

Equality & Justice

for people with disabilities



December 2024

THE ADVOCATE

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Disclaimer: The materials provided in this Newsletter have been supplied by the Disability Discrimination Legal Service Inc (DDLS). The DDLS provides general information to the public with the intention of making disability discrimination law accessible to people with disabilities, their carers, and friends. However, the information on this site should not be regarded as legal advice. Readers who are seeking advice regarding actions or decisions relating to disability discrimination matters should contact the DDLS directly.

DDLS wishes everyone happy holidays for the upcoming couple of months.

2024 has been a rollercoaster for people with disabilities - including the catastrophic response by state and federal governments to the Royal Commission into Violence Abuse and Neglect against People with Disabilities. In addition, the restrictive amendments to the NDIS have not been negotiated with people with disabilities in the manner that the Convention on the Rights of Persons with Disabilities expects.

For Victorians with disabilities, watching the state and federal governments argue about who should not be providing them with foundational supports has been a demeaning experience.

The only positive in a poor year, is the collective response of people with disabilities, and the disability sector in general, being determined to unite and take a more forceful approach to some of the impositions been placed upon them by different levels of government.

Meanwhile, disability organisations themselves, and disability advocacy agencies-legal and nonlegal, are being starved of funds.

Let's try and approach next year with a determination to assist people with disabilities to be heard and respected.

Julie Phillips
CEO
Disability Discrimination Legal Service

Costs Protection Bill passed by Parliament

The Federal Parliament passed the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) in September 2024, amending the *Australian Human Rights Commission Act 1986* (Cth).

This provides victims in discrimination and sexual harassment cases an avenue to pursue legal action with an 'equal access' cost protection from adverse costs orders. This applies to all proceedings commenced under the federal anti-discrimination laws in the Federal Court of Australia (FCA), Federal Circuit and Family Court of Australia (FCFCOA) and appeals to the High Court of Australia.

Previously, the adverse costs orders involved in bringing a case to court deterred many applicants from making a claim beyond the Australian Human Rights Commission (AHRC) conciliation stage.

This reform promotes access for victims to exercise their rights, promoting the community's anti-discrimination framework by preventing and addressing all forms of sexual harassment and discrimination.

KUNC V NATIONAL AUSTRALIA BANK LIMITED

HEARD IN: VCAT

JUDGEMENT OF: Senior Member G. Nihill

DATE HEARD: 6th September 2024

PARTIES:

- Leszek Kunc (applicant)
- National Australia Bank Limited (NAB) (Respondent)

ORDER: Application is dismissed.

Kunc alleged that NAB discriminated against him in breach of the *Equal Opportunity Act 2010* (Vic) ('EOA') on the basis of his disability and political beliefs, and that they failed to make reasonable adjustments for his disability.

He alleged that, when he went to a local NAB branch to make funds transfers on 16th February 2021 (at the time, during a 5-day lockdown), he was 'targeted, harassed [and] assaulted' because he did not wear a mask when he attended the bank.

FACTS:

A five-day lockdown was in place on 16th February 2021, the day Kunc attended the local NAB branch as he was unable to transfer his money online (due to the amount). When he entered, he was told by a bank employee that he must wear a mask.

He told her he had an exemption, and did not have to wear a mask, but when she asked to see the exemption, Kunc explained that she did not have the right to ask for it or see it because it was private information. She insisted that he had to wear a mask for him to be in the bank and be served by her. He requested to see the Branch Manager. After a long wait, the police came to arrest him instead (the Branch manager did not come to speak to him).

Ms Chen (the bank employee) submitted that she consulted Ms Luo (the Branch Manager) who sought NAB Security for advice. NAB Security then, apparently, called the police. Kunc submitted that he was treated like a criminal:

- Forced to wait with police officers for police vehicle outside the bank; then
- Handcuffed and transported in the vehicle; and
- Photographed and fingerprinted.

Kunc said that there was no lawful basis on which NAB could deny him service, because he had an exemption from wearing a mask, and that NAB had discriminated against him based on his disability or political beliefs. Ms Luo submitted that she was unaware as to whether Kunc had a disability, or any political beliefs he may have had, and it had nothing to do with her deciding to call NAB Security.

CONSIDERATIONS & CONCLUSIONS:

Reasonable adjustments in the delivery of its service for a person with disability

To establish that the NAB discriminated against him, Kunc need to show that he had been treated unfavourably *because* he was a person who held particular a political belief or was a person with disability. Kunc presented no evidence at the hearing that he held particular political beliefs. There was also no evidence that Ms Chen thought he was a person with particular political beliefs, or that she declined to serve him for that reason. Ms Chen and Ms Lou, as far as they were concerned, regarded Kunc as a customer who was not wearing a face mask at a time when the Stay Safe Directions said that masks were compulsory.

While there was no doubt that what Kunc said was true, in that he was exempted from wearing a mask, he did not provide any evidence that he is or was a person with disability. To prove a claim of disability discrimination, he would need to demonstrate such.

Thus, Senior Member Nihill was not satisfied that NAB failed to make reasonable adjustments in the delivery of its service for a person with disability.

DDLS CHRISTMAS HOURS

DDLS will be closed Monday, 20 December 2024 and reopening on 6 January 2025.

Changes in the *Mental Health and Wellbeing Act 2022*

As of the 1st of September 2023, the *Mental Health and Wellbeing Act 2022* replaced the *Mental Health Act 2014*.

The stated reasoning behind this change was to further the implementation of a diverse, responsive, and compassionate mental health and wellbeing system for Victorians.

Furthermore, from the *Mental Health Act 2014* to the current *Mental Health and Wellbeing Act 2022* a statement of recognition of Aboriginal people and acknowledgement of the Treaty process has been administered within the Act.

There are additional changes which now include commitments to Aboriginal self-determination within the Victorian Government health statutes for the first time.

Specific changes in the Act are in regard to promoting good mental health and wellbeing, recognition of lived experience, inclusion of broader mental health and wellbeing systems, supported decision making; alongside safeguards and protection rights.

In the new Act, the promotion of mental health is reflected by providing objectives which aim to achieve the highest possible standard of mental health and well-being, which includes promoting and having better protection of human rights. Further, emphasis on lived experience is prioritised within the mental health framework. This has been implemented as previously, there was a lack of importance placed upon the contribution that those with experience within the mental health and well-being system may provide.

In conjunction with the protection of rights, a new provision has been established by which information must not be disclosed if there is a risk that a person may be subject to family violence or other serious harm. Further, the role of a nominated support person (formally a nominated person) is clarified, providing greater focus on advocacy for the views and preferences of the patient, and supporting them to communicate their own decisions and views.

Under the new *Mental Health and Wellbeing Act 2022* supported decision making practices are to now be promoted. Decision making principles highlight that people who are entitled to mental health and wellbeing services are to be supported through the decision-making process, while also being involved in decisions about their assessment, treatment and recovery. Significantly, there is a new obligation to provide appropriate support (ie things that can be reasonably done to assist the person to make decisions and participate in decision making, understanding their rights and communicate their views, preferences or decisions) to people, so they understand and participate in decisions about their treatment, care and support.

Victoria's response to the Disability Royal Commission

It was a major blow to the Victorian disability community to have our State Government accept in full less than 20 of over 200 recommendations made by the Disability Royal Commission ("DRC").

There has been no approach by the State Government to the disability community since the provision of that formal response, to work with government on the few recommendations that have been accepted in full, or any of the others that have been accepted "in principle". This is despite a commitment to "meaningful engagement with people with disability".

Given the millions of dollars spent on the DRC, it is not hard to imagine the despair of the disability community after observing and experiencing the courage of so many individuals who told their stories.

The Commonwealth government response was only marginally better. DDLS welcomes improvements to the *Disability Discrimination Act*, but is extremely disappointed that the recommendation to develop a Disability Rights Act has not been accepted.

We note the recommendation to include the police in the *Disability Discrimination Act* as a provider of services was only accepted in principle. This was a lost opportunity to prevent discrimination by police officers against people with disabilities, a problem that has been raised for over a decade.

The Victorian Government failed to accept in full the recommendation to improve regulation over restrictive practices, and seemed to be saying its response, that the job was already done, and there were sufficient frameworks in place. This is in the context of the Department of Education latest figures on the restraint seclusion of children in schools approaching the 2000 mark for the year ending 2023. We know that the majority of these children are children with disabilities, however even if they were not, one would hope that restrictive practices imposed on children would be a high priority in terms of mitigation.

Given the enormity of the task in front of disability advocacy organisations and the disability community, it is not surprising that there has been a hiatus in activity in relation to the DRC. It is difficult to know where to start. 2025 we believe will be the year that the disability community rise up in relation to some of the significant changes being imposed upon them, as significant changes not being made that should be.

Give Now

Donate to the Disability Discrimination Legal Service

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>

Our Organisation

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