Equality & Justice
for people with disabilities

Disability Discrimination Legal Service Inc

Summer 2017

THE ADVOCATE

Villamanta Disability Rights Legal Service Inc.

In this edition

ACCESS – if you need this in an alternative format, please let us know

Editorial

We hope you enjoy this issue of The Advocate.

The value of people with disabilities continues to be challenged by government with the recent decision that there will not be a Royal Commission into the Abuse of People with Disabilities.

This was a bitter disappointment for those who spent time and effort submitting to the Federal Senate Inquiry and believing that the exposing of abuse would lead to some just outcomes.

There are only three months to go before many community legal centres around Australia are subject to significant cuts which will affect their ability to help disadvantaged Australians. Please contact your local Member of Parliament if you believe that such cuts should not be made.

Julie Phillips
Manager
Disability Discrimination Legal Service

Deidre Griffiths
Principal Solicitor and Executive Officer
Villamanta Disability Rights Legal Service

Exciting opportunity to help transform the CLC sector

The Federation is currently recruiting for the Specialist/Generalist CLC Project.

This Project aims to explore innovative ways to improve collaborative practices between generalist and specialist CLCs to ensure clients with specialist legal needs can access appropriate assistance.

We are looking for an Outcomes Evaluation Consultant and a Researcher to form part of the Project Team. (Terms of Reference attached).

If you know of anyone who has done excellent evaluation or research work in the past, please forward them this email.

This opportunity will be advertised today on the Federation newsletter (Sector News), and is already live on the Australasian Evaluation Society website https://www.aes.asn.au/services/evaluation-tenders.html

The project is funded by Victoria Legal Aid's Innovation and Transformation Fund.

Interested in Becoming a Member?

We would like to invite you to become a member of DDLS. By doing so, you are supporting equal treatment for people with a disability. DDLS provides free legal services to often vulnerable community members and advocates for better laws and policies to ensure equality for all. DDLS membership is open to anyone who is committed to our aims and objectives, and it's free of charge.

As a member, you will receive the DDLS quarterly newsletter 'The Advocate', the DDLS Annual Report and a copy of the DDLS Constitution (on request). You will be able to attend and vote at the Annual General Meeting, participate in the planning, evaluation and other activities of the Service and nominate for a position on the Management Committee.

But most of all, you will be showing your support for the important work of the Disability Discrimination Legal Service. Membership application forms can be downloaded at http://ddlsaustralia.org/get-involved/ddls-membership/ or simply call us for a hard copy to be mailed or document to be emailed to you .

VCAT Special Provisions - the relationship between VCAA decisions and discrimination legislation

What is Special Provision in VCE?

The aim of Special Provision is to ensure that a student's ability to complete VCE is not impeded by personal circumstances beyond their control such as illness, impairment or disability. Eligible students may receive provisions throughout VCE such as alternative assessments, additional working time, frequent rest breaks during examinations, or the use of technology aids. Other forms of Special Provision are also available, as adjustments are made in order to accommodate the needs and circumstances of the particular student.

Who decides whether I get Special Provision?

Although schools can independently grant Special Provision to their students on some occasions, they must not approve Special Provision for any VCE examinations unless the Victorian Curriculum Assessment Authority (VCAA) approves. VCAA is an independent statutory body that oversees government and non-government schools in Victoria. They develop, conduct and monitor VCE assessments and examinations to ensure standards are consistent across the state.

Students wishing to apply for Special Provision will need to provide their school and VCAA with supporting documentation (such as medical certificates or evidence of hardship). However, VCAA's website expressly states that 'VCAA does not automatically adopt a medical or psychological provider's advice'. This may mean that on some occasions VCAA may reject an application even where the applicant has the relevant supporting documentation.

What if I need Special Provision, but my application was rejected?

Where an application for Special Provision is rejected by VCAA, students and parents often accept the decision as final. However, while VCAA does have the power to review, accept and reject applications for Special Consideration, VCAA's determinations must be consistent with Commonwealth and State legislation. This includes the *Disability Discrimination Act 1992* (DDA) and the *Equal Opportunity Act 2010* (EOA). Under both Acts, it is unlawful to discriminate against a person with a disability by failing to make reasonable adjustments. This means, where VCAA rejects an application without justification, the decision can be challenged.

If you or someone you know feels that an application for Special Provision in VCE has been unfairly rejected, we encourage you to get in contact with us at Disability Discrimination Legal Service. Under both State and Commonwealth legislation, VCAA is under a duty to make reasonable adjustments for people with disabilities. For further information, you can reach us on (03) 9654 8644.

Disability Standards for Education- help or hindrance?

A – What are the "Standards"?

The term "Standards" refers to provisions within the *Disability Standards for Education 2005* (Cth)[1] ('the Standards') legislation, that revolves around Education Providers (including all types of Schools and the like) balancing the need to ensure there are adjustments necessary to enable a person with a disability to be able to apply for admission, effectively participate in their course and otherwise be able to 'use the facilities or services on the same basis as a student without a disability', with the obligation to not impose 'unjustifiable hardship on the education provider'.[2]

B – What are "Reasonable Adjustments"?

The term "Adjustments", refers to a 'measure or action taken by an education provider' that helps a student with a disability apply for admission or enrolment, or participate in a course or program or use facilities or services.[3]

For such Adjustments to be "Reasonable" however, would depend on all the circumstances[4] of the student or students whom the reasonable adjustments are to apply to. This would involve analysing, the student's disability, the views of that student or their associate (i.e. those acting on behalf of that student); and the effect of the adjustment on the student, which includes the effect on the student's ability to achieve: learning outcomes, participate and their independence.[5]

"Reasonable Adjustments" are referred to in both the Standards[6] and in the Disability Discrimination Act[7] (DDA). The Standards contains much commentary on what makes an adjustment "reasonable", and how one goes about arriving at an adjustment.

In regards to the DDA reference however, there is no definition that clarifies the way in which an adjustment is considered reasonable. Accordingly, several cases have discussed the test of 'reasonableness' in this context.

The Standards further suggest that an adjustment easily satisfies the reasonableness test. Considering an adjustment by a school is reasonable if it is a measure or action taken to assist a student with a disability in participating in education and training on the same basis as other students, while taking into account the student's learning needs and balancing the interests of all parties affected, including those of the student with the disability, the education provider,

---

[1] *Disability Standards for Education 2005* pt 3.4(2).
[2] *Purvis v NSW (Department of Education and Training)* (2003) 202 ALR 133, [99].
[3] *Disability Standards for Education 2005* pts 1.4, 3.3; *Burns v Director General, Department of Education* [2015] FCCA 1769 (10 July 2015) [25] (Antoni Lucev J).
[4] *Walker v Victoria* [2012] FCAFC 38 [93] (Gray J).
[5] *Disability Standards for Education 2005* pt 3.4 (2); *Burns v Director General, Department of Education* [2015] FCCA 1769 (10 July 2015) [27] (Antoni Lucev J); See also *Sievwright v Victoria* [2013] FCA 964, [62].
[6] *Disability Standards for Education 2005* pt 3.4(2).
[7] *Disability Discrimination Act 1992* (Cth), s4.

staff and other students.[8] The Standards further specify that an adjustment being 'reasonable' is a flexible term that may change over time.[9]

The Standards provide that an independent expert assessment may be required to determine what adjustments are necessary and reasonable. Furthermore, Education Providers, who determine what adjustments are considered reasonable, should implement review mechanisms to deal with grievances arising regarding reasonable adjustments. This appeal mechanism could mean that individuals or experts could play a greater role as the final authority on what constitutes a reasonable adjustment. Importantly though, there is no requirement that this appeal mechanism needs to be in place. Additionally, the Standards do not specify a formal process for compulsory consultations,[10] which the Education Providers would have to comply with.[11]

C – Are Reasonable Adjustments considered effective?

In *Watts v Australian Postal Corporation* however, Mortimer J pointed out that 'reasonable' does not have any qualitative character in the context of a 'reasonable adjustment'.[12] Her Honour stated that '[u]nless a modification involved unjustifiable hardship, it will by operation of s 4 be a reasonable adjustment.'[13]

This was an employment discrimination case and therefore **did not reference** the Standards, but redefined the manner in which reasonable adjustments should be considered by the courts. The decision also was in harmony with other case law in that an adjustment was regarded as reasonable unless making the adjustment would 'impose an unjustifiable hardship on the person making the adjustment'.[14]

Adjustments that do not work will still be considered reasonable, considering 'reasonable adjustments' must balance the interests of the parties affected, which involves taking regard of a range of factors, including but not limited to the effect of the adjustment on the child.[15] On the other hand however, there was an instance where more than one adjustment was considered by a Court, to be so unreasonable, that Discrimination on grounds of Disability against a student was firmly established.[16]

In summary, the Standards have created a number of barriers to defining whether adjustments are reasonable due to the manner in which they have been written, and case law including rigid interpretations. The question then to be asked is whether education discrimination law would be stronger if the Standards did not exist.

---

[8] *Disability Standards for Education 2005* (plus *Guidance Notes*), 3.4(2).
[9] Ibid 3.4(1) Note.
[10] *Walker v Victoria* [2012] FCAFC 38.
[11] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 (21 October 2013) [185] (Member E Wentworth); *Burns v Director General, Department of Education* [2015] FCCA 1769 [117] (Antoni Lucev J).
[12] [2014] FCA 370; in *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 at [38].
[13] *Watts v Australian Postal Corporation* [2014] FCA 370 in *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 at [38]; see also *Sievwright v Victoria* [2013] FCA 964, [39].
[14] *Disability Standards for Education 2005* pt 4.2(4); See also *Purvis v NSW (Department of Education and Training)* (2003) 202 ALR 133, 157 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[15] *Disability Standards for Education 2005* (Cth) s 3.4(2)(c); See also *Perkiss v Technical and Further Education Commission* (NSW) [2016] FCCA 957.
[16] *Burns v Director General of the Department of Education* [2015] FCCA 1769, [317].

MATSOUKATIDOU V YARRA RANGES COUNCIL

The decision in *Matsoukatidou v Yarra Ranges* handed down in the Supreme Court of Victoria in February has shone light upon issues concerning rights to equality and fair hearings for people with disabilities requiring adjustments and accommodations before the courts.

The facts

The case concerns the charge from the Yarra Ranges Council (the defendant) against Maria Matsoukatidou and her mother Betty (the plaintiffs) for committing offences under the *Building Act 1993 (Vic).* The charge was handed down as a result of their failure to secure and demolish their home after it was burnt down by an arsonist in 2012.

At the Magistrates Court hearing where the plaintiffs were self-represented, Maria was fined without a charge and Betty was fined with a charge. They accordingly appealed to the County Court under the *Criminal Procedure Act 2009 (Vic)* but their appeals were struck out for non-attendance.

The plaintiffs then applied to the County Court for orders reinstating their appeals, and their applications were heard the following day. However, the plaintiffs were again self-represented and the court did not make changes to accommodate for the plaintiffs' disadvantages. Maria has a learning disability and is on a disability pension and her mother's first language is not English. They struggled to explain their arguments and were left confused about the proceedings in general as the judge did not explain the legal test which would be used and gave them little assistance.

In this case the plaintiffs seek judicial review of the orders made by the previous judge under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic).*

The legal issues

The plaintiffs argued that the judge failed to safeguard their human rights to and fair hearing under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter).

Issue 1: Whether the Charter applied to courts and tribunals

According to section 6(2)(b) of the Charter, the Charter applies to courts and tribunals "to the extent that they have functions under Part 2 and Division 3 of Part 3". Part 2 contains human rights protected under the Charter and Division 3 of Part 3 contains terms concerning legislation interpretation. Accordingly, whether courts and tribunals have human rights obligations under the charter turned on whether they have "functions" under these sections.

In this case, it had to be determined that a judge of a County Court was required to apply the rights of equality and fair hearing under the Charter in order for the plaintiffs to be successful.

Justice Bell found that a judge in the County Court is required to apply the right to a fair hearing when adjudicating on a charge brought against a person charged with a criminal offence. However he noted that whether the obligation arises in relation to setting aside strike-out orders was a separate legal question. Justice Bell also found that equality must be applied procedurally in courts and tribunals and ensure that everyone is equal before the law without discrimination.

Issue 2: Whether the right to equality specifically applied in the plaintiffs' proceedings

It was submitted that the County Court judge was under an obligation to give positive assistance to the plaintiffs to make adjustments to accommodate for their disadvantaged positions. In determining the validity of this claim, Justice Bell held that there are different elements to the equality requirement enshrined in section 8(3), the first being that every person is equal before the law. The second element is that people must have equal protection without discrimination and the third concerns equal and effective protection against discrimination.

It was found that despite the Attorney-General's submission, the first element concerning equality before the law does not have a substantive operation and is procedural in character. It requires that the court apply the laws equally and that no one is treated arbitrarily. This aspect does not require a court to make procedural adjustments in relation to accommodate for particular parties. However this issue did not prove to be a great barrier to Maria's claim as she is protected in the other elements of equality. However Betty did not have the same protection due to the limited definition of disability. Maria has a 'disability' as defined under 6E of the *Equal Opportunity Act* however Betty's self-representation and the conduct of the hearing judge could not be considered in the context of disability.

Justice Bell accepted that the final two elements concerning equal protection of the law without discrimination and equal and effective protection against discrimination had substantial operations and applied to courts and tribunals. He found that equality in substance can require positive action to redress the disadvantaged suffered by some people.

Issue 3: Whether the right to fair trial specifically applied to the plaintiffs' proceedings

Section 24(1) of the Charter states that a person charged with a criminal offence or a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court after a fair and public hearing. The issue was wether this right applied to the plaintiffs in respect of their application under s267(3) of the *Criminal Procedure Act* to set aside the orders made in the Country Court to strike out their appeals against the sentencing orders of the Magistrates court.

The Attorney-General argued that the provision should not apply because in determining whether their applications should be upheld regarding the strike-out provisions, they were not persons "charged with a criminal offence." However Justice Bell believed that section 24(1) should not be so restricted and that the right to a fair

hearing should not be confined to criminal cases. Therefore, in their application to the *Criminal Procedure Act,* the plaintiffs were entitled to a fair hearing.

It should be noted that Betty's claim, under the right to equality under section 8(3), depended on this provision. However both the rights to equality and fair trial applied to Maria due to her protection under the *Equal Opportunity Act.*

Issue 4: Whether the County Court judge ensured that Maria's right to equality was upheld and that both Maria and Betty had a fair hearing

Maria's right to equality

Justice Bell held that Maria's right to equality under section 8(3) of the Charter was breached. He held that her disability greatly reduced her ability to effectively participate in the hearing including her capacity to understand what the judge said, the issues at hand, the nature of the application and also her ability to communicate. Due to the absence of judicial advice, she could not make informed decisions on what to say and what evidence to divulge.

In order for her right to equality to be upheld the judge was required to recognise that Maria had a disability and make reasonable adjustments to compensate for Maria's disability. This includes both the assistance judges are required to give to self-represented parties, and also taking into consideration the disadvantage she experienced due to her disability. The judge in the County Court did not make such accommodations and therefore her right to equality in section 8(3) of the Charter was breached.

Maria and Betty's right to a fair trial

Justice Bell held that a right to a fair trial under section 24(1) covers parties which are self-represented. He then listed a number of factors which established that section 24(1) had been breached. These included that the judge did not recognise the plaintiffs as self-represented parties and therefore did not inquire into whether the parties wished to have the hearing adjourned to obtain legal representation. Further, if the parties were recognised as self-represented, assessment regarding how the hearing should have been conducted would have occurred including attaining their capacities which would have revealed that Maria had a disability.

Justice Bell also noted that the judge did not appreciate that the plaintiffs lodged two different applications, and did not explain to the plaintiffs the process which would be adhered to.

Justice Bell also took issue of the active questioning undertaken by the judge where both plaintiffs were cut off on occasion. The process was confusing, there were no breaks and their participation was accordingly ineffective and they were not given a fair opportunity to argue their case. Therefore, the plaintiffs' rights to a fair hearing under section 24(1) of the Charter were breached.

Decisions of the court

Justice Bell held that the orders of the judge of the County Court refusing the plaintiffs applications to set aside the strike-out orders would be set aside and the applications would be remitted to a different judge. In most cases, a self-represented party will be entitled to make an application for an order for judicial review for breach of procedural fairness under sections 8(3) and 24(1).

Management of Public Sector Records - Victorian Auditor General Report

Two of the Government's largest service providers to people with disabilities have been audited by Mr Andrew Greaves (Auditor General). The "Managing Public Sector Records" audit focused on the effectiveness of:

- Department of Education and Training and the Department of Health And Human Services' management of public records according to legislative requirements
- Public Record Office Victoria (PROV) assisting agencies to do this
- Department of Premier and Cabinet (DPC) supporting PROV to oversee agency records management

The report examined the records management practices of the Department of Education and Training (DET) and the Department of Health and Human Services (DHHS) and their compliance with the Act, focusing on DET procurement and outsourcing, and DHHS child protection files.

The Auditor-General's findings at the conclusion of this current Report were as follows: The DET and DHHS have demonstrated that they do not comply with the requirements set out in the legislation. Neither agency adequately understands the records it owns/holds and cannot be assured that their records are being effectively managed and maintained. Their current regime is putting them at risk of losing records and having them inaccessible, inappropriately accessed, unlawfully altered or destroyed. Both agencies acknowledge these issues and have started to address them.

In summary, the impact of both DET's and DHH's non compliance is as follows:

- Many files have been reported as missing or in transit. Details of these files and the risks they pose to client privacy and DHHS accountability have not been reported adequately. The DHHS has endeavoured to monitor and address this issue. E.g. by implementing an audit annual process.
- As instructed by the PROV, DHHS has incorporated record management requirements into the contracts of the Community Service Organisations that deliver their services on its behalf. Due to the lack of monitoring of their compliance, there is no evidence that these requirements are being met.

- Relating to DHHS's Records of Children in State Care, the DHHS has been diligent in its recent efforts to address issues raised in a 2008 audit report regarding concerns about the records of third party providers. They have created a Ward Records Plan and published the website 'Finding Records' with many guides to help those who were once in state care to find/access records about themselves.
- The records of the DET are stored throughout its 50 locations. Many of these records are stored in undocumented locations. The DET could not provide information on missing files/files in transit and is largely unaware of the extent of the risks related to its record management
- The PROV mandated that DET embed records management clauses in their contracts to improve the way records of outsources activities are captured and preserved. It was found that most DET contracts met little or none of the requirements, demonstrating major concerns that DET's third party providers will not fully comprehend all of their record management obligations.

So far as the legislation is concerned:

- The PRA is outdated. It has not kept pace with changes in how the government delivers its services
- There is no "whole-of-government" oversight framework - needed to ensure that agencies are lawfully managing their records
- Public-sector staff currently have insufficient access to competency development in records management for staff
- Current punitive measures are ineffective deterrents for non-compliance

PROV has successfully assisted agencies to manage public records since the 2008 audit and has implemented a number of changes since that audit. These include the release of additional records management standards to help comply with the Act. Further, developing/implementing an Information Management Maturity Measurement Tool to help agencies understand their information management weaknesses and help PROV learn to better support information management by agencies

DPC as of late, has managed to use its resources to strengthen PROV's administrative arrangements but was not doing it as much prior to this year's audit

Volunteer Needed

Interested in supporting the work of DDLS? We are looking for someone who has a fund-raising background who can look for fund-raising opportunities and write simple submissions. If you fill this is something if you can do, please contact Julie Phillips 9654-8644.

Our organisations

DDLS Management Committee

Claire Spivakovsky (Chair)
Jan Ashford (Vice Chair)
Elizabeth Knight
Nick Corker (Treasurer)
Elizabeth Muhlebach
Wayne Kiven
Liddy Nevile
Marius Smith
Julie Phillips (Secretary)

Staff

Manager
Julie Phillips
Principal Solicitor
Placido Belardo
Solicitor
Deborah Randa
Administrative Officer
Anna Leyden
Bookkeeper
Darrell Harding

Ross House, 2nd Floor
247-251 Flinders Street
MELBOURNE VIC 3000
Tel: 03 9654 8644
Fax: 03 9639 7422
Country: 1300 882 872
https://twitter.com/ddls2014
https://www.facebook.com/ddls1
www.ddls.org.au

Villamanta Management Committee

Phillip H Clarke - Chairperson
Andrew Hill - Secretary
Kathryn McBride - Treasurer
Amanda Millear - Deputy Chairperson
Neville Porter - Member
Hank Wyllie – Member
Michele Tucker - Member

Staff for

Principal Solicitor and Executive Officer
Deidre Griffiths
Lawyers
Greg Leeson
Naomi Anderson
Viv Avery
Paralegal Worker
Sue Wolter
Administration Worker
Viv Nicol
Accounts administrator/ Personnel/Special Projects Worker
Darrell Harding

C/- Deakin University
Building ib
Level 3
75 Pigdons Road
Waurn Ponds Vic 3216
Tel: 03 5227-3338
Free Call 1 800 014 111
www.villamanta.org.au