

# Equality & Justice

for people with disabilities



Winter Edition 2018

## THE ADVOCATE



**Villamanta Disability Rights Legal Service Inc.**

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### Editorial

Disability Discrimination Legal Service and Villamanta Disability Legal Rights Service Inc are long-standing members of Disability Advocacy Victoria and are both represented on its Board.

As in past years, we have been pleased to work with the Disability Advocacy Resource Unit to organise this year's Strengthening Disability Advocacy Conference 2018.

The advocacy sector rarely has time to do any strategic thinking, to come together and share ideas and thoughts. This is an opportunity to do just that. The theme of the conference is "Doing Disability Differently". For more information on the conference, go to the following link. We hope to see you there.

<http://www.daru.org.au/strengthening-disability-advocacy-conference>

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## Owners Corporation v Black

### **Background:**

Our client, Ms Black lives in an apartment building in Travencore which she has owned since December 2013. However, in 2015 Ms Black developed disabilities that affected her mobility. This led to Ms Black relying on mobility aids such as a wheelchair and scooter. As a result, various parts of the apartment building were not suitable or accessible for her. This included the doors to the car park, rubbish disposal area, courtyard and the ramp to the car park door.

Whilst the owners corporation did comply with the Building Code in force when the building was constructed, they failed to make various modifications to hard to access areas of the building to ensure Ms Black could use them. As a result, Ms Black applied to VCAT for orders under the Equal Opportunity Act 2010 ('The Act') to compel the owner's corporation to modify the doors and the ramp to the car park door to enable her access. The basis for the claim was that the owners corporation, as service providers breached s 44 and 45 of the Act by indirectly discriminating against Ms Black in failing to make reasonable adjustments for her disability. In addition, Ms Black sought to rely on s 56 of the Act, which requires an owners corporation to make alterations to common property in certain circumstances.

### **VCAT:**

The owners corporations maintained that they were not service providers for the purposes of s 44 and 45 of the Act. Consequently, they contended that s 56 of the Act was the only provision which would require them to make alterations to common property. However, under s 56, Ms Black would be required to pay for the alterations herself and establish that they had no adverse effect on other members of the corporation. Both parties agreed to deal with this question of law as a preliminary matter. The parties' submissions involved statutory interpretation of the Act to determine how and in what ways the Act applied to owners corporations. Amongst other things, the owners corporation contended that due to its statutory construction, s 56 exhausts their obligations regarding alterations to common property. They argued that on this basis, s 44 and 45 of the Act did not apply. Our client contended that due to its nature, the definition of "services" under the Act should be given a liberal interpretation and s 56 should not be interpreted as limiting the operation of sections 44 and 45 in relation to common property affected by owners corporations. VCAT held, amongst other things, that the part of the Act aimed at service providers does apply to an owners corporation. One of the reasons for this decision was that due to the 'beneficial and remedial purpose' of the Act, the term "services" is to be given a 'wide meaning'. Thus, it was held that the owners corporation was a provider of services to Ms Black. The owners corporation then sought leave to appeal against this aspect of the VCAT decision to the Victorian Supreme Court, on a question of law. Leave to appeal was granted, partly due to the fact that the questions of law were of 'general and public importance'. Before the hearings for the appeal commenced, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) applied for leave to assist the Court as amicus curiae, a friend of the court. This application was granted.

### **Appeal at the supreme court:**

The appeal was held at the Supreme Court of Victoria. Richards J agreed with VCAT's conclusions that the owners corporations were providers of services, and that s 56 does not exclude sections 44 and 45 from applying to owners corporations. In other words, 's 44, 45 and 56 can all apply to an owners corporation' in relation to its common property.

### **The next steps:**

A hearing will now be held at VCAT to determine if the owners corporations have in fact unlawfully discriminated against Ms Black by failing to make reasonable adjustments for her disabilities. This will turn on whether it is reasonable to require the owners corporations to make the various modifications of the common property. There is also a possibility that the owners corporation will seek to appeal the Supreme Court decision that they are service providers.

# **‘Improving Educational Outcomes for Children with Disabilities in Victoria’.**

**Monash University Castan Centre for Human Rights Law**

**June 2018**

Link to article: <https://noahsarkinc.org.au/wp-content/uploads/2017/03/Monash-University-Improving-educational-outcomes-for-children-with-a-disability-in-Victoria.pdf>.

## Report Summary

In June 2018 the Monash University Castan Centre for Human Rights Law submitted their report on ‘Improving Educational Outcomes for Children with Disabilities in Victoria’. Throughout Victoria, approximately one in every six students lives and learns with a disability. A number of recent reports and inquiries have highlighted the disadvantages facing students in Victoria’s government schools.

This study focused on the current experiences of children with disability in Victorian mainstream government schools by applying a human rights analysis. The findings of this report were based on nearly 100 interviews with former students, school staff (including principals, teachers and support staff), and individuals working to support and represent them. The result of these interviews revealed that some government schools continue to discriminate against students with a disability by turning them away. Moreover, those students with a disability who are enrolled and in the classroom are not receiving appropriately designed and implemented adjustments.

Schools in Victoria are also facing the added challenge of using the current Program for Students with Disabilities (PSD) funding model to provide targeted funding. In a PSD review, 15 out of every 100 Victorian students are estimated to be in need of reasonable adjustment support due to a disability, with only four of these students receiving targeted funding. In addition, eligibility for this funding is based on a student’s deficit and diagnosis, as opposed to their functional needs and capacities, resulting in many students not receiving the adequate support they need to participate in education on the same basis as their peers without disabilities.

The study also highlighted that despite the Department of Education and Training pursuing a policy of inclusion in government schools, there were many reports of students with disability continuing to be segregated from their peers in the classroom or playground.

There are also a number of problems outlined within the study in regards to the Department of Education and Training’s procedures. The reports states that the Department has not clearly articulated what duties are imposed on which duty-bearers by Department policies, nor has it attached clear consequences for failure to fulfil these obligations. In addition, data that is being collected is not being publicly released, meaning that there is a lack of accountability.

In light of these issues, the Monash University Castan Centre for Human Rights Law outlines a number of recommendations to improve the current framework:

### 1. Unequal access to schools:

- The Department of Education and Training should:
  - Make information in regards to the rights of children with disability and their parents, including reasons for permissible refusal of enrolment and the assessment for this, available prior to enrolment.

- Provide parents of any prospective students with disability with an information pack that outlines the relevant law and policies, the expectations of their child's rights in relation to enrolment, guidance on how the school will conduct an analysis of the prospective student's reasonable adjustments, the support networks available for students with disabilities and details of the school and Departments complaints processes.
- Amend the existing policy guidance on admissions to clearly outline the rights of children with disability to seek admission to, or apply for enrolment in a government school on the same basis as a prospective student without disability.
- Develop and implement practical guidance and tools for principals to conduct an analysis of a prospective student's anticipated adjustments, which integrate a human rights-based approach and designed to achieve compliance with the requirements of the *Equal Opportunity Act 2010* (Vic) and the Disability Standards (Cth).
- Require all mainstream schools to collect and report to the Departments de-identified data relating to the enrolment of students with disability with the Department to publish this data annually. In addition, the Department should monitor trends in the enrolment of children with disability.

## 2. Assessment and Funding Experience: The Program for Students with Disabilities:

- The Department of Education and Training should:
  - Develop a new funding model that replaces the current Program for Students with Disabilities (PSD) by basing the new model on human rights principles and standards as well as reflecting a strength-based functional needs approach by using eligibility criteria based on a student's functional needs. The new funding model should also close the gap in support for children with autism, Asperger's, dyslexia, and related disorders as well as incorporating enhanced accountability mechanisms, which ensure that the Department is able to determine the impact of funding on students' schooling outcomes.

## 3. The Right to Participate: Curriculum Modification, Adjustments, and (Low) Expectations:

- The Department of Education and Training should:
  - Make Individual Learning Plans (ILPs) and Student Support Groups (SSGs) compulsory for all students who require adjustments beyond quality differentiated teaching and learning.
  - Require all ILPs to be submitted to the Department, and develop a moderation process for ILPs.
  - Evaluate the effectiveness of existing professional development opportunities and other guidance (such as online materials) designed to assist teachers in making appropriate adjustments and curriculum modifications.
  - Elevate the personalised support profiling tool currently in development into a hub for each student, which should include all planning and assessment tools and documentation, reports and results, SSG minutes and other correspondence and links to relevant policies and other information.
  - Ensure that the guidelines on the use of teacher aides currently in development include guidance to teachers to enhance understanding of the policies which delineate instructional responsibilities for teachers and aides.
  - Examine options for increasing rights-compliance in standardised testing, in particular VCE and NAPLAN.

## 4. Social inclusion, dignity and self-worth:

- The Department of Education and Training should:
  - Offer training for all school staff on inclusive education and the social model of disablement which must incorporate social risk assessment and specific policy guidance about micro segregation.

#### 5. Managing Behaviours of Concern:

- The Government of Victoria should:
  - Repeal regulation 25 of the Education and Training Reform Regulations 2017 (Vic), which outlines that a member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that are dangerous to the member of staff, the student, or any other person.
- The Department of Education and Training should:
  - Amend the School Policy and Advisory Guide - Restraint of Students to require that a meeting be held between the relevant teacher, parents, the relevant school leader, and any other relevant stakeholders after an incident of restraint or seclusion, or when an incident has been alleged by a student, witness or parent

#### 6. Workforce Capacity: Training and Support:

- The Department of Education and Training should:
  - Appoint a teacher to lead the school's inclusion initiatives as well as develop a plan to evaluate the impact and effectiveness of all workforce development initiatives relating to inclusive education and expand collaborative learning initiatives on inclusive education.
  - Develop and introduce a mandatory professional development program for school aides, and increase opportunities for aides to learn from experts outside the school.

#### 7. Grievance Handling:

- The Department of Education and Training should:
  - Require schools to develop complaints policies which reference the Departments Parents Complaints Policy as well as clarifying to parents that they have the right to refer their complaint to the Independent Office for School Dispute Resolution, once efforts at resolution at the school level have failed. The Department should then publish a report annually on complaints made by students and parents against schools.

#### 8. Barriers to Change: The Impact of Devolution:

- The Department of Education and Training should:
  - Include indicators of inclusion and compliance with anti-discrimination laws and the Charter as key performance indicators in Principals' professional development plans.
  - Make explicit the nature of the obligation placed on schools by each Department policy and require schools to make all their policies available online.
  - Incorporate into the FISO practices and measures specifically designed to improve outcomes for students with disability, and to help schools realise their legal and policy obligations to students with disability as well as Conduct a comprehensive review into all aspects of the Department's disability-related monitoring and data-collection processes.
  - Periodically audit schools' policies for compliance with Department requirements, and where the policies do not reflect Department policy or legal obligations, or do

- not reach minimum standards; support the School Council to revise the policies accordingly.
- Develop an Access to Information policy, which enshrines the principle of maximum possible disclosure, and provides guidance to Department personnel (and to the public) on the permissible bases for not disclosing information.

## Australia Human Rights Commission: A future without violence

### Why was this recently released Report necessary?

As the NDIS takes form and its impacts ripple through the disability sector, the Australian Human Rights Commission has produced its report examining how the changing landscape will impact on violence against people with a disability in institutional settings.

People with disability experience violence at a higher rate than other people in the community. Disability advocates claim 18% of people with disability report being victims of physical or threatened violence compared to 10% of people without disability. This estimate is conservative, as there are many hefty barriers to reporting abuse for people with disability.

Yet, none of the primary policies of the NDIS are designed to specifically address violence against people with disability. Indeed, the sole performance indicator for violence, abuse and neglect, 'feelings of safety in different situations', has been criticised as an ineffective measure for understanding this clearly evidenced violence.

Focusing on how Australian law can best realise the government's obligations under the *Convention on the Rights of Persons with Disabilities*, the Commission gave four core recommendations to protect against violence, both under the NDIS Quality & Safeguards Commission and within mainstream services. The Recommendations focused on oversight and availability of information.

The recommendations were drawn from evidence gathered in national consultations with government, disabled people's organisations, disability advocacy organisations, industry and academia.

### What Key Concerns were Raised?

The primary concerns from stakeholders were as follows:

1. Uncertainty around how the different mechanisms work and relate to one another;
2. Accessibility for people with disability;
3. Effectiveness in preventing and responding to instances of violence;
4. Inadequate training and remuneration of workers; and
5. Inconsistent levels of protections offered to people with disability in different jurisdictions.

## **Methodology: How Can We Properly Assess the Changing Landscape?**

The Commission's research identified six essential elements to ensuring effective quality, safeguarding and oversight mechanisms that give effect to the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings.

The elements were:

1. Effectively implementing a human-rights based approach;
2. A connected and integrated system with free-flowing communication accessible to those who need it;
3. Independent oversight to ensure reports and concerns are actioned;
4. Robust prevention and response systems;
5. Accessibility for people with disability; and
6. Using data and research to improve access and efficiency.

## **What was Recommended?**

### **Recommendation 1**

*That quality, safeguarding and oversight mechanisms in the disability and mainstream sectors should incorporate and implement the essential elements of a quality, safeguarding and oversight system.*

The Commission supports the new Safeguarding Framework and the NDIS Quality & Safeguards Commission as the primary oversight mechanisms and welcomes the requirement that providers maintain incident-reporting systems. Human rights concerns are incorporated into the fabric of these agencies, promoting easy access to justice. The NDIS Quality & Safeguards Commission is afforded invaluable independence as a fully external authority. Although directions from the Minister are possible, they must be of a general nature and cannot be inconsistent with the purposes of the Act.

Both community and the Commission have expressed concerns regarding a lack of practical guidance in incorporating the human rights principles of the agencies, and concern that human rights risks may be sidelined in the market-based structure of the NDIS. They thus emphasise the need for strong oversight.

The Commission notes governing bodies should consider including community visitors in the Safeguarding Framework as they offer proven insights and access. This inclusion is particularly important because complaints systems are unclear, and difficulty accessing assistance is a known barrier to people with disability reporting violent events. In assisting individuals to make reports of violence, consideration and extra support should also be given to intersectional discrimination (e.g. sexuality and disability, indigenous identity and disability).

### **Recommendation 2**

*That the Commonwealth and state and territory governments should increase collaborative efforts to ensure that relevant quality, safeguarding and oversight mechanisms can operate effectively during transition to the NDIS in order to ensure that people with disability have continuing access to effective quality, safeguarding and oversight mechanisms during transition.*

The primary problem in the transition is uncertainty and lack of clear communication as to lines of accountability. The majority of quality, safeguarding and oversight bodies consulted did not know how the Safeguarding Framework would individually affect their functions, particularly where communication was required across jurisdictional lines or regulations were merged as in the case of restrictive measures. Some of the organisations that were unclear about their functions during consultations in April 2018 are in states that will reach full roll-out in July 2018. Delays in information can and do result in delays to critical services.

### **Recommendation 3**

*That the Commonwealth Government and the NDIS Quality & Safeguards Commission should increase publicly available information about the operation of current and future quality, safeguarding and oversight mechanisms, and effectively disseminate this information to key stakeholders.*

The confusion addressed in recommendation 2 can be largely remedied by making information available as to how the Safeguarding Framework and NDIS Quality & Safeguards Commission will operate. In consultation the Commission found a significant disconnect between how Commonwealth Government departments and agencies, state and territory governments and oversight entities, and the disability advocacy sector, understand the operation of the Safeguarding Framework. Disseminating information improves the disability advocacy sector's ability to support people who need to access these mechanisms. The NDIS Quality & Safeguards Commission has itself stated that it will take a 'no wrong door' approach to complaints and the Commission hopes this will be acted upon.

#### **Recommendation 4**

*The NDIS Quality & Safeguards Commission should work with the Commission within 18 months of the release of this report to identify the extent to which the essential elements identified below have been implemented through the Safeguarding Framework and NDIS Quality & Safeguards Commission, and whether recommendations 2 and 3 have been addressed.*

The issues in transition must not become permanent, and lack of national statistical information renders policy adaptation difficult. Partnership between the NDIS Quality & Safeguards and Human Rights Commissions is important in alleviating teething pains.

It is important to note that many of the issues raised are not in the new scheme but its implementation. Clarity in cross-jurisdictional communication will form the basis for improving access to justice.

## **Stronger Schools Campaign**

The Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service Inc. are proud to support the VCOSS lead campaign for stronger schools.

Supportive schools have healthier and more resilient students who go on to become happier and more fulfilled adults. They are more likely to succeed in their goals if they are supported during their education and likely to have stronger connections to family, the workforce and within their local community.

Strong schools are inclusive and supportive of every student and every family. Without the right support, students are at risk of increasing disengagement that can lead to a lifetime of social, economic and health problems.

Please join us in our campaign.

Website: [www.strongerschools.org.au](http://www.strongerschools.org.au)

Facebook: [www.facebook.com/strongerschoolsvic](https://www.facebook.com/strongerschoolsvic)

Petition: [www.strongerschools.org.au/petition](http://www.strongerschools.org.au/petition)

## Marketing and Fundraising Committee Member Being Sought

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability.

DDLS relies on government funding to assist people with disabilities who need assistance regarding discrimination, throughout the state of Victoria.

Our funding permits us 2.7 EFT staff.

We are looking for a volunteer to join our Management Committee who has experience in marketing/fundraising in order to assist us solidify our position and continue to provide the service we do, regardless of variations in government funding.

If this would interest you, please contact Julie Phillips, Manager on 9654-8644 or by email at [manager@ddls.org.au](mailto:manager@ddls.org.au).

## Give Now

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. This is why the Disability Discrimination Legal Service provides free legal services to those experiencing harm. We also work to improve conditions for all people with disabilities through community legal education and law and policy reform.

In the face of limited government funding, we need your support to expand our work, especially in the key areas of education and employment. Despite numerous parliamentary inquiries and government bodies uncovering widespread abuse and neglect, not enough has been done to improve matters. But we know that continual advocacy and litigation creates pressure for better protections. Every dollar you donate helps us to achieve this goal.

DDLS is an independent, non-profit community organisation. Many people with disabilities, volunteers and students contribute their efforts to our work

<https://www.givenow.com.au/DDLS>

### **Donations may also be made to Villamanta Disability Rights Legal Service Inc.**

Villamanta does excellent work for people who have a disability and a disability-related legal issue. These people are often our most vulnerable citizens.

Any amount, no matter how small, will help us to make a difference for those who most need it!

You can help Villamanta to help Victorians who have a disability by donating using either PayPal or Credit Card via our website at [www.villamanta.org.au](http://www.villamanta.org.au)

All donations greater than \$2 are tax deductible and a receipt will be sent to all donors.

## Our Organisations

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 Nick Corker (Treasurer)  
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