

# Equality & Justice

for people with disabilities



Christmas 2017

## THE ADVOCATE



**Villamanta Disability Rights Legal Service Inc.**

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### Editorial

As the year draws to a close, both organisations would like to encourage those interested in the human rights of people with a disability to continue their attempts, large or small, to support the community to realise equality of treatment in Victoria and Australia.

Year after year, including 2017, reports from around Australia continue to conclude that people with disabilities are not able to obtain the basic skills required to set them on a path to employment and financial independence - that is, of course, an education.

We also end the year without the Federal Government's commitment to a Royal Commission into the abuse of people with disabilities. While this is disheartening, we urge the community to use that disappointment and to continue fighting for equal rights and redoubling efforts to ensure that people with disabilities can live a life free of abuse, and have the same opportunities that the rest of the community does - education, employment and community participation.

We hope you will join us with vigour in 2018, to continue our advocacy.

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# King and National Disability Insurance Agency [2017] AATA 643

## VPZ v Victoria Police (2017) VCAT 1398 Case Summary

### Facts:

- The applicant brought a claim against Victoria Police under s 44 EOA alleging that police officers discriminated against him in the provision of services.
- There is an extensive history of conflict between the applicant and the mother of his children ('the mother').
- The involvement/conduct of Victoria Police in dealing with this conflict is the source of the applicant's allegations of discrimination.
- The alleged conduct spans across an array of incidents involving the applicant and police officers between 2012 and 2016 including:
  - Charging/arresting the applicant
  - Issuing the applicant with family violence orders
  - Failing to lay charges against the mother
  - Failing to issue the mother with family violence orders
  - Refusing to take the applicant's statement
  - Advising the mother to seek legal counsel and not the applicant
  - Consulting with the mother but not the children of the applicant
  - Failing to contact DHHS in relation to child abuse by the mother
  - Making reports to Barwon attempting to have the applicant incarcerated under the Mental Health Act
  - Threatening and attempting to intimidate and entrap the applicant
  - Failing to protect the applicant from family violence

### Issues:

- The first issue before the Tribunal was to decide whether Victoria Police were providing services for the applicant.
- If, indeed, Victoria Police were found to be providing services to the applicant, the second issue was whether Victoria Police discriminated against the applicant in providing these services

### Held:

- The applicant's claims under the EOA were misconceived as the respondent was not providing services to the applicant and further, the conduct was authorised and permitted under s 75 EOA
- The Tribunal conceded that there are occasions where police officers are deemed to be providing services but that services are not being provided when:
  - Police investigate an alleged offence
  - Police arrest an offender
  - Police decide to apply for court orders such as a family violence order or
  - Police decide whether or not to lay charges.
- Further, a failure to take a statement from a particular person will not necessarily amount to refusal to provide services.
- Moreover, the Tribunal found the whole proceeding brought by the applicant to be an abuse of process. It was the view of the Tribunal that if the applicant had issue with orders against him, that he should have appealed them not lodge an application with VCAT.

## Senate committee to begin enquiry into the use of mobility scooters

On December 6 2017, the Senate moved that the matter of regulating the use of mobility scooters (also known as motorised wheelchairs) be reported on and investigated by the Rural and Regional Affairs and Transport References Committee. Nationals senator John Williams will be spearheading this inquiry. Senator Williams has been advocating for stricter regulations since his wife Nancy was hit by a mobility scooter and sustained a serious hip injury. The matters being investigated will include:

- a. the number of deaths and injuries attributed to accidents involving mobility scooters in Australia since their introduction;
- b. the causes of these accidents;
- c. any current regulations governing the use of mobility scooters throughout Australia;
- d. comparison of Australian regulations with international standards;
- e. what support structures are in place to ensure the safe operation of mobility scooters;
- f. the regulatory role of government and non-government bodies; and
- g. any related matter.

Currently in Australia, users of mobility scooters can be granted permission to drive without requiring a licence, insurance or ongoing eyesight or other health checks. Statistics from a Monash University study show that in the 10 years between 2000 – 2010, 62 people were killed and 442 people were hospitalised due to mobility scooter incidents.

Managing Director of Scooters Australia, Peter Fraser commented on these statistics, saying that these incidents reflect “less than one per state per year for a mobility product that gives untold thousands of people independence and freedom when they might otherwise be housebound”.

Senator Williams has emphasised that the push for stricter regulations is not an attempt to outlaw mobility scooters rather that it is about having “a good look at the industry, the circumstances, and see what we can do to make it safer for all Australians in the future”.

Greens Senator Jordan Steele-John who has cerebral palsy and uses a wheelchair was approached to support the inquiry; however, he asserted his party position not to support the inquiry. Senator Steele-John stated that "The Australian Greens did not support Senator Williams' motion for an inquiry into mobility scooters because it does not come from a place of genuine concern for the safety of people who need mobility assistance."

Managing Director of Scooters Australia, Peter Fraser holds that “Australia already has some of the strictest regulations regarding mobility scooters in the world and if the committee is serious about looking at international practices, the mobility scooter industry has nothing to hide.”

The committee will report back next September.

Submissions should be received by **13 March 2018** and can be done by visiting the following website: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Rural\\_and\\_Regional\\_Affairs\\_and\\_Transport/MobilityScooters](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/MobilityScooters)

# What is significant emotional and psychological harm - Reportable Conduct Scheme?

The Commission for Children and Young People have released material to assist organisations identify behaviours that cause significant emotional and psychological harm under Victoria's Reportable Conduct Scheme.

We have updated this information in response to feedback from organisations seeking more guidance on this type of reportable conduct and we will continue to update and add to our guidance material in response to questions and feedback.

## [Significant psychological or emotional harm](#)

Our information sheet covers some of the behaviours by a worker or volunteer that can cause significant emotional and psychological harm. It also discusses some of the behaviours that a child may display when they are affected by these behaviours.

The information sheet provides further guidance on what type of circumstances can be considered significant and provides examples.

[Read the information sheet: What is Reportable Conduct?](#)

## [The Reportable Conduct Scheme](#)

The scheme seeks to improve organisations' responses to allegations of child abuse and child-related misconduct.

Heads of organisations are required to report to the Commission any reportable allegation made against a worker or volunteer in their organisation, including alleged behaviour that causes significant psychological or emotional harm to a child.

The organisation must ensure any reportable allegation is investigated and report its findings to the Commission.

Read more:

[About the Reportable Conduct Scheme](#)

[Notify and update reportable allegations](#)

[Reportable Conduct Scheme form requirements.](#)

## [Where to get help](#)

We have a range of supports available for organisations that need to comply with the scheme on [our website](#)

You can also contact us directly for clarification and guidance via:

Phone: (03) 8601 5281

Email: [childsafestandards@ccyp.vic.gov.au](mailto:childsafestandards@ccyp.vic.gov.au)

# Ferris v Department of Justice and Regulation (Human Rights)

[2017] VCAT 1771 (13 November 2017)

*Applicant:* Scott Ferris

*Respondent:* Department of Justice and Regulation

The applicant was employed by the respondent from May 2009 until June 2014 as a store supervisor at Langi Kal Kal prison. His employment was terminated 3 June 2015 after he was suspended with full pay on 3 July 2014.

Disability Attributes: Type 2 Diabetes, Cardiomyopathy (accepted but no basis for making a finding on this attribute)

## **BACKGROUND:**

The prison expanded its prisoner numbers but not the number of staff. The Applicant claims that the extra workload had the effect of making his Type 2 Diabetes unstable due to increased stress and lack of rest & exercise breaks. The consequence of this was that he became irritable and moody.

## **CLAIMS:**

Direct Discrimination, s8 of the EOA – Treated Applicant unfavourably due to attributes by suspending him, then recommending termination, then terminating employment.

**HELD:** No direct discrimination as the Applicant could not establish that anyone involved with his termination knew about his Type 2 Diabetes nor did they terminate him because of the diabetes. The reasons for termination were based on disciplinary reasons, rather than anything to do with his disability.

Indirect Discrimination, s9 of the EOA – It is irrelevant whether the person engaging in discrimination is aware of the applicant's attribute, aware of the discrimination, or what the motive is for the discrimination. The legislation is remedial and serves to protect a group of people who could be discriminated against if they possess that attribute.

The overall evidence about unreasonable increased hours, and unsustainable working conditions was clear, for the most part consistent, and was accepted by the member.

**HELD:** Indirect discrimination was found to exist as the Department imposed a requirement that the applicant work unreasonable hours, and that requirement disadvantaged him as a diabetic in that he was unable to take appropriate breaks, regulate his diet, and the unreasonable workload caused him stress.

### **REMEDIES:**

- 1) The member found that the Indirect Discrimination was not a causal factor in the Applicant's termination. Rather it was due to the Applicant's misappropriation of funds and his inappropriate behaviour. On the Applicant's evidence, he suggested the behaviour wasn't inappropriate but 'normal' prison behaviour and thus not linked to his unstable diabetes. Furthermore, the member could not link the misappropriation of funds to unstable diabetes. Therefore, the member did not feel reinstatement was an appropriate remedy nor did he feel compensation for the humiliation and embarrassment of having his employment suspended and terminated was appropriate.
- 2) Since the respondent had no knowledge of the attribute and thus did not directly discriminate against the applicant, the member found an apology was also not appropriate.
- 3) The member did not feel compensation was appropriate because the applicant had an opportunity to advise the respondent on multiple occasions that he had diabetes and that the work load was affecting him and he failed to do so. The respondent had given him a form to complete as to details of any disabilities suffered by him which may impact on his work, which the applicant left blank. He did not attempt to update this information when he became aware that his diabetes was being adversely impacted by his workload. The member also found that the respondent had procedures in place to accommodate any workers who had a disability, had the applicant advised the respondent about his diabetes in the above mentioned form.

### **IMPLICATIONS:**

The implication of this case are that even though a person can be held to have indirectly discriminated against someone or a group of persons, if the person being discriminated against does not advise the first person about a disability they have when it would be reasonable to do so, there might not be an order for compensation made by the Tribunal.

Thus, a person might be found to have indirectly discriminated against someone and unless loss was incurred, a punitive remedy is not necessarily ordered.

# Petrou v Bupa Aged Care Australia Pty Ltd (Human Rights) [2017] VCAT 1706 (18 October 2017)

*Applicant:* Mrs Dimitra Petrou

*Respondent:* Bupa Aged Care Australia Pty Ltd

## **BACKGROUND:**

The respondent applied a blanket ban on a mobility aid known as a 'bed pole' in Aged Care residencies that the respondent operated. This was in response to coroner's findings and inquests that found Bed Poles caused a hanging risk. Mrs Petrou (living with MS) resided in one of the respondent's aged care facilities.

## **CLAIM:**

Indirect Discrimination, s9 of the EOA: The applicant claimed the respondent indirectly discriminated against her by imposing a blanket ban on the bed poles. It was claimed that the removal of her bed pole and the refusal to fit a different model of bed pole caused her disadvantage. The respondent claimed that the ban was *reasonable*.

## **ISSUE 1:**

Does the indirect discrimination have to disadvantage a 'group' of persons or can indirect discrimination affect only one person?

Application: the respondent argued that indirect discrimination must be shown to apply to a group of persons with a particular attribute. The respondent argued that any disadvantage caused only applied to the applicant and not a wider group of persons affected by the same attributes as the applicant.

The applicant argued that there was no such requirement to demonstrate the disadvantage applied to a group of persons due to recent changes to s9 of the EOA that removed the need to establish a comparator as argued by the respondent above.

## **HELD:**

Previous cases (before the amendment to s9 EOA) all required the disadvantage to apply to a group of people possessing an attribute. However, even though the comparator principle is no longer part of the definition of indirect discrimination in Victoria, it was held that it is still necessary for a complainant to prove that the requirement in question still disadvantages a group of persons (at least 2) with the attribute.

The reason is because the Act uses the word "persons" not person:

*"...the effect of disadvantaging **persons** with an attribute..."*

It was held that Parliament intended s8 of the EOA to provide individual protection against discrimination and for s9 to differentiate from s8 by providing wider protection.

**ISSUE 2:**

Was the ban reasonable?

**HELD:**

The test to determine 'reasonableness' of a requirement does not require an inquiry as to whether other reasonable alternatives exist. The test is not whether the course of action or requirement is the *only* correct action, but whether that particular requirement is reasonable.

In this case, in the light of all circumstances presented and considered, it was held that the policy to have a blanket ban on bed poles was reasonable to eliminate the real risk of death by accidental hanging.

**IMPLICATIONS:**

The implication of this case is that an applicant for a claim of indirect discrimination must be able to establish that the indirect discrimination must have the effect of discriminating against a group of people that have the same (or very similar) attribute as the applicant.

If the indirect discrimination has the effect of disadvantaging the applicant, however other people that have the same attribute are not also disadvantaged by the actions of the respondent, indirect discrimination may not be the correct claim. The case implies that s8 of the EOA would be more appropriate.

Moreover, the test for the reasonableness does not rest on the ability to establish that there was another correct or preferable option, rather, reasonableness depends on whether the specific requirement is one of the reasonable approaches available.



## Give Now

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. That's 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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