

Equality & Justice

for people with disabilities



June 2022

THE ADVOCATE



Villamanta Disability Rights Legal Service Inc.

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Amongst more bad news for Victoria and another lockdown, at least the disability and advocacy communities received some long awaited for news, with the Disability Royal Commission being extended to 29 September 2023.

Concerns continue to be held about the accessibility of the Commission for people with severe to profound disabilities. The periods of lockdown in Victoria have done little to facilitate a resolution to this challenge. The extension gives us more time to lobby for increased access for people with disabilities. However, submissions will not be accepted after December 2022. We urge all those who believe they have something to offer the Disability Royal Commission to ensure their voices are heard. this

Please note that Disability Discrimination Legal Service and Villamanta are currently operating from their offices..

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

CITTA HOBART PTY LTD & ANOR v CAWTHORN [2022] HCA 16

HIGH COURT OF AUSTRALIA

4 May 2022

Today, the High Court allowed an appeal from the Full Court of the Supreme Court of Tasmania. The primary issue in the appeal concerned whether the Anti-Discrimination Tribunal had jurisdiction under the Anti-Discrimination Act 1998 (Tas) ("the State Act") to determine a complaint made by the respondent that he had been discriminated against by the appellants, in circumstances where the appellants had asserted that parts of the State Act were inconsistent with the Disability Discrimination Act 1992 (Cth) ("the Commonwealth Act") and a standard made under the Commonwealth Act, and were therefore inoperative by force of s 109 of the Constitution. This issue arose against the background of the High Court's decision in *Burns v Corbett* (2018) 265 CLR 304, which held that a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of a State within the meaning of the Constitution judicial power with respect to any matter of a description in ss 75 and 76 of the Constitution including, relevantly, ss 76(i) (matters arising under the Constitution) and 76(ii) (matters arising under a Commonwealth law).

The first appellant is undertaking the development of Parliament Square in Hobart on land owned by the second appellant. When the development is completed, one of the entrances will provide access only by way of stairs. The respondent, who relies on a wheelchair for mobility, made a complaint to the Tribunal that this entrance constituted direct and indirect disability discrimination under certain provisions of the State Act. The appellants, as part of their defence ("the constitutional defence"), argued that these provisions were inconsistent with the federal scheme for disability access and that, as a result of this inconsistency, those provisions of the State Act were rendered inoperative because of s 109 of the Constitution. Applying *Burns v Corbett*, the Tribunal formed the opinion that if it determined the complaint it would be exercising judicial power and, as it was not a court of a State, it did not have jurisdiction to hear the matter because the constitutional defence arose under the Constitution or arose under a law made by the Commonwealth Parliament and was "not colourable". Accordingly, without considering the merits of the constitutional defence, the Tribunal dismissed the complaint for want of jurisdiction. The Full Court, on appeal, addressed the merits of the constitutional defence and rejected it. The Full Court set aside the order of the Tribunal dismissing the complaint and remitted the complaint to the Tribunal for hearing and determination.

The High Court held that the Tribunal had reached the correct conclusion on the primary issue of its jurisdiction. The Tribunal exercises judicial power in hearing and determining a complaint under the State Act. The Court, by majority, held that for a claim or defence in reliance on the Constitution or a Commonwealth law to give rise to a matter of a description in ss 76(i) or 76(ii) of the Constitution, it is enough that the claim or defence be genuinely raised and that it not be incapable on its face of legal argument. The constitutional defence had been genuinely raised in answer to the complaint in the Tribunal and, whatever its merits, it was not incapable on its face of legal argument. On that basis, the Tribunal was correct to order that the complaint be dismissed for want of jurisdiction.

Intervention in G93966 - HYY (Guardianship) VCAT 97 - Jan 2022

From the website of the Victorian Equal Opportunity and Human Rights Commission

This case is about when and how an appointed guardian can authorise the use of forcible physical restraint in order to administer medication to people under their guardianship.

Background

The case concerned an older woman, HYY, who was under a guardianship order.

HYY was voluntarily admitted to hospital for treatment of her psychological and physical health conditions. HYY has a long-standing mental health diagnoses for which she was being treated in hospital, and also requires daily anticoagulant medication to reduce the serious risk of stroke or thrombosis. However, at times during her hospital stay HYY refused to take her anticoagulant medication.

The hospital asked HYY's guardian, the Office of the Public Advocate (OPA), whether the treating medical staff could physically restrain her to administer the medication. In response, OPA sought advice from VCAT about the scope of its powers to authorise restraint. There are no express provisions in the Act that govern the use of restrictive practices, unlike the Disability Act and Mental Health Act. HYY is not subject to a compulsory treatment order under the Mental Health Act.

VCAT invited the Victorian Equal Opportunity and Human Rights Commission (Commission), the Attorney-General and the Secretary of the Department of Health to make submissions in the case, given the potentially far-reaching consequences of a decision. The Commission intervened to make submissions to the Tribunal on the application of the Charter in this case.

What did VCAT decide?

VCAT has confirmed that if a person under guardianship orders does not consent to medical treatment and restraint is required to be used in order to administer the medication, appointed guardians must seek an order from VCAT under the *Guardianship and Administration Act 2019* (the Act) to authorise the use of forcible physical restraints.

Legislative framework

The Guardianship Act provides for appointed guardians to make certain decisions on behalf of "represented" people, that is on behalf of people with a disability who are subject to guardianship orders. A guardianship order confers powers on an appointed guardian:

- to make decisions about the "personal matters" of the represented person that are specified in the order appointing the guardian (s 38(1) (a)). A "personal matter" is broadly defined and includes "medical treatment decisions" (s 3);
- to "do anything that is necessary to give effect to any power or duty vested in the Guardian" (s 38(1)(b)).

The case concerned whether the Guardian's powers to make decisions about personal matters, medical treatment and to do anything necessary to give effect to their powers also encompassed the power to authorise the use of force to administer medical treatment.

If not, whether VCAT could make such an order under section 45 of the Act. Section 45 of the Act allows VCAT to make an order to that "specific measures or actions" be taken to ensure that a represented person complies with a guardian's decisions, and for a review of that order within 42 days.

VCAT's decision

OPA asked VCAT for advice on four questions, which VCAT answered as follows:

- **Does the scope of a guardian's power to make decisions about medical treatment extend to making decisions about restraint (in this case, physical restraint), if that restraint is required to provide medical treatment?**

VCAT: The guardian's power to make decisions about medical treatment decisions does not extend to making decisions authorising forcible physical restraint in order to overcome resistance to medical treatment.

- **If the use of restraint for the purposes of providing medical treatment is not within the scope of a guardian's medical treatment authority, is the use of restraint a personal matter for which the Tribunal could appoint a guardian?**

VCAT: No.

- **Is restraint a matter caught by s 38(1)(b) of the Act, as a "thing necessary to be done to give effect to the power of the guardian" to consent to medical treatment?**

VCAT: No.

- **Does the use of restraint in the provision of medical treatment require an application under s 45 of the Act for an order for the represented person to comply with the guardian's decision?**

VCAT: Yes, to the extent that the restraint is forcible physical restraint proposed to be authorised in order to overcome resistance to medical treatment. VCAT accepted s 45 of the Act may be used for the purpose of authorising the use of restraint.

In light of the questions posed to the tribunal and the facts of this case, VCAT focused its decision on the question of physical restraint rather than chemical or environmental restraints.

VCAT held that guardians cannot rely on their broad powers in the Act to make decisions about "*medical treatment*", "*personal matters*" or "*thing necessary to be done to give effect to the power of the guardian*" to consent to the use of physical restraints.

VCAT interpreted the words of the Act in accordance with the ordinary principles of statutory construction and the Charter's interpretative provision in s 32 of the Charter. Section 32 requires courts and tribunals to interpret Victorian laws to uphold human rights to the extent it is possible. Where a statutory construction has more than one meaning, a meaning to be preferred is that which is consistent with the purpose of the provision and least incompatible with human rights.

VCAT did not consider that the plain meaning of the definition of "medical treatment" includes forcible physical restraint [151].

VCAT did not agree that the power to make decisions on "personal matters" includes forcible medical treatment. In doing so it distinguished different interpretations of similar provisions in other jurisdictions, noting that the Act represents a departure from paternalist notions of decision making done in the best interests of people with disability, and instead looks to enhance the autonomy, dignity and equality of people with disability [162].

VCAT held that the most Charter-compatible reading of the definition of "personal matter" is that it does not include the power to authorise forcible physical restraint.

For the same reasons, VCAT decided that that the power to do anything necessary to give effect to a power or duty does not include authorising forcible physical restraint.

VCAT noted that the Act does not outline specific safeguards for the use of physical restraints (unlike the Mental Health Act and Disability Act). Instead, as a public authority under the Charter, VCAT must, through its orders under s 45 of the Act, incorporate protections and give specific and clear guidance about what can be done by whom, to ensure human rights are adequately protected and only limited in a proportionate manner for sufficiently important purposes. These VCAT orders must be reassessed within 42 days (s 45(2)).

VCAT noted that physical restraint does not include compassionate human contact such as gentle, non-forcible, physical support which can be provided to a person to administer treatment. These kinds of strategies are within the scope of the power of a guardian to make medical treatment decisions and there is no need to seek an order from VCAT. This might include handholding, the holding or steadying of a limb, or the person's head, encouraging the person into a wheelchair for transport to a treatment room or walking alongside and gently steering the person, providing assistance to get onto a bed and other potential actions and strategies. These kind of strategies and forms of support may potentially occur in the context of resistance to treatment; the person may be frightened or confused or overwhelmed by a noisy hospital environment or anxious about needles, the sight of blood or loud and constricting medical machinery.

What is the broader impact of this decision?

This decision means VCAT is ultimately responsible for authorising the terms on which physical restraint can be used to administer medical to people with a disability who are subject to a guardianship order. This, in turn, will ensure that physical restraints are only used where absolutely necessary, there is a system of oversight and any limits on rights are reasonable, justified and in accordance with law.

VCAT acknowledges this decision may require more of VCAT, the guardian and others involved in the decision-making related to a person under guardianship orders who is resisting medical treatment. However, VCAT considers this is what Parliament intended, is consistent with purposes of the Act and its relevant provisions in accordance with the Charter. VCAT notes that if there are resource implications, this is a matter for consideration elsewhere or potentially legislative amendment or preparation of protocols as exist under other protective legislation.

Why is this matter important?

This case raised important human rights questions about whether and in what circumstances a guardian can authorise the use of restraint against a person in order to administer medication. It was important that this issue be approached with a human rights lens to ensure that people who are subject to guardianship orders have their human rights adequately protected, that restrictive practices are only authorised in limited circumstances and with the appropriate safeguards in place.

What did the Commission say?

In summary, the Commission submitted that:

OPA and VCAT are public authorities with s 38(1) obligations under the Charter to properly consider human rights when making decisions and act compatibly with human rights.

The following Charter rights are engaged by this issue:

- Right to enjoy one's human rights without discrimination (s 8(2))
- Right to equality before the law and equal protection against discrimination (s 8(3))

- Right to life (s 9)
- Right to protection from cruel, inhuman or degrading treatment (section 10(b))
- Right to protection from being subjected to medical or scientific experimentation or treatment without full, free and informed consent (s10(c))
- Right to freedom of movement (s 12)
- Right to privacy (s 13(a))
- Right to liberty and security of person (s 21)
- Right to human treatment when deprived of liberty (s 22(1)).
-

The Commission made detailed submissions about the nature and scope of each these Charter rights engaged by this issue.

Only VCAT can empower a guardian to authorise the use of restrictive practices via an application under s 45 of the Act for a VCAT order. However, when doing so VCAT must impose specific safeguards on the use of restrictive practices that would best protect the person subject to the guardianship orders.

VCAT should impose appropriate safeguards on the use of restrictive practices, drawing on the kinds of safeguards set out in the Disability Act, Mental Health Act, as well as best practice in other jurisdictions. The Commission set out some appropriate safeguards VCAT may wish to impose.

To assist VCAT to understand the meaning and scope of the relevant provisions in the Act, the Commission outlined the nature and scope of the interpretative provision in s 32 of the Charter, which requires that, as far as possible to do so consistently with its purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The Commission submissions assisted VCAT to understand and perform its obligations as a public authority under s 38 of the Charter to properly consider and act compatibly with human rights. VCAT accepted all of the Commission's submissions on the questions about which OPA requested advice.

Disability Royal Commission

Get help from Villamanta to make your Submission to the Royal Commission

Villamanta Disability Rights Legal Service Inc. ("Villamanta") is looking for people with a disability who have suffered from violence, abuse, neglect or exploitation in Victoria, to take part in the Disability Royal Commission and have their voice heard.

Villamanta can help you:

- Write a written submission to the Disability Royal Commission (DRC) that tells your story and expresses the problems you see within Australia's current systems of disability care, as well as offering suggestion on how to change these issues;
- Organise a public or private hearing with a Commissioner of the DRC in which you will be given the opportunity to tell your story yourself.

Villamanta offers free and independent legal advocacy for disability-related legal or justice matters.

If you would like to share your story you can contact us by telephoning

(03) 5227 3338, or free-call 1800 014 111.
You could also email legal@villamanta.org.au

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>

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.

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