

Equality & Justice

for people with disabilities



April 2019

THE ADVOCATE



Villamanta Disability Rights Legal Service Inc.

In this edition

Editorial

1

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

Editorial

As with the disability community as a whole, our organisations were relieved and excited at the announcements of a Royal Commission into the abuse of people with disabilities.

After the Federal Senate Family & Development Committee's recommendation for a Royal Commission after their 2015 inquiry into abuse, the sector for years had concluded that a Royal Commission was not going to be on the agenda in the near future given both major parties' disinterest in the subject matter.

At first the ALP, after receiving a letter signed by numerous academics (but notably not after many overtures by the disability community), agreed to support the Royal Commission.

The timing of a Federal Election than encouraged the Liberal Party to also join suit. Things have moved quickly since then. The terms of reference are suitably broad. Apart from some remaining difficulties of a conflict of interest allegation in relation to 2 of the Commissioners, things have moved quite speedily and the Commission that we thought we would never have, is upon us.

Our organisations will ensure that we are up-to-date with the latest information in relation to the Royal Commission in order that we can provide information to our clients should they wish to take part. Many people with disabilities have been waiting for this day for a long time and the importance of it cannot be underestimated.

Julie Phillips
Manager
Disability Discrimination
Legal Service

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

SPM v Flemington and Kensington Bowling Club (Human Rights) [2019] VCAT 68

Background

SPM was a member of Flemington and Kensington Bowling Club ("FKBC") as a full member, which includes social membership and associate membership. Associate membership allows a member to compete in bowls competitions. SPM left for another club, and later returned and re-joined FKBC. FKBC accepted a social membership from SPM, but not an associate membership. Prior to SPM attempting to re-join as a full member, SPM was engaged as a volunteer, and a number of disputes arose that resulted in a Federal Circuit Court action, where SPM was successfully awarded \$2480¹.

SPM's claim

SPM commenced an action at VCAT alleging both direct discrimination and victimisation. SPM's argument is that while in attendance at the club there had been no complaints about her, and no letters from FKBC indicating that there were any problems. FKBC said to SPM via email that the board had made a decision that it is in the best interest of the club not to admit her as an associate member. The timing of the complaint to Victorian Equal Opportunity and Human Rights Commission ("the Commission") precedes the decision to refuse to admit her and her son, and an unsuccessful conciliation had happened four days before FKBC's decision to exclude SPM. SPM's argument concludes that there was no other explanation for the decision to not admit her². SPM had no direct evidence in relation to how the board came to its decision.

FKBC's response

FKBC argued that its decision to exclude SPM was based on the amount of time it would have to dedicate to respond to SPM's many queries and complaints, rather than based on the complaint before the Commission. FKBC agreed that the board was aware of the complaint at the Commission, but that it did not form part of the club's conscious decision to not admit SPM. Counsel for FKBC framed this as being part of the Board's 'subconscious' rather than conscious mind. FKBC was able to introduce evidence of the state of mind of board members, and those members were cross examined. Board members who gave evidence all provided the same reasoning for the refusal – that SPM would consume too many of FKBC's resources if admitted as a full member.

VCAT's holding

Member Philips found that SPM had a protected attribute (employee activity) and that FKBC took unfavourable treatment against SPM by not admitting SPM and her son³. Member Philips found that no evidence supported the allegation that the reason for unfavourable treatment was because of the complaint to the Commission or because of the employment activity and that on the contrary the evidence led by FKBC indicated that there is another reason for the decision unrelated to the protected attribute. SPM was unable to satisfy the evidentiary burden to make out the claim, and so the application was dismissed.

Notes

Member Philips considers that SPM was not prejudiced by FKBC

¹ This allowed SPM to argue that her protected attribute was employment activity, which enlivens the protections of the Equal Opportunity Act ("EOA"), and her son by extension as an associate.

² SPM's argument is summarised by Member Philips at 72.

³ This is considered at 82 and 84.

Victorian Local Council liable for unlawful discrimination: Wheelchair User awarded \$5,000

In *Philip Barnes v Boroondara City Council (Human Rights)* [2019] VCAT 116, the Victorian Civil and Administrative Tribunal (VCAT) ruled in favour of the Applicant and awarded the Applicant \$5,000 in damages for non-economic loss. VCAT found that the Applicant, Philip Barnes, who has multiple sclerosis, was discriminated against under the *Equal Opportunity Act 2010 (Vic)* when disputing a proposed heritage listing at a Boroondara Council meeting in 2017. As the retired town planner had to speak into a microphone at a fixed table during the meeting, he was forced to remove the footplates of his wheelchair in order bring his wheelchair to a position under the table from which he could speak into the microphone. Without the footplates, his feet got caught under his wheelchair as he moved to speak which caused him 'acute pain and embarrassment'. Representatives for Boroondara Council argued it was up to Mr. Barnes to notify the Council if any modifications were needed. However, VCAT member Anita Smith said the Boroondara Council offered absolutely no facility by which to do so – invitations to the meetings did not provide a way for a person to inform the Council if they had any special needs.

This article explains why attending Council meetings constitutes a 'service' for the purposes of anti-discrimination laws, including the *Equal Opportunity Act 2010 (Vic)* and clarifies when a person with a disability is required to ask for an adjustment to be made.

Was the Victorian Council engaged in the provision of services?

Section 44(1) of the *Equal Opportunity Act 2010 (Vic)* makes it unlawful to discriminate in the provision services whether or not the services are provided for payment. The Act prohibits discrimination:

- a. by refusing to provide services to a person; or
- b. in the terms on which services are provided; or
- c. by subjecting the person to 'any other detriment' in connection with the provision of services.

Ms. Smith referred to *Byham v Preston City Council* (1991) EOC 92-377 where the Equal Opportunity Board found the provision of access for persons to attend to Council meetings is the provision of a service. Ms. Smith also relied on *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294, where Member Dea stated, 'irrespective of how the public question time sessions came to be established, I am satisfied that the Council does provide a service to members of the public'. On the basis of these authorities, Ms. Smith was satisfied that in offering consultative meetings at which affected members of the public could attend and discuss their views on the MWHGS, the Boroondara City Council was offering a service. Ms. Smith found that every ratepayer has the basic right to have the ability to present his or her views on important municipal decisions to their local Council.

Does a complainant need to ask for an adjustment?

Section 45 of the *Equal Opportunity Act 2010 (Vic)* imposes express obligations to make 'reasonable adjustments' for a person with a disability in relation to the provision of services. The duty aims to ensure that disabled persons have access to services as close as is reasonably possible to get to the standard usually offered to non-disabled people. The Tribunal had to determine whether the Council was in breach of their obligation under section 45 by failing to make reasonable adjustments for Mr. Barnes to be able to participate in the meeting.

The adjustments that Mr. Barnes required included 'being permitted to present his address away from the table or move the microphone away from the table'. The Boroondara Council argued that because Mr. Barnes did not ask for this adjustment, the Council could not be liable for failing to provide the adjustment. Ms. Smith referred to *Sklavos v Australasian College of Dermatologists*

[2016] FCA 179, where the Federal Court held that ‘a failure to make reasonable adjustments indicates that there must exist some circumstance calling for action by the putative discriminator’. Ms. Smith stated that the Council observing Mr. Barnes ‘in obvious and genuine distress when giving evidence at the meeting’ was a circumstance calling for action. Ms. Smith also stated that none of the Council’s letters inviting residents to attend the meeting made provision for residents to nominate special needs related to their attendance at the meetings. The case highlights that the duty is ‘anticipatory’, which means that Councils are required to think in advance (and not on an ongoing basis) about what disabled persons might reasonably need.

We have invaluable experience with helping our clients who have been unlawfully discriminated against on the basis of a protected attribute listed in the Equal Opportunity Act and/or the Disability Discrimination Act. If you have been discriminated against and need some advice, please get in contact with the Disability Discrimination Legal Service team.

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

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

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

On Friday April 5 2019, Prime Minister Scott Morrison announced the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

The announcement follows extensive consultation across Australia about the scope of the Royal Commission. Consultations were held with people with disability, their families and carers, states and territories, peaks representing people with disability, and the disability sector.

The Prime Minister also announced the appointment of the Hon Ronald Sackville AO QC as the Chair of the Royal Commission. Mr Sackville will be supported by five other Royal Commissioners:

- Ms Barbara Bennett PSM
- Dr Rhonda Galbally AC
- Ms Andrea Mason OAM
- Mr Alastair McEwin
- The Hon John Ryan AM

The Royal Commission's terms of reference are included in the Letters Patent, which are available below:

- [Letters Patent signed \[PDF 2MB\]](#)
- [Letters Patent HTML](#)

Find out more about the Royal Commission

To find out more about the Royal Commission read the documents below:

- [Easy Read Terms of Reference \[PDF 5.3MB\]](#)
- [Easy Read Terms of Reference \[DOCX 46KB\]](#)
- [Fact sheet about the Royal Commission \[PDF 100KB\]](#)
- [Fact sheet about the Royal Commission \[DOCX 70KB\]](#)
- [Easy Read fact sheet \[PDF 3.6MB\]](#)
- [Easy Read fact sheet \[DOCX 41KB\]](#)

A stand-alone website for the Royal Commission will soon be established. The website will provide information about how the public can engage with the Royal Commission, including how submissions can be made, and when and where hearings will be held.

View the AUSLAN version of the fact sheet

<https://www.ag.gov.au/About/RoyalCommissions/Pages/disability-royal-commission.aspx>

Our Organisations

DDLS Management Committee

Liddy Nevile (Chair)
Marius Smith (Vice Chair)
Winnie Gu (Treasurer)
Elizabeth Muhlebach
Wayne Kiven
Geoff Waite
Julie Phillips (Secretary)

Staff

Manager

Julie Phillips

Principal Solicitor

Placido Belardo

Solicitor

Kerry O'Hagan

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
Michele Tucker – Treasurer
Amanda Millear – Deputy Chairperson
Neville Porter – Member
Hank Wyllie – Member
Naomi Anderson – Member
Dominique Saunders – Member
Viv Avery - Member

Staff

Principal Solicitor and Executive Officer

Deidre Griffiths

Lawyers

Steve Grainger
Naomi Anderson
Viv Avery
Kate McGrath
Mae Mactier

Paralegal Worker

Sue Wolter

Administration Worker

Viv Nicol

Accounts Administrator/ Personnel/Special Projects Worker

Darrell Harding

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