the Complainants results from denying them the remedy they seek. At all times the Complainants were aware of the family law-related topics to be discussed at the workshop because they were clearly advertised by the Second Respondent. For the same reason the Complainants were also aware that the workshop was targeted at migrant and refugee women.
>
> At all times the Complainants have known that they could avail themselves of the same family law information provided at the workshop from other reputable sources (eg. community based organizations, legal aid, the community legal service) without the

need to attend a skills workshop targeted at migrant and refugee women.

The refusal to permit the Complainants to attend the family law workshop could not be said to have disadvantaged them, or taken place at their expense. The workshop was designed by the First and Second Respondents to advance the equality of opportunity of women, not to operate to the Complainants' detriment."

[148] The Commissioner then looked at whether the "special measure" was designed to advance the group. He took account of the flyer advertising the Family Law Workshop for Migrant and Refugee Women. A copy of this flyer is at AB 18.

[149] The Commissioner noted the expertise of the presenters at the workshop. He observed that community legal education was recommended in the Australian Law Reform Commission Report as necessary to advance the equality of women before the law.

[150] Taking into account all the submissions, the Commissioner was satisfied that the workshop, or "project", as he described it, is a special measure designed to advance women, especially migrant and refugee women, toward equal opportunity.

[151] He concluded that the second and third respondents had discharged the onus of proof that was upon them and that by virtue of the operation of s 57 of the Act the conduct of the second and third respondents did not amount to unlawful discrimination.

[152] I do not consider the appellants have pointed to any error of law by the Commissioner in arriving at his conclusion. The appellants did not raise any errors of fact or law before the Local Court on appeal from the decision of the Commissioner.

[153] The learned stipendiary magistrate in the Local Court adopted the Commissioner's findings.

[154] In the appeal to the Supreme Court from the decision of the Local Court, which appeal is solely on a question of law, the appellants have not identified any error of law. The appellants have not identified any error of law in the appeal to the Court of Appeal.

[155] I accept the finding by the Commissioner that in applying s 57 of the Act, the conduct of the second and third respondents did not amount to unlawful discrimination.

Ground of Appeal 2(e)

[156] His Honour dismissed the appeal from the Local Court by applying s 41(2). I am not able to agree the appeal should be dismissed by application of s 41(2) of the Anti-Discrimination Act.

[157] I have concluded that the appeal should be dismissed by virtue of the operation of s 57 of the Anti-Discrimination Act.

[158] I have reached the same conclusion as his Honour, that the appeal should be dismissed, albeit for different reasons.

[159] I accept the submission made by Mr Pauling QC, for the second respondent, that it is open to the Court of Appeal to dismiss the appeal on the grounds of s 57, if it believes the conclusion of his Honour, Acting Justice BF Martin, is correct, but for different reasons – *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25 at 32.

[160] The order I propose is that the appeal be dismissed.

Southwood J:

Introduction

[161] This is an appeal from a judgment of Martin AJ delivered on 12 September 2005 whereby his Honour dismissed the appellants' appeal from the Local Court.

[162] The appellants are aggrieved by the fact that they were excluded from attending a free family law workshop aimed at migrant and refugee women that was held in Darwin by the third respondent on Saturday 10 November 2001. The appellants were refused entry to the family law workshop because Messrs Kennedy and Ingham are males and Ms Bath attended in association with them. The workshop was partly funded by the second respondent.

[163] The primary question in the appeal is – was the otherwise unlawful discriminatory conduct of the second and third respondents, which resulted

in the appellants being excluded from the family law workshop on the basis of the male sex of Messrs Kennedy and Ingham, protected or exempted by either s 41(2) or s 57(1) of the Anti-Discrimination Act ("the Act")? I have had the opportunity of reading Mildren J's Reasons for Decision. I agree with his Honour that the appeal should be dismissed. In accordance with s 57(1) of the Act the discriminatory conduct of the second and third respondents was part of a project designed to promote equality of opportunity for disadvantaged migrant and refugee women who had special needs when accessing legal services including family law services: s 4 and s 19(1) of the Act.

[164] Subsection 57(1) of the Act provides as follows:

> "A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute."

[165] There are two primary reasons for the exemption of the discriminatory conduct of the second and third respondents under s 57(1) of the Act. First, the Anti-Discrimination Commissioner found as a matter of fact that migrant and refugee women were disadvantaged and had special needs when it came to accessing legal services because they had to contend with such issues as: less access to financial resources than men; women are more likely to be impeded by their responsibility as carers; women experience and fear violence to a greater extent than men; linguistic and cultural barriers; difficulties in gaining recognition of overseas qualifications; ethnic

stereotyping; lack of family/ethnic community support if they wished to separate; poor understanding of the Australian legal system – especially in areas of no fault divorce and entitlements on separation; and, fear of speaking out in the presence of men. He was entitled to so do on the evidence before him. The Commissioner's findings were upheld by the Local Court. No appeal lies to this court from such a finding of fact: s 19 Local Court Act.

[166] Secondly, the family law workshop was part of a project designed to promote equality of opportunity for migrant and refugee women when accessing legal services including family law services. The objects of the third respondent include "the provision of legal services to women, with special concern for women who face additional discrimination for reasons such as, but not limited to: race, culture, language, poverty, age, disability and sexuality" and "to educate women and the community in general so that women can participate fully and confidently in legal matters which affect them". In 2000/2001 the second respondent sought applications from interested groups for funding pursuant to its 2000/2001 Ethnic Affairs Sponsorship Program. The objective of the program was to allow ethnic groups to develop their level of participation in the Northern Territory Community. On 25 May 2001 the third respondent successfully sought funding from the second respondent for a "Legal Access and Equity Project for Migrant and Refugee Women" ("the project"). The objectives of the project were: to provide migrant and refugee women with greater awareness

of their legal rights and the range of legal, government and non-government services which are available; to develop best practice in working with migrant and refugee women on legal issues and to act as a resource for other agencies providing legal services to migrant and refugee women; to provide a point of first contact and referral for migrant and refugee women on legal issues; and, to provide high quality ongoing community legal education for migrant and refugee women and other agencies working with such women. One of the project initiatives was the family law workshop held on 10 November 2001 which was a "women only" event that was designed to raise awareness about family law issues among migrant and refugee women. The family law workshop covered the usual family law topics and appropriate experts in family law from the legal profession addressed the workshop.

[167] I agree with Mildren J that government support for such a project might reasonably be made.

[168] Subsection 41(2) does not apply so as to protect the conduct of the second respondent from the anti-discrimination provisions of the Act because the second respondent did not supply services on behalf of the third respondent. The second respondent merely provided funding to the third respondent so that the third respondent could supply the relevant legal and educational services to migrant and refugee women at the family law workshop on 10 November 2001.

[169] Nor does s 41(2) of the Act apply so as to protect the conduct of the third respondent from the anti-discrimination provisions of the Act. But for the provisions of s 57(1) of the Act, the third respondent would have remained liable under s 41(1) of the Act for the acts of its servants and agents in preventing the appellants from attending the family law workshop that the third respondent was conducting exclusively for migrant and refugee women: *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1956-1957) 97 CLR 36 at 52-53; 54 and 67-68. Subsection 41(2) of the Act operates so as to protect the servants or agents of certain non-profit associations who engage in the supply of goods, services or facilities on behalf of the association from the anti-discrimination provisions of the Act.

[170] The appeal should be dismissed.
