
ANTI-DISCRIMINATION COMMISSION NORTHERN TERRITORY

**DECISION AFTER REMITTAL FROM THE LOCAL COURT IN DARWIN
FOLLOWING SUCCESSFUL APPEAL BY COMPLAINANTS.**

LOCATION: DARWIN

TRIBUNAL: TONY FITZGERALD - COMMISSIONER

DATE OF DECISION: 4 JUNE 2004

ADC FILE NO: 20021157

LOCAL COURT CLAIM NO: 20212873

**BETWEEN: ROBERT E KENNEDY
ANTHONY INGHAM
SHEILA M BATH
HOWARD BAILEY-GREEN
Complainants/Appellants**

**AND: NORTHERN TERRITORY OF AUSTRALIA
(OFFICE OF ETHNIC AFFAIRS)
First Respondent**

**TOP END WOMEN'S LEGAL SERVICE
Second Respondent**

1. THE COMPLAINT

- 1.1 The Complainants allege that their exclusion on 19 December 2001 by the Second Respondent from a family law workshop targeted at migrant and refugee women, organized and presented by the Second Respondent and funded by the First Respondent, unlawfully discriminated against them on the grounds of their (male) sex, contrary to sections 19 and 20 of the NT *Anti-Discrimination Act* ("the Act").
- 1.2 The Complainant Sheila M. Bath alleges unlawful discrimination arising out of the same circumstances on the basis of her association with the above-named male Complainants contrary to section 19(1)(r) of the Act.
- 1.3 On or about 16 January 2002 the First Respondent, or more precisely the Delegate of the Commissioner of the First Respondent ("the Delegate"), accepted the complaints and notified the First and Second Respondents to that effect. Under the Act, "acceptance" of complaints does not mean that complaints have been found proved. "Acceptance" or "rejection" under the Act describes an initial screening process undertaken by the Delegate pursuant to section 66 of the Act. Acceptance simply means a complaint appears to fall within the scope of the Act.

2. STATUTORY PROVISIONS

The complaints involve sections 15, 19, 20, 27, 28, 41, 42, 57, 74, 75, 76, 90(1)(a), 91 and 102 of the Act. These sections are set out below.

"15. Delegation

- (1) The Commissioner may, in writing, delegate to a person, including the person from time to time holding, acting in or performing the duties of, an office, designation or position, any of the powers and functions of the Commissioner under this or any other Act, other than Part 6 Division 4 or this power of delegation.
 - (2) A power or function delegated under this section, when exercised or performed by the delegate, shall, for the purposes of this Act, be deemed to have been exercised or performed by the Commissioner.
 - (3) A delegation under this section does not prevent the exercise of a power or performance of a function by the Commissioner.
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19. Prohibition of Discrimination

- (1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
 - (a) race;
 - (b) sex;
 - (c) sexuality;
 - (d) age;
 - (e) marital status;
 - (f) pregnancy;
 - (g) parenthood;
 - (h) breastfeeding;
 - (j) impairment;
 - (k) trade union or employer association activity;
 - (m) religious belief or activity;
 - (n) political opinion, affiliation or activity;
 - (p) irrelevant medical record;
 - (q) irrelevant criminal record;
 - (r) association with a person who has, or is believed to have, an attribute referred to in this section.
- (2) 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. Discrimination

- (1) For the purposes of this Act, discrimination includes -
 - (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
 - (b) harassment on the basis of an attribute,in an area of activity referred to in Part 4.

- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –
- (a) an attribute;
 - (b) a characteristic imputed to appertain to an attribute; or
 - (c) a characteristic imputed to appertain generally to persons with an attribute,
- less favourably than a person who has not, or is believed not to have, such an attribute.
- (3) For discrimination to take place, it is not necessary that -
- (a) the attribute is the sole or dominant ground for the less favourable treatment; or
 - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

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.

28. Areas of activities

This Act applies to prohibited conduct in the areas of -

- (a) education;
 - (b) work;
 - (c) accommodation;
 - (d) goods, services and facilities;
 - (e) clubs; and
 - (f) insurance and superannuation.
-

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.

42. Exemptions – services for members of one sex

Nothing in this Division applies to or in relation to the provision of a service the nature of which is such that it can only be provided to members of one sex.

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.

74. Investigation of complaint

- (1) The Commissioner shall carry out an investigation under this Division of alleged prohibited conduct if -
 - (a) requested to do so by the Minister; or
 - (b) the Commissioner accepts a complaint under section 66.
- (2) The Commissioner may carry out an investigation under this Division if, during the course of carrying out the Commissioner's functions, it appears that prohibited conduct has occurred.
- (3) An investigation carried out under subsection (1)(a) or (2) shall, for the purposes of this Act, be deemed to be an investigation of a complaint and this Act shall apply to and in relation to -
 - (a) the investigation;
 - (b) any other proceedings under this Act in relation to the prohibited conduct; and
 - (c) the Commissioner,as if a complaint had been made.

75. Conduct of investigation

- (1) An investigation under this Division shall be conducted in such manner as the Commissioner thinks fit.
- (2) An investigation under this Division shall be carried out with as little formality and technicality, and with as much expedition as the requirements of this Act and a proper consideration of the matters before the Commissioner permit.
- (3) In carrying out an investigation under this Division, the Commissioner -
 - (a) shall make a thorough examination of all matters relevant to the investigation; and
 - (b) where the Commissioner considers it appropriate, ensure that each party to the investigation is given a reasonable opportunity to present his or her case.

76. Completion of investigation

- (1) The Commissioner shall, on completing an investigation under this Division in respect of a complaint, determine that the complaint is -
 - (a) dismissed; or
 - (b) if satisfied that there is *prima facie* evidence to substantiate the allegation of prohibited conduct in the complaint –
 - (i) to proceed to conciliation; or
 - (ii) if the Commissioner believes it cannot be resolved by conciliation, to proceed to a hearing.
- (2) The Commissioner shall give notice of a determination under subsection (1) to the complainant and the respondent.
- (3) The Commissioner shall, on completing proceedings under this Act in respect of a matter investigated under section 74(1)(a) or (2), report to the Minister on the matter together with such recommendations, if any, as the Commissioner thinks fit.

90. Conduct of proceedings

- (1) In the conduct of proceedings under this Act, the Commissioner –
 - (a) is not bound by the rules of evidence and the Commissioner may obtain information on any matter as the Commissioner considers appropriate;

.....

91. Burden and standard of proof

- (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.

102. Discontinuance of complaint

- (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 –
 - (a) frivolous or vexatious;
 - (b) trivial;
 - (c) misconceived or lacking in substance; or
 - (d) fails to disclose any prohibited conduct.
- (2) Where a complaint is discontinued under subsection (1)(a), the Commissioner may order the complainant to pay to the respondent an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused to the respondent by the complainant making the complaint.”

3. BACKGROUND

3.1 The Second Respondent is a Commonwealth funded community legal service. A condition of funding is that the Second Respondent provide services in accordance with an “approved plan”. The approved plan for 2000/2001 had the following objectives [Appeal Book (AB) p.42]:

- Provide legal assistance and advice to women in the Top End with particular regard to women who cannot obtain legal services from any other source
- Provide community legal education relevant to the needs of TEWLS clients
- Identify major legal issues facing TEWLS clients and promote the protections of their legal rights
- Improve women’s access to legal services and the justice system.

The constitution of the Second Respondent has similar objects, namely:

“3. Objects

- (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.
(AB48)

As such, the Second Respondent is not funded to provide legal services, or any other services, to men.

- 3.2 In 2000/2001 the First Respondent sought applications from interested groups for funding pursuant to its 2000/2001 Ethnic Affairs Sponsorship Program (AB25). Broadly the objective of the program was to allow ethnic groups to develop and facilitate participation in the general NT community.

3.3 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.

The project sought to “build on previous work done by the Top End Women’s Legal Service (Second Respondent) in this area” (AB21).

The application cited two other recent projects for women from a non-English speaking background (“NESB”) completed by the Second Respondent:

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

3.4 One of the project initiatives was a workshop designed to raise awareness about family law issues among migrant and refugee women. The workshop was held on Saturday, 10 November 2001 and it was promoted by way of an article in the local newspaper (NT News 8/11/01 extract AB36) (“the article”) and a flyer circulated amongst interest groups (AB37).

3.5 The Complainants read the article, and with the exception of Complainant Ingham, attended at the location of the workshop at the advertised time and date. Three men, two complainants (Messrs Kennedy and Bailey-Green) and another man, who does not wish to make a complaint) were refused entry to the workshop by the Second Respondent because it was a “women only” event. Complainant Bath refused to attend because her male associates were not allowed to accompany her, and; Complainant Ingham did not attend the event after the

Second Respondent informed him by telephone beforehand that he would not be admitted because of his male gender.

- 3.6 Once accepted (supra para 1.3) the Complaints were investigated by the Commissioner's Delegate. [Pursuant to section 15 of the Act the Commissioner may delegate the powers in respect of the "Investigation of a Complaint" found in ss74-76 inclusive of the Act, and powers in respect of "Discontinuance of a Complaint" contained in section 102 of the Act.]
- 3.7 The Delegate conducted a "... thorough examination of all matters relevant to the investigation ..." as contemplated by section 75(3)(a) of the Act. The examination included interviewing the parties, requesting and receiving submissions from the parties, consideration of those submissions, and consideration of relevant authorities and the provisions of the Act.

The Delegate's decision was conveyed in writing to the parties on 2 August 2002 (AB3) - and that decision was to discontinue the complaints on the basis that they "... failed to disclose any prohibited conduct ..." pursuant to section 102(1)(d) of the Act.

- 3.8 The decision described in paragraph 2.7 was appealed by the Complainants to the Local Court at Darwin on 18 November 2002.
- 3.9 After hearing submissions and considering the manner in which the Delegate investigated the complaints, the Learned Magistrate formed the views that the Delegate may have been biased "by virtue of her identity and her upbringing as a female" (p.7 Transcript of Proceedings No. 20212873) and that the Delegate's investigation was inadequate (p.8 Transcript of Proceedings).

On 26 March 2003 the Presiding Magistrate made the following orders (my brackets):

- (1) The Appeal is allowed.
- (2) The Decision of the Delegate of the Anti-Discrimination Commissioner to discontinue the complaints is quashed.
- (3) The matter is remitted to the Commissioner for further investigation.

(4) I recommend that the Commissioner allocate the investigation to a Delegate other than (the original Delegate) for further investigation.

(p.10 Transcript of Proceedings)

3.10 I gave the parties until 21 July 2003 to make further submissions on the matter. The First and Second Respondents took advantage of this opportunity and the Complainants elected to rely on their existing submissions.

4. FINDINGS

4.1 In further investigating the complaints pursuant to the Order of the Learned Magistrate I may conduct a "thorough investigation" pursuant to section 75 of the Act or consider whether it is appropriate to discontinue the complaints pursuant to section 102 (supra para 2.7).

4.2 After fully considering the history of the complaints, the conduct of their investigation by the Delegate, the submissions of the parties and the provisions of the Act I am persuaded, and I so order, that the complaints should be discontinued pursuant to section 102(1)(d) of the Act in that they "fail to disclose any prohibited conduct".

4.3 In arriving at my Decision I find that the Complainants have been discriminated against on the basis of their (male) sex (and in the case of Complainant Bath, on the basis of her association with the former) in the provision of a service by the First and Second Respondents. If the First Respondent - even though it knew about, approved and funded the project - did not actually commit the prohibited conduct, then I find it is properly joined as a Respondent because it "assisted or promoted" the prohibited conduct contrary to section 27 of the Act.

However, section 19(2) of the Act states that discrimination is not unlawful "if an exemption under Part 4 or 5 applies".

4.4 Section 41 occurs under Part 4 of the Act and provides exemption for conduct which would otherwise be discriminatory under the Act.

4.5 Section 41 (supra para 2) provides *inter alia* that it is unlawful to discriminate in the provision of services to a person, but exempts the supply of services by 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.

“Association” is not defined under the Act, but I take it to mean an association as defined under section 4 of the *Associations Act* (NT) which is reproduced below:

“4. Definitions

In this Act, unless the contrary intention appears –

...

"association" means –

- (a) an association, society, institution or body formed or carried on for –
- (i) a religious, educational, benevolent or charitable purpose;
 - (ii) the purpose of providing medical treatment or attention;
 - (iii) the purpose of promoting or encouraging literature, science, art or a cultural activity;
 - (iv) the purpose of recreation or amusement; or
 - (v) the purpose of beautifying or improving a community centre,

being an association, society, institution or body the activities of which are carried on in whole or in part in the Territory;

- (b) another association, society, institution or body certified in writing by the Minister to be an association for this Act; or
- (c) a trading association;

...”

According to the Second Respondent’s Constitution (AB48 and the Objects of which are reproduced at para 3.1), the Second

Respondent is established for "community service purposes" and I so find.

Also I am satisfied that the Second Respondent does not operate "for the purpose of making a profit" on the basis that it is funded by the Commonwealth Government Community Legal Centres Program (see p.3 submission of Second Respondent dated 29 July 2003), and on the basis that Australian Tax Office documentation dated 19/6/00 supplied by the Second Respondent indicates that the latter is an "income tax exempt charitable entity".

It follows that the Second Respondent is an association as defined under section 4(a)(i) of the *Association Act* and also an association that falls within the exemption contained in section 41 of the Act. Thus the discrimination in which the Second Respondent has engaged (*supra* para 4.3), and the First Respondent has promoted, is lawful and I so find.

- 4.6 Accordingly, as the conduct of both Respondents "fails to disclose any prohibited conduct", the complaints are hereby discontinued.

I note that under section 91(2) of the Act where the Respondent wishes to rely on an exemption, the Respondent must show on the balance of probabilities that the exemption applies. For the record, my finding in para 4.5 means that the First and Second Respondents have passed that test.

- 4.7 The foregoing would ordinarily be sufficient to dispose of this matter, but in view of the uncertainty of the Learned Magistrate about whether women are a "disadvantaged group" for the purposes of section 57 (special measures) of the Act, I believe it is necessary to discuss whether section 57 is applicable to the facts of this case.
- 4.8 Under section 57 (*supra* para 2) the Act permits discrimination in the adoption of "special measures" designed to promote equality of opportunity for disadvantaged groups. That is section 57 protects "a program plan or arrangement" devised for the purpose of securing equality.
- 4.9 It is settled law that before a special measure on racial grounds obtains protection under section 57 (or its interstate equivalents) it must satisfy four requirements, namely (my brackets):
- (i) the measure must confer a benefit on some or all members of a class;

- (ii) the membership (of the class) is based on race, colour, descent, or national or ethnic origin;
- (iii) 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
- (iv) 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.

[Per Brennan,J. in Gerhardy v Brown (1985) 57ALR472, 520.]

In Gerhardy v Brown the High Court considered the extent to which the *Racial Discrimination Act (C'wlth)* gives operative effect to Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 1(4) permits special measures to advance the interests of racially/ethnically disadvantaged persons or groups.

4.10 Gerhardy v Brown involved discrimination on the basis of race. However it is also settled law that what Brennan,J. said in that case about preferential treatment on the ground of race is equally applicable to members of other disadvantaged groups who possess attributes covered by the various anti-discrimination statutes throughout the nation, eg.

- (i) for a case of sex discrimination see Re Municipal Officers Association of Australia and Others (1991) 38 IR 13, 18. In that case union rules, which reserved positions on an executive for women, were found by the Australian Industrial Relations Commission (AIRC) to be consistent with the special measures exception to the *Sex Discrimination Act (C'wealth)* (ie. acts done to advance equal opportunity for women are lawful).

In an analysis of Gerhardy v Brown (ibid) and the significance of Article 1(4) of CERD Moore,DP said (p.18):

“The effect of Article 1(4) of that Convention appears to be the same as, or at least similar to, ... the Convention on the Elimination of All Forms of Discrimination Against Women.”

- (ii) another sex discrimination example is the unreported February 2004 AIRC Case of Appeal by William Jacomb (PR 943240) involving a similar analysis of branch rules purporting to reserve branch positions for women. Senior Deputy President Lacy, during an analysis of Brennan,J.'s remarks in Gerhardy v Brown, said (para 73) (my brackets):

“The question that must be determined, on the approach taken by Brennan,J. (in Gerhardy v Brown) is whether rules that reserve positions specifically for women achieve substantive equality, that is do they advance effective and genuine equality.”

- (iii) for a case of age discrimination see Re AIS American Institute for Foreign Study (2000) EOC 93-071 where the Applicant wished to advertise the availability of a residence/work/study program in the USA for under 26 year olds. In granting an exemption for the program from the provisions of the Anti-Discrimination Act (Tas) (“the Act”) the Commission found that as the relevant exception to the Tasmanian Act related to programs designed to promote equal opportunity, and that as youth were a disadvantaged group and a group in special need, then it was appropriate to exempt the Applicant from the provisions of the Act.

4.11 As the First and Second Respondents seek to rely on the section 57 exemption, under section 91(2) of the Act they must show on the balance of probabilities that their “program plan or arrangement” (that is the provision of legal services and legal education to women in general, and the provision of a family law workshop to migrant and refugee women in particular) is in fact a program plan or arrangement contemplated by section 57.

4.12 As I understand it the Learned Magistrate accepts that women were at some unspecified time in the past disadvantaged compared to males, but he wonders whether substantial equality for the former might now have been achieved. Also, he stated that the Delegate ought to have investigated more thoroughly the issue of whether women are a “disadvantaged group”. (Transcript, *ibid*, 8, 9).

4.13 When faced with an issue such as that raised in para 4.11 (ie. are women a disadvantaged group?) other Tribunals (Municipal Officers Case ibid 20, Jacomb ibid 13, American Institute for Foreign Study Case ibid) have adopted a two-step process, namely:

- (i) determination of the circumstances affecting the disadvantaged group so as to ascertain the extent if any to which the group is denied opportunities enjoyed by others;
- (ii) assessment of whether the (special) measure aimed at the disadvantaged group is designed to advance that group towards equal opportunity.

Circumstances affecting the disadvantaged group

4.14 As observed by Brennan, J. in Gerhardy v Brown (ibid 523.15) “the objective circumstances affecting the disadvantaged group are matters of fact, capable of ascertainment albeit with difficulty”.

The Second Respondent provides legal services and legal education to women, and in particular women who are disadvantaged because of race, culture, language, poverty, disability among other factors. [See Object of Association 1(a) (AB 48)].

It submits that women, and particularly women who are marginalized because of factors such as those described above, are denied equal opportunity to men in accessing legal services and legal education.

In support of this contention it relies on the comprehensive two-part Report of the Australian Law Reform Commission entitled “Equality Before the Law: Justice for Women” (ALRC 69 1994). That Report concluded that women still suffer widespread inequality, that problems of inequality include “representation in legal ... institutions,” and “that (women’s) unequal social status prevents or inhibits them from gaining access to the legal system on an equal basis with men”. (All quotations from Part 1 p.11 of the Report).

The Report also concluded that “... women of non-English speaking background experience serious difficulties with the legal system”, (p.14) and “... are even more disadvantaged than men of a similar background since they face the dual barriers of race and gender ...” [p.105 ch.4 Access to Justice: Legal Aid].

The Report identified various factors causing problems for women in accessing legal services including women have less access to financial resources than men (p.15) and; women are more likely to be impeded by their greater responsibility as carers, (pp.11-12) because women suffer more inequality and sexual harassment in the workplace (p.18), and because women experience and fear violence, to a greater extent than men (p.26). [The NT Government Domestic Violence Strategy Data Collection Project for year 2000 (occasional paper #40 printed November 2001) shows that 92% of victims of violence were female.]

The Report proposed various legislative and non-legislative measures to advance the equality of women before the law. Non-legislative measures included the provision of women's legal centres, women's court support schemes, women's telephone advice services, and women's community legal education and training (p.91 ch.4 Access to Justice: Legal Aid).

The Second Respondent directed me to a statistical snapshot of women's social and economic circumstances in the NT (NTG 2001-02 Budget Papers "Women in the Budget" pp.21-27) which reports that men comprise 63.1% of all higher education enrolments, and that NT women earn an average 80.7% of the average weekly earnings of NT men.

I am satisfied that the more recent data provided above demonstrates that the findings and recommendations contained in the ALRC Report (supra) and propounded 10 years ago are still sound and current. Indeed it is the ALRC recommendations which provide the justification for the continued existence of the Second Respondent.

As I am entitled pursuant to section 90(1)(a) of the Act to inform myself as I consider appropriate, I take notice that the following additional factors support the contentions of the First and Second Respondents that women in general and migrant and refugee women in particular are a disadvantaged class:

- Since 1996 the Second Respondent has been, and continues to be, funded by the Commonwealth because of a perceived need to provide separate legal services and legal education to women to overcome difficulties women have experienced in the past in accessing mainstream legal services.

- The Second Respondent has been externally funded in the recent past to produce legal information - in the form of radio advertisements and a self-help kit – specifically for NESB women, and the project (ie. the subject of this action) falls into the same category. (Second Respondent submission 29/7/03 p.9). As such external funding providers (Legal Aid Commission and government) accept the disadvantaged status of NESB women. As we know, many migrant and refugee women come from a non-English speaking background.
- The fact that the First Respondent (namely the Office of Ethnic Affairs) exists as a government agency, and, as an expert in the field of “ethnic affairs”, saw fit to fund the project is further evidence of an acceptance by government of the disadvantaged status of migrant and refugee women. The project objectives were clearly stated in the application for funding (AB22), and the project, although restricted to women, clearly met the objectives of the Ethnic Affairs Sponsorship Program (AB27).

In view of the foregoing I am satisfied that the First and Second Respondents have demonstrated on the balance of probabilities that women continue to be a disadvantaged group because of circumstances which affect them to a greater extent than men. It is noteworthy that the AIRC in Jacomb (ibid 13) was of a similar view as recently as February 2004 when it found that the Respondent trade union was entitled to continue to apply special measures (reservation of certain branch positions for women) to achieve substantive equality between men and women. “The material before me does not suggest that the steps that have been taken by (the union) to redress systematic discrimination against women in the organization since its inception generally, has resulted in substantive equality”
[para 75].

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.

Is the special measure designed to advance the group?

The project was a family law workshop for migrant and refugee women. It was advertised as such. The advertising flyer (described in para 3.4) was circulated amongst interest groups and announced that all the usual family law topics would be covered. Experts in the field from the Family Court, the staff of the Second Respondent (from para 4.15 the Second Respondent is able to demonstrate expertise and experience in the area of community legal education to NESB women), and the legal profession addressed the workshop (see Second Respondent submission p.8). Community legal education was recommended in the ALRC Report as necessary to advance the equality of women before the law.

Taking all of the above and the submissions before me into account, I am equally satisfied that the project is a special measure designed to advance women, and especially migrant and refugee women, towards equal opportunity. That is, I am satisfied on the balance of probabilities that the First and Second Respondents have fulfilled the second part of the “two-step process” described in para 4.13 (supra).

4.15 In summary I have found in para 4.14 that the project delivered by the Second Respondent and “promoted” by the First Respondent is a “program, plan or arrangement designed to promote equality of opportunity” for a disadvantaged group, namely women. This means that, by virtue of the operation of section 57 of the Act, the conduct of the First and Second Respondent is not unlawful discrimination.

5. CONCLUDING REMARKS

5.1 As the Learned Magistrate indicated it may be that some women have managed to achieve equality of opportunity with men. However, the *Anti-Discrimination Act* is beneficial legislation and it is therefore not appropriate to disentitle all women to special measures benefits because some may have achieved equality when it is clear that many women have not advanced to that point.

Moreover, allowing distinctions between “achievers of equality” and “non-achievers of equality” within a disadvantaged class or group was not contemplated by Brennan,J. in his formulation of a test for a special measure in Gerhardy v Brown (ibid), nor in any of the cases following Gerhardy v Brown (supra), nor by the wording of section 57 of the Act.

It is clear that the “special measures” contemplated by Brennan,J., and by the Act, and by the Respondents, are those special measures designed to benefit a disadvantaged group **as a whole**. This means that justification for the continued application of special measures does not cease until the disadvantaged group **as a whole** has achieved equality of opportunity.

If the law permitted the application of special measure exemptions to only part of a disadvantaged group, or the disentanglement of part of the disadvantaged group to special measures benefits, then the Respondents in this case and providers of “programs, plans or arrangements for disadvantaged groups” in general would be required to subjectively decide which members of the disadvantaged group had/had not achieved equality of opportunity. The very heterogeneity of most groups would render this task impossible.

5.2 The situation may need review from time to time to determine whether women have managed to achieve equality. However, I’m satisfied that for the present women continue to constitute a disadvantaged group.

5.3 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.

TONY FITZGERALD
NT ANTI-DISCRIMINATION COMMISSIONER

4 June 2004