

Kennedy & Ors v Anti-Discrimination Commission of the Northern Territory [2005]
NTSC 56

PARTIES: ROBERT KENNEDY, ANTHONY INGHAM,
SHELIA M. BATH and HOWARD BAILEY-
GREEN

v

ANTI-DISCRIMINATION COMMISSION OF
THE NORTHERN TERRITORY and

NT GOVERNMENT OFFICE OF ETHNIC
AFFAIRS and

TOP END WOMEN'S LEGAL SERVICE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: LA1/05 (20417920)

DELIVERED: 23 September 2005

HEARING DATES: 12 September 2005

JUDGMENT OF: MARTIN (BF) AJ

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellants:	Self Represented
1 st Respondent:	C Ganley
2 nd Respondent:	T Pauling QC
3 rd Respondent:	Peter Barr QC with G Martin

Solicitors:

Appellants:	Self Represented
1 st Respondent:	Anti-Discrimination Commission
2 nd Respondent:	Solicitor for the Northern Territory
3 rd Respondent:	William Forster Chambers

Judgment category classification: C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kennedy & Ors v Anti-Discrimination Commission of the Northern Territory [2005]
NTSC 56 No. LA1/05 (20417920)

BETWEEN:

ROBERT E KENNEDY

First Appellant

ANTHONY INGHAM

Second Appellant

SHELIA M BATH

Third Appellant

HOWARD BAILEY-GREEN

Fourth Appellant

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: MARTIN (BF) AJ

REASONS FOR JUDGMENT

(Delivered 23 September 2005)

- [1] At the conclusion of the hearing of submissions in this appeal on 12 September 2005, I ordered that it be dismissed. These are the reasons for that order.

The Proceedings

- [2] The proceedings arise from the actions of third respondent which the appellants claim discriminated against them in contravention of s 41(1) of the Anti-Discrimination Act (“the Act”). It is there relevantly provided that a person who supplies services shall not discriminate against another person by failing or refusing to supply the services upon the grounds of that persons sex (s 19(1)).
- [3] The second respondent is joined upon the basis that it provided funds to the third respondent and thus could be said to have caused or promoted the third respondent to contravene the Act and is thus a jointly and severally reliable with the third respondent for that contravention (s 27).
- [4] However, subsection (2) of s 41 exempts a person from the operation of s 41 if the person supplies a services 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.”
- [5] I pause to note that although a “person” includes a body corporate (see Interpretation Act s 19) it seems to me that in this context “person” bears its normal meaning and the constraints imposed by the Act operate against the person. Except for some passing reference to Mr Ralph, apparently an officer of the Family Court of Australia, no complaints were made against

any person for having engaged in the alleged prohibited conduct. It was the Association and the Government department against which the appellants complained. That is not an issue which has arisen in the proceedings and the second and third respondents have been content to deal with the issues as if they had been properly joined. In the end result it does not much matter.

[6] Mr Cavanagh SM sitting as the Local Court dismissed an appeal under s 106 of the Act instituted by the appellants as persons aggrieved by a decision of the Anti-Discrimination Commissioner (“the Commissioner”). That decision was to discontinue proceedings upon the complaints made by the appellants under s 60. The Commissioner’s power to discontinue is found in s 102 and he exercised the power on the ground that the complaints failed to disclose any prohibited conduct because, although the appellants had been discriminated against on the grounds of sex, the third respondent fell within s 41(2) and the second respondent could not be held to have discriminated if it was otherwise caught by s 27. Since the third respondent had not contravened the Act the second respondent was not prohibited from doing what it did.

[7] The Local Court upheld the findings of fact and law made by the Commissioner.

[8] From that decision of the Local Court the appellants appeal to this Court under s 19 of the Local Court Act. The appeal is limited to questions of law.

Background to the complaints

- [9] With financial assistance partly provided by the second respondent the third respondent organised what it described as a “free family law workshop aimed at migrant refugee women in the Darwin region” to be held on 10 November 2001 in the Casuarina Library. The advertising “flyer” declared that “all non-English speaking background women are welcome”. It acknowledged the funding by the Northern Territory Office of Ethnic Affairs.
- [10] The Northern Territory News newspaper published on 8 November 2001 carried an item referring to the proposed workshop.
- [11] The appellants each made a written complaint to the Commissioner, summarised as follows:
- (a) Mr Kennedy asserted that he was aware that the workshop was to be held and decided to attend with his partner, the third appellant, Sheila Bath. He said that on arrival he was refused entry to the meeting place because he was told that it was a women’s only meeting and received confirmation that he was being refused entry because of his gender.
 - (b) Ms Bath confirmed that she had sought entry to the meeting with Mr Kennedy and she was told because of Mr Kennedy’s gender she could not go in but when it was explained that she had been born in

India she was told that she could go in. However, she objected to Mr Kennedy being treated differently because of his gender and refused the permission.

- (c) Mr Ingham was aware of the event from the newspaper report and telephoned the office of the third respondent to advise that he would be attending. He was told that the information was for women only and he would not be allowed to attend. As he did not wish there to be any confrontation he stayed away.
- (d) Mr Bailey-Green also attended at the appointed place and time where he met a man known to him as Mr Stephen Ralph, a counsellor of the Family Court of Australia, who refused him entry because it was a women's only event. He asserts that it was clear he was being discriminated against because of his gender and parenthood.

There does not appear to have been any dispute between the parties as to the facts lying behind the complaints.

- [12] In addition to the second and third respondents the complaints were expressed to be against "The Family Court of Australia and officers" Mr Ralph was not named as a respondent it apparently being thought by the appellants that it was appropriate to join the Court. "Others responsible for the Event of a Family Law Workshop at Casuarina Library on Saturday 10 November 2001" were also the subject of the complaints. The complaints were dealt with in the first instance by a delegate of the Commissioner. As

a preliminary matter the delegate 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 grounds that a complaint should specify the respondent (s 64(1)(c)). There does not appear to have been any appeal against those decisions. There was a later attempt to join the Family Court of Australia in the appeal process but it was rejected and again that decision does not appear to be the subject of appeal.

[13] In her decision conveyed to the appellants by letter of August 2002, the delegate apparently accepted their allegations of what occurred leading to the complaints. She pointed to submissions by the third respondent based on s 41(2) and another arising under s 57. That section provides:

- “(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.”

[14] She held that the workshop fell within s 57 and in conclusion “I am therefore discontinuing all complaints that have derived from actions associated with the conduct of the workshop provided by TEWLS on the grounds that they failed to disclose any prohibited conduct”. It is unclear whether that decision was based upon the operation of s 41(2) or s 57 or both.

[15] From that decision the appellants appealed to the Local Court. It came before Mr Gillies SM. I do not consider it useful to examine in detail the reasons given for upholding the appeal and remitting the matter to the Commissioner for further consideration as was ordered. However, given the lengthy discussion of the operation of s 57 in the delegate's reasons, the Court dwelt upon issues arising thereunder and called in question the adequacy of the investigation of the complaint undertaken by the delegate. I will return to that matter later.

[16] In a letter of 13 June 2003, the Commissioner referred to the decision of the magistrate and informed the parties that he would conduct the investigation personally and as part of it was willing to accept any submissions they may wish to make on the issues. As to the powers of the Commissioner to investigate see s 74 and s 75. The Commissioner is given directions as to the conduct of proceedings in s 90 and powers are conferred under s 92 but it will be noted that in carrying out that investigation the Commissioner is to make a thorough examination of only matters relevant to the investigation (s 75(3)(a)).

[17] At the conclusion of the investigation the Commissioner discontinued proceedings on the complaints upon the bases that although the discrimination had been shown under s 41(1) that provision did not apply to the third respondent by reason of the operation of s 41(2). He also held that the second respondent was not caught by s 27 because the third respondent had not contravened the Act.

[18] At paragraph 4.6 of his detailed reasons, the Commissioner ruled “as the conduct of both respondents fails to disclose any prohibited conduct the complaints are hereby discontinued”.

[19] As to the operation of s 41(2) the Commissioner made findings of fact and law which are not properly open to be called in question. For example:

1. The third respondent is an Association incorporated under the Associations Incorporation Act.
2. Amongst the objects found in its Constitution 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, cultural, language, poverty, age, disability and sexuality;
 - b) to educate women and the community in general so that women can participate fully and confidentially in legal matters which affect them.
3. It was established for “community purposes or other similarly lawful purposes”, and
4. Did not carry out its purposes for making a profit (with reference to the Constitution of the third respondent and the provisions of the Associations Incorporation Act).

[20] The Local Court dismissed the appeal from the decision of the Commissioner and I am not persuaded that it erred in law in doing so. There is evidence to support the findings of facts to bring the third respondent within s 41(2).

[21] The grounds of appeal are directed to the alleged failure of the Local Court to “pick up and respond to” enumerated failings of the Commissioner.

Looking at the written submissions in support of those grounds:

- (a) The complaints against the Family Court of Australia had not been accepted and the Judicial Registrar’s refusal to join the Court as a party in the first appeal shows that the Court was never joined in the proceedings. Any question of whether it should have been a party is not before this Court. One might say, however, that it seems to me that if the Family Court of Australia or its officers fell within s 27(1) of the Act then none of them would be liable because the third respondent had not contravened the Act.
- (b) The reliance upon what fell from Mr Gillies to support allegations of failure on the part of the Commissioner to properly investigate the complaints, are not well founded. Whether Mr Gillies was right or wrong in his criticism of the delegate’s investigation of the complaints he gave no directions to be followed when he sent them back to the Commissioner. At page 9 of his reasons Mr Gillies said:

“My second point is this: I’ve mentioned that the delegate should have investigated the matter further and not proceeded on what she was told. The extent of her investigations and indeed any investigations are limited by ones imagination. The following comments I make are not intended to be exhausted (sic) or prescriptive.”

Given that what fell from Mr Gillies was by way of comment and not intended to be prescriptive, I am of the opinion that in so far as it might be shown that the Commissioner did not adopt his Worship’s comments he was not disobeying any directions or orders. He was free to conduct his investigation as he saw fit within the powers and for the proposed granted under the Act. It is not suggested that the Commissioner refused to exercise any particular power in aid of his investigation as requested by the appellants or any of them.

- (c) A general proposition, of which some particulars are given, that “the whole of the determination is so incomplete and ill-conceived on a grossly inadequate base as to be misleading and injurious to a community if it is to be left un prepared.” In my opinion, there was evidence before the Commissioner upon which he could make his findings of fact and those facts brought s 41 into operation. The Local Court in brief reasons adopted the Commissioners findings and dismissed the appeal.
- (d) Reference is made to statutes and decisions based on statutes in other jurisdictions which are distinguishable from the Act and provide no assistance.

(e) A number of arguments are directed to the operation of s 57 in the circumstances in the matter. For reasons given it is not necessary to consider those matters. The appeal fails because of s 42(2). The appellant put that the services to provided by the third respondent to migrant refugee women should have been made available to them and that the Commissioner and the Local Court erred in law in not finding to uphold that proposition. Apart from anything else the Constitution of the respondent does not extend to enabling it to do what the appellants say it should have done. It was established and funded to provide legal services only to women.

Conclusion

[22] It should be noted that it is for the complainant to prove on the balance of probabilities that the prohibited conduct alleged in the complaint is substantiated (s 91(1)). It has been held by the Commissioner and the Local Court that they were discriminated against. No evidence other than that before the Commissioner was required to established that point. No further investigation was necessary.

[23] As to the exemption under s 41(2), relied upon by the third respondent, the onus is on it to raise and prove it on the balance of probabilities (s 91(2)). It has been held by the Commissioner and the Local Court that it had established the exemption. There was evidence upon which such a finding could be made. No error of law has been demonstrated.

[24] For these reasons the appeal was dismissed.

Addendum

[25] In his reasons for decision, the Commissioner dealt firstly with the operations of s 41 and concluded at par 4.6 “accordingly, as the conduct of both the respondents fails to disclose any prohibited conduct the complaints are hereby discontinued”. They had discharged the onus upon them in that regard. The Commissioner went on at par 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 ‘disadvantaged group’ for the purposes of s 57 (special measures), I believe it necessary to discuss whether s 57 is applicable to facts of this case.”

[26] In the light of what had fallen from Mr Gillies, I can well understand why the Commissioner felt disposed to express his own views about the operation of s 57 in the circumstances of this matter. The concluded that it did and thus the conduct of the first and second respondents was not unlawful discrimination. Notwithstanding the urging of some of the parties, I do not feel that it is necessary for this Court to go beyond finding that there was no error of law demonstrated in applying s 41(2) to the case.
