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Newsletter of the Northern Territory **Anti-Discrimination** Commission

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I take this opportunity to extend the compliments of the season to all our readers.

Message from the Commissioner

Alice Springs Desert Park – Special Measure Employment Plan

If you have an opportunity to visit the Alice Springs Desert Park, then grab it with both hands.

The Desert Park was established about nine years ago by the NT Government and is still managed by NT Parks. The Park, nestled at the foot of the West McDonnell Ranges just outside Alice Springs, has won major tourism awards and I am reliably informed that David Attenborough himself has said that “no museum or wildlife park in the world could match it.” I’ve been there (as a tourist). It’s fabulous!

In addition to its major tourist attraction status, there is an interesting experiment going on at

the Desert Park. Management has established a very successful Aboriginal apprenticeship program after deciding that the best way to promote and sell the Park was to employ local Aboriginal people to deliver information to visitors about local desert ecology and local culture.

Management was also keen to reflect Alice Springs population demographics on staff, so it aimed for a 25% Aboriginal staffing ratio.

In pursuit of this broad strategy the Desert Park approached ADC for advice in 2000 on how to comply with the terms of the Anti-Discrimination Act (“the Act”) whilst indicating in its recruitment advertising that Aboriginal applicants were preferred. Under the Act members of “special measures” groups (which are disadvantaged groups such as disabled, indigenous, women, youth, aged, NESB) may be preferred in employment, without infringing equal opportunity principles, if the purpose is to advance equality of opportunity for that disadvantaged group. This is a form of positive discrimination which is permitted to help create a level playing field for persons who might not otherwise be able to compete equally. Special measures appointments may be made in any type of job, not just jobs particularly suited to members of the disadvantaged group. The Anti-Discrimination Commission provided advice to the Desert Park that their employment program aiming at increasing Aboriginal representation on staff was lawful, and a perfect example of a special measures program.

The Desert Park employment plan goes further than just hiring Aboriginal recruits. After appointment, recruits are not just “thrown into the deep end”. They are given the careful and unflinching support of management through measures such as cross-cultural awareness and Arrernte language courses for all staff, Arrernte language included on plant and animal identification signs, consultation with Aboriginal traditional owners on Aboriginal culture talks, designation of four of the full-time guide positions at the Park for Aboriginal people, mentoring by senior Aboriginal staff for the younger Aboriginal staff, and peer support through a network of Aboriginal employees already on staff.

The actual apprenticeship program is of three years duration and has three streams – Guiding (1½ years formal training), Zoology (3 years formal) and Botany (3 years formal). Included is training in corporate and personal responsibility, and work ethics. Full-time employment is offered at the successful conclusion of apprenticeships.

Several years on the results have been outstanding. Most of the recruits have graduated, some have been retained on staff, 22% of the Park’s 48 employees are Aboriginal, two more Aboriginal apprentices started this year in guiding and two in zoo keeping. The Desert Park apprenticeship program has received NT Public Service Awards for Equity and Diversity in the Workplace for the last three years running.

The Desert Park has learned a lot from this program. There are lessons for all potential employers to share, namely: the Act supports employers who are willing to prefer members of disadvantaged groups; this practice may be time consuming and energy intensive for staff, (in some cases

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recruits will have absolutely no appreciation or experience of a sustained work culture) but this is offset once a recruit is sharing the work load; a flexible management style may be needed to accommodate the diverse obligations and challenges that exist for people who live and work within two cultures; and recruitment of persons from disadvantaged groups need not be restricted to compliance with selection criteria but can be extended to persons who are sufficiently meritorious but may not necessarily have the best claim on merit, or can be based simply on the employer's belief that the special measures applicant is capable of learning the job.

Lessons aside, the real dividend for the Desert Park, and the Territory, is the caliber of its Aboriginal graduates. The guides are the ones I have seen in action. They are trained among other things in presentation to groups, public speaking, voice projection, story telling and how to deal with culturally insensitive questions. They have responded to the challenge and rewarded their employer for its patience. They have blossomed. They are outstanding public performers delivering the very information that tourists want to hear – local experience from local Aboriginal experts.

Tony Fitzgerald

Anti-Discrimination Commissioner

LAUNCH OF SMALL BUSINESS GUIDELINES

The launch of the Anti-Discrimination Commission's Publication 'Preventing Discrimination – Its Good for Business', took place on 25 October at the Members and Guest Lounge in Parliament House.

The Launch was hosted by the Minister for Business and Economic Development (The Hon Kon Vatskalis). However, Minister Marion Scrymgour attended the launch as Minister Vatskalis was unavailable.

Minister Scrymgour praised the booklet in her opening address and congratulated the Commission for producing a very practical resource. The Anti-Discrimination Commissioner, Tony Fitzgerald, and the CEO of the NT Chamber of Commerce, Chris Young, also spoke about the need for small business to fully understand discrimination issues, both to promote harmony in the NT community and to protect their business interests.

The launch coincided with October Business Month to maximise exposure of the Guidelines within the business community – thereby getting the message out to as many small businesses as possible.

The launch was well attended by members of the small business community and other private business organisations, representatives of appropriate government agencies and members of the NT Chamber of Commerce.



From LtoR, Anti-Discrimination Commissioner, Tony Fitzgerald, Minister Marion Scrymgour, CEO for the NT Chamber of Commerce, Chris Young



Most small businesses in the NT consist of 5 people or less and resources and time are in short supply. Preventing discrimination and harassment and providing a fair workplace is often low priority for owners or managers, even though the cost to small business from discrimination complaints can be devastating. However problems in this area are easily preventable. The Anti-Discrimination Commission has produced an information booklet on preventing discrimination and harassment in small businesses and the publication is endorsed by the NT Chamber of Commerce.

The booklet provides accessible and essential information in an 'easy to understand' format for employers and managers to ensure that they become fully aware of their legal rights and obligations. It includes such topics as:

- anti-discrimination law in relation to employment
- strategies for preventing discrimination and harassment in the workplace
- the benefits to be gained by complying with the law
- where to get more information, advice and assistance.

For copies of the booklet contact the Commission on 8999 1444 or tollfree 1800 813 846.



Annual Report:
The ADC 2005/2006 Annual Report is now available from our website www.adc.nt.gov.au. Hard copies are available on request.

Training Program:

Training Program for January 2007 – June 2007 is also available from the website. Hard copies available on request.



Women are a Special Measures Group – Decision by the NT Court of Appeal October 2006

The Court of Appeal recently dismissed the appeal by Mr Robert Kennedy in the matter of Kennedy & Ors v Anti-Discrimination Commission, NT Government Office of Ethnic Affairs & Top End Women's Legal Service [2006] NTCA 9.

Mr Kennedy's appeal against a decision by the Anti-Discrimination Commissioner to discontinue a complaint of sex discrimination made by Mr Kennedy on behalf of the Lone Father's Association was dismissed by the Court.

The complaint concerned a legal advice clinic held by Top End Women's Legal Service (TEWLS) in November 2001 and funded in part by Ethnic Affairs. The event was a free family law workshop aimed at migrant and refugee women. Mr Kennedy and other men who attempted to attend were refused admission on the basis that the workshop was for women only. The men then complained of sex discrimination to the Anti-Discrimination Commission. In August 2002 this complaint was discontinued by the Commission on the ground that the 'special measures' exemption set out in section 57 of the Anti-Discrimination Act ('the Act') applied because the reason for the discrimination was to promote equality of opportunity for women, who are a disadvantaged group.

Mr Kennedy appealed against this decision. In March 2003 his appeal to the Local Court was allowed by Mr Gillies SM and the matter returned to the Anti-Discrimination Commission for further investigation on the issue of whether or not women are a disadvantaged special measures group within the meaning of the Act.

The further investigation was conducted by the Anti-Discrimination Commissioner, Mr Tony Fitzgerald, and in June 2004 he ordered the discontinuation of the complaint on two grounds. The first was that, because TEWLS was a non-profit association established for a community service or other similar purpose, it was exempted from the operation of the Act. The second reason given by the Commissioner for discontinuing the complaint was that:

The project delivered by TEWLS and "promoted" by Ethnic Affairs 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...is not unlawful discrimination.

In making this finding he said that:

It is clear that the "special measures" contemplated by the Act are 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.

The Commissioner went on to say that, although the situation may need review from time to time to determine whether women have managed to achieve equality, at present women continue to constitute a disadvantaged group.

Mr Kennedy appealed to the Local Court against the Commissioner's decision. This time, in February 2005, his appeal was dismissed by Mr Cavanagh SM, who agreed with the Commissioner's findings that both the exemption for non-profit community service associations, and the special measures exemptions applied. In commenting on the special measures issues, Mr Cavanagh SM said:

It apparently troubled another Magistrate dealing with another, previous appeal by the present appellants ...in relation to the same matters... 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 complainants.

Mr Kennedy then appealed the Local Court decision to the Supreme Court. In September 2005 his appeal was dismissed by Chief Justice Martin on the basis that the Commissioner had made no error in law.

Following this dismissal, Mr Kennedy appealed to the Full Court of Appeal. The Appellant successfully argued that, due to wording in the Act, the exemption applying to persons performing services on behalf of a non-profit association established for a community service purpose, did not apply to the association itself. This meant that, despite being a non-profit association, TEWLS could be found liable for discriminatory conduct. [Note: The Anti-Discrimination Commission intends to seek legislative amendment to clear up the apparent inconsistency which exempts persons carrying out the work of non-profit associations, but not the associations themselves.]

However, despite the success of this argument, Mr Kennedy was unsuccessful in his overall appeal. In dismissing the appeal the Full Court unanimously agreed that the Commissioner was correct in finding that the special measures exemption applied, because the workshop delivered by TEWLS was "a program designed to promote equality of opportunity for a disadvantaged group, namely women".

The Court of Appeal ruling makes it clear that the Commissioner was correct in finding women to be a special measures group, and also includes useful discussion regarding the correct test to apply. As such it will be useful to the Anti-Discrimination Commission when decisions regarding the general application of the special measures exemption need to be made.

Bouquets to: Alice Springs Desert Park for its commitment to an outstanding Aboriginal Apprenticeship program.

Darwin Community Legal Service for proudly presenting the Territory's premier Human Rights Art Award and Exhibition "Rights on Show" for the last 12 years. This year's exhibition is at the NT Supreme Court in Darwin from Thursday 7 December 2006.



Conciliated Complaints



Discrimination on the ground of breastfeeding in employment

A mother alleged that her employer would not accommodate her need to breastfeed her child during work hours and had discouraged her from returning to work on reduced hours at the date that she wished.

At conciliation the employer agreed to provide the complainant with a written apology and a reference, and allowed her to work shorter hours for a specified period on her return to work. The employer agreed to change its equal opportunity policy to provide employees with appropriate breastfeeding facilities, lactation breaks and flexible work options, where practicable and consistent with the recommendations of the Australian Breastfeeding

Association. The employer paid the woman \$5,000 in compensation for hurt, humiliation and distress, and 5 week's pay at the rate the woman would have been paid had she worked the reduced hours she was seeking. *(ACT Annual Report 2003-2004)*

Accommodation

An Aboriginal woman was offered the opportunity to rent or purchase an on-site caravan in a caravan park. She was advised that she would need references and later advised that her references were not adequate. She believed that she was being denied the right to live on the site because of her race.

The ADC contacted the park operators and discussed the concerns raised by the Complainant. The operator was adamant that race was not a factor in their decision and advised that they had many Aboriginal tenants. However, in discussions they came to understand why their conduct had been perceived by the Complainant as racist. They apologised for this and better explained their concerns with the references and their requirements for occupancy. Once the tenant complied with requirements she was able to occupy the site within a week of her complaint to the ADC.

All parties were happy with the outcome.

Community Visitor Program Complaint

Averting Discrimination in Accommodation

A consumer of mental health services rang the Community Visitor Program (a Mental Health complaint services operated from the ADC) because he had been informed that an accommodation provider would only give him a tenancy if he received weekly living skills support from a non-government mental health organisation.

The consumer, who experiences only occasional episodes of illness, is intelligent, able to work, and able to function at an extremely high level when well. He had not been a client of mental health services for over twelve months.

The requirement by the accommodation provider appeared to be based on an assumption that because this person has a mental illness, he is unable to maintain accommodation without regular and ongoing support.

The Community Visitor pointed out that any requirement for support should be based on the person's needs at a particular time, and that the blanket application of a rule on the basis of the person suffering a mental illness could be seen as discriminatory.

The accommodation provider agreed with the Community Visitor's suggestion that they work with the consumer to develop a plan that would provide for follow up in the event he became unwell. The consumer agreed that this would be an appropriate way forward.

Breastfeeding Discrimination or Womens' Right to Breastfeed in Public

What is Breastfeeding discrimination?

Breastfeeding discrimination occurs when a woman is treated unfairly because she is breastfeeding or needs to breastfeed. In the Northern Territory this is against the law.

Breastfeeding in Public

The *NT Anti-Discrimination Act 1992* (The Act) protects right of women to breastfeed their babies whether they are at home, at work or in public. The Act also prohibits unfavourable treatment on the basis of other, related grounds, such as parenthood.

Breastfeeding and Work

The Act states that a person shall not fail or refuse to make "reasonable accommodation" for a special need that another person might have due to breastfeeding or parenthood. It would be discriminatory for an employer not to allow a woman to return to work simply because she is still breastfeeding, even if the employer stated that she can return as soon as she has stopped breastfeeding.

The Anti Discrimination Commission recommends that people discuss these issues with their employer in advance.

A person may, in fact, be able to bring the baby to work. However, there may be circumstances where this is inappropriate or unreasonable, for example in a busy public environment or where there is inadequate physical space for the baby. In these circumstances, it might be reasonable for the baby to be brought in to breastfeed or alternatively the mother could leave work to breastfeed during her meal breaks or flex-time.

If told to stop breastfeeding, or if asked to leave a public place while breastfeeding, it is appropriate to say that the right to breastfeed in public is protected under the Act, that it is unlawful to ask a person to leave because they are breastfeeding, and that a complaint of discrimination may be made to the Anti-Discrimination Commission.

A successful complaint may result in changes of policy and/or an order for the payment of damages.

FOR FURTHER INFORMATION OR ADVICE, TO REQUEST TRAINING OR TO BE ADDED TO THE MAILING LIST CONTACT:

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