



Message from the Commissioner

Over the past year we have received a steadily increasing number of complaints and enquiries concerning the recruitment of employees who have a criminal history.

The community expects public and private sector employers to engage employees who operate in a professional manner and who do not place clients and/or the public at risk.

One step increasingly relied upon by employers in the process of selecting suitable employees is the requirement for criminal history checks. Usually an employee or prospective employee authorises the employer to conduct the check.

For employers who wish to conduct criminal history checks our expert staff are available to give advice at any stage of the process. We remind employers conducting checks to consider three important questions:

1. Is it lawful to exclude persons from employment on the basis of their criminal history?
2. Have those subjected to the check been treated fairly and in a non-discriminatory manner?
3. Is a person's criminal history strictly relevant to the duties of the position on offer?

In the NT it is unlawful to discriminate on the basis of "irrelevant criminal record" (*NT Anti-Discrimination Act* ["the Act"] section 19). Irrelevant criminal record is defined under the Act and includes spent convictions, acquittals, withdrawn or dismissed charges, pardons, and convictions for offences where the circumstances relating to the offence are not directly relevant to the situation. However, under the Act it is lawful to discriminate on the basis of criminal record against those working with vulnerable persons, providing that the discrimination is reasonably necessary to protect the vulnerable persons.

Spent convictions do not have to be disclosed and are not obtainable through a criminal history check except for particular vocations such as police and prison officers, and for employment principally involving the care, instruction or supervision of vulnerable persons (eg children, the aged, the disabled or mentally impaired).

If it is decided that a position requires a criminal history check and a criminal history is identified, then care must be taken to assess whether or not the history has any relevance to the duties and tasks of the position. For instance, a DUI offence is unlikely to impact on the performance of clerical duties, but a conviction for fraud may do so, if the person being considered will have direct access to funds or other opportunities to commit fraud. Some factors which should be considered in assessing the relevance of criminal histories are:

- nature of offence(s);
- time since commission of offence(s);
- age of offender at commission of offence(s);
- penalty imposed;
- extent of criminal history;
- extenuating circumstances of offence(s); and
- general character since commission of offence(s).

Note that a person with a conviction may actually be **less** likely to commit an offence since they have already 'learned their lesson'. Also further insight into a person's criminal history and their likelihood of re-offending may be obtained through (confidential) discussion with that person at, or prior to, job interview.

Information about criminal history must not be used for any purpose other than recruitment for employment, confirmation of suitability to continue employment, or in making decisions about which staff are suitable for providing services to clients.

A detailed analysis of the concepts of spent convictions, and irrelevant criminal record in the context of recruitment for employment takes place in the recent (22 April 2005) ADC Decision of *Wall v NT Police* (No. 1 of 2005). The case was brought by a 45 year old complainant whose application for employment with the NT Police ('the respondent') was rejected on account of a dishonesty conviction 26 years earlier (when the complainant was aged 19 years). The respondent contested the complainant's contention that his criminal record was "spent" in the NT, and therefore irrelevant for the purposes of the Act, and that he was the victim of unlawful discrimination based on his "irrelevant criminal record".

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FAREWELL: Roxanne Sheehan – Training and Enquiry Officer

I write this with mixed emotions: the excitement of many new opportunities and the sadness at leaving a job that I really enjoy, colleagues who have become friends and a very special place, the Northern Territory.

I have been with the Northern Territory Anti Discrimination Commission for over 18 months and during that time I have been fortunate to meet a wonderful mix of Territorians and have had the opportunity to visit some regional and community centres. These experiences have been enriching and I can easily see how some come to the Territory for a 'holiday' and are still here 40 years later.

To me, the Territory is a unique and diverse place. I like the richness and vibrancy of the indigenous cultures, the fact you can feel the heart beat of the land, the influences from our Asian neighbours and the opportunities that exist in many areas. The down side is that there is still much work to be done to balance this brightness with basic human rights issues such as health, housing, education, domestic violence, incarceration rates, systemic discrimination and more.

I would also like to take this opportunity to publicly thank my colleagues at the Anti-Discrimination Commission for their professionalism, dedication and commitment to the numerous and varied challenges that come with the promotion and protection of human rights endeavours in the Territory.



NEW STAFF: Amy Wilson – Training and Enquiry Officer

Amy has been living in the Northern Territory since 2001 when she moved here to pursue a career in teaching. Prior to that, she completed a double degree in Education and Arts at Deakin University in Melbourne.

Amy worked for two years at Kormilda College as a Studies of Society and Environment (SOSE) teacher. During this time Amy travelled to East Timor, where she volunteered as an English teacher in Dili and in a small remote village called Kairui.

In 2003 Amy accepted a job as a visiting teacher at the Yirrkala Homelands School. In this position, Amy was privileged to be able to work with Yolngu teachers in the delivery of curriculum to students living in remote homelands in the Northern Territory.

Last year Amy worked as the secondary teacher at the Yirrkala Community Education Centre. During this time Amy was awarded a Remote Workforce Development Scholarship to study a Diploma of Aboriginal and Torres Strait Islander Studies at Charles Darwin University. In her spare time, Amy was involved in acting, directing, and filming for Gove Arts Theatre.

Human rights is something Amy has always felt very strongly about. In her new role as the Trainer and Enquiries officer for the Anti-Discrimination Commission, Amy is looking forward to working with people all over the Territory and informing them about their human rights and responsibilities in the area of discrimination and harassment.



www.playbytherules.net.au

The Play by the Rules campaign emphasises that inappropriate sports behaviour denies people the right to be treated with respect, dignity, fairness and the right to participate in an environment that is enjoyable, fair, safe and healthy.

"Play by the Rules" also incorporates a website with information on NT and federal Anti-Discrimination legislation, and frequently asked questions about discrimination in sport and how to overcome it.

The website has recently been updated and went live to be tested by many different sporting groups across the Northern Territory and Australia in May. It is anticipated that the new website will be operational in June/July 2005 with quite a different look and improved accessibility. Information on discrimination, harassment and child

protection will be integrated where possible to provide a one stop shop so consumers will be able to access all information relevant to coaching, playing, managing and administering in sports.

NT consumers may now download the Play by The Rules brochure and A4 information publication from the website with our Territory specific logo and contact details.

Member Protection Officer Training will be offered throughout the Territory from August to December'05. If you are interested in attending this training then ring Sue Rhodes on 1800-813846 at the Anti-Discrimination Commission or Annette Duncan at Office of Sports and Recreation on phone 1800-045678.

The Member Protection Officer is the person to consult if you have been discriminated against, or have a concern, question or complaint about harassment, child protection or inappropriate behaviour in your sport.

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In *Wall* it was found that the rejection of the complainant's application to join the NT Police was made on the basis of an irrelevant criminal record which amounted to unlawful discrimination under the Act. Consequential orders were made to ensure that the complainant was reinstated into the recruitment process for consideration alongside other applicants for appointment to the NT Police. The *Wall* decision which followed a public hearing of the complaint, may be accessed and downloaded from our website www.adc.nt.gov.au.

You can discuss any aspect of the decision in *Wall*, and any workplace discrimination or harassment issues, with our staff. Indeed we can help you to effectively deal with your own workplace complaints and grievances.

Remember that unresolved workplace complaints may result in loss of time, mistakes, sickness, resignations and even legal costs.

If you are a manager or supervisor in need of workplace assistance in any of our fields of expertise don't forget to call our dedicated Manager and Supervisor Helpline on NT freecall 1800-501288.

Tony Fitzgerald, Commissioner



COMMUNITY VISITOR PROGRAM

The Community Visitor Program is established under Part 14 of the *Mental Health and Related Services Act (NT) 1998*. The program is located in the NT Anti-Discrimination Commission and Judy Clisby is the Program Manager.

The Community Visitors Program is available to consumers of mental health services throughout the Northern Territory. This is a vulnerable group of people, and there are many ways in which we try to make sure that people are able to contact us easily:

- We have a free call number: 1800 021 919 for receiving complaints.
- Community visitors in Darwin and Alice Springs visit community groups so that consumers get to know the visitors, and feel safe and comfortable approaching them.
- Community visitors go to the mental health wards in Darwin and Alice Springs regularly. While there, the visitor approaches people who are consumers of mental health services to give them the opportunity to talk about the service they are getting. Of course, if the person doesn't feel like talking, the community visitor just walks away.
- When funding for the program is more assured, community visitors will be recruited in the more remote areas of the Northern Territory.

Community visitors talk to people for many reasons, only one of which is in response to complaints. A person who is admitted to hospital against their will may feel frightened, and the community visitor can help the person to feel safer. They can achieve this just because they are involved as an independent person. The community visitor, at the consumer's request, can speak to their doctor and nurse, and sit in on any meetings the consumer might have with their treating team. The visitor can also attend the hearing of the Mental Health Review Tribunal at the consumer's request, although it's always more effective if their legal representative acts as their advocate in this setting. The community visitor will also make sure that consumers are aware of their human and legal rights.

Any person wishing to contact the Community Visitor Program can do so by phoning either the freecall number 1800-021919 or 89991444, by writing to LMB 22 GPO DARWIN NT 0801, or emailing cvpprogram.adc@nt.gov.au.

CONCILIATED COMPLAINT

An indigenous complainant attended the respondent's motel where she had booked accommodation for the night.

The complainant arrived late at night after a long drive and had difficulty finding anyone to check her into her room. Once she was able to locate the staff she was given the keys to her room only to find that the room had not been made up after the previous guests had left.

The complainant located the staff again and was provided with keys to another room. The complainant was upset by her treatment and by the quality of the room which she believed was related to her aboriginal race.

The complainant also believed that the motel had a practice of assigning certain rooms, which were of a lesser standard, to aboriginal people.

The parties agreed to conduct conciliation at a very early stage and at that meeting the respondent was able to explain that the problems the complainant experienced were caused by errors on the part of the motel through staff failing to check that the room had been cleaned.

The respondent explained that there were no rooms set aside for aboriginal people and in fact the assignment of rooms was purely based on the rate paid by the organisation. The respondent also explained the efforts the motel went to accommodate all of its guests and noted that all rooms had been upgraded recently.

The respondent offered the complainant a written apology and free accommodation for one night with breakfast. The complainant accepted the respondent's apology and offer of accommodation and a meal in settlement of the complaint.

FAILURE TO ACCOMMODATE A SPECIAL NEED IN THE AREA OF WORK

1. Reasonable accommodation of Special Need

The *Northern Territory Anti-Discrimination Act 1992* (the Act), Section 24 states that a person shall not fail or refuse to make reasonable accommodation for a special need that another person has because of an attribute such as impairment, pregnancy, breastfeeding or parenthood. This includes making inadequate or inappropriate provision to accommodate the special need.

This means, before deciding that an employee with a special need cannot perform the essential requirements of a job, employers must consider whether there are special services or facilities which would enable the person to carry out the essential duties of that job. Then, in accommodating these special needs, each situation should be considered on its particular facts.

(a) Pregnancy and special need

In the Northern Territory a female employee who has been employed full or part time with 12 months continuous service is entitled to maternity leave and is entitled to return to the same or similar position she held before going on maternity leave.

If, for example, a woman returns from maternity leave to find

- Her original position is filled by someone else and she is asked to take a different position, with less pay and less favourable conditions to her previous position, then her employer is likely to be in breach of both industrial and anti-discrimination laws.
- The original position no longer exists, because of say, a genuine restructure, and there are other positions for which the employee is qualified and capable of performing, she is entitled to be employed in an available position that is as nearly as possible comparable in status and pay to her former position.

It is not unlawful to restructure or abolish positions of pregnant employees or those on parental leave provided that the pregnancy, or the fact that a person is on parental leave, does not influence the decision. Many pregnancy and sex discrimination complaints arise because pregnancy, or the fact that an employee is on maternity leave, has been taken into account in making decisions

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about restructures and redundancies. Another common cause of complaints is that employers have failed to inform or consult with people on maternity or paternity leave. Disputes often arise where new positions are being advertised and those on maternity or parental leave are not given an opportunity to apply.

Employers must consider: how much leave to give women who are not legally entitled to maternity leave, whether to keep jobs open for those on maternity leave, and whether to be flexible about working hours on the woman's return to work. However pregnancy is not available as a basis for dismissal. These matters are usually determined by negotiation and discussion between the employer and the employee. Pregnant or post natal employees may be able to take annual leave in advance or to negotiate unpaid leave. Employers should have in place a clear policy on how they will decide about requests for unpaid leave. If requests for unpaid leave from pregnant women are treated less favourably than unpaid leave requests from workers with other reasons, such as extended holidays, this may be pregnancy discrimination.

(b) Breastfeeding and special need

It would be discriminatory 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. Instead, consideration must be given as to how an organisation could reasonably accommodate a breastfeeding mother's special needs. For instance, can the baby remain at work with the woman and be breastfed, or will the baby be brought in at feeding time, or will the woman use her meal breaks or flex-time to go and feed the baby? All these, are issues to be discussed between the employer and the mother, and any one of these options could be quite reasonable accommodation given all the circumstances. However, it may be inappropriate and unreasonable to bring the baby to work in a kitchen setting where there are safety issues with hot oil and water and the only space to sleep is under the kitchen sink.

(c) Industrial Awards and special needs

Employees may have a right to return to work part-time under an industrial agreement, an award or a part-time work agreement. Under discrimination law a requirement to work full time with no option for part-time work could be indirect discrimination, and the woman would need to prove that:

- There was a requirement to work full time
- She was unable to comply with that requirement due to her family responsibilities
- A substantially higher proportion of men than women could comply
- The requirement was not reasonable in all the circumstances.

In Hickie v Hunt & Hunt (EOC 92-910), the complainant had taken maternity leave shortly after being made a contract partner at the respondent law firm. She complained of a range of less-favourable treatment during the period of her maternity leave and following her return to work on a part-time basis. Also, an area of her practice was removed from her on the basis that it could not be managed working part-time. In this complaint it was successfully argued that a requirement to work full time is unlawful indirect sex discrimination as it is predominantly women who seek the opportunity to work part time. The judge inferred 'from general knowledge that women are for more likely than men to require at least a period of part time work following maternity leave, in order to meet family responsibilities.'

So, what is reasonable? It is clear from case law that all the circumstances of a case need to be considered.

Factors that companies have to consider in determining the reasonableness of their decisions in relation to the accommodation of special needs include the size of the organisation, operational requirements, commercial considerations, the benefit and detriment to all concerned and their ability to accommodate the request.

2. Unjustifiable hardship

It is a defence to a claim of failure to reasonably accommodate a special need that accommodating the person's special need would impose 'unjustifiable hardship' upon a respondent.

We will address this topic in the next edition of the newsletter.

3. Conclusion

A best practice approach is to discuss reasonable accommodation of special needs prior to an employee changing work circumstances. Many employees do nothing about their issues of discrimination because they are scared that they will lose their job or be further disadvantaged or singled out in the workplace. However, this is victimisation which is a separate prohibited conduct under the Act.

It is important to review the way that policies and practices about the allocation of work, communication of information, and access to training and other benefits of employment impact on those returning from maternity leave, sick leave and in particular on part-time staff and people with disabilities. Policies must be prepared and communicated to managers and staff, so that they are clear about their entitlements and responsibilities and the avenue of redress if they have a grievance. An important component of such policies is induction training and ongoing staff awareness training about employee/ employer rights and responsibilities.

We don't expect you to do it on your own. We encourage you to:

- ring the ADC Helpline for Managers and Supervisors free call 1800501288. Commission staff will provide expert and confidential assistance with your particular issues of workplace discrimination and harassment, OR
- attend one of the Commission's workplace-related training seminars.

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

Northern Territory Anti-Discrimination Commission

Darwin: 7th Floor, 9-11 Cavenagh St, Darwin • Postal Address: LMB 22, GPO Darwin NT 0801

Phone: (08) 8999 1444 • Free call: 1800 813 846 • Fax: (08) 8981 3812 • TTY: (08) 8999 1466

Alice Springs: Ground Floor Centre Point Building, 54 Hartley Street, Alice Springs (08) 8951 5818

Website: www.adc.nt.gov.au • E-Mail: administrationadc@nt.gov.au