

### *In this edition*

Editor's Letter	1
Legal Action – First or Last Resort?	2
VCAT – Costs	3
Access to Taxis for people with disabilities	5
Auditor General Report on DHS	6
Snapshot of the DDLS & Volunteer Profile	8

**ACCESS** – if you need this newsletter hard copy, increased font size or plain English, please let us know.

### Editors' Letter

In this issue, we consider the effectiveness of the many independent (government funded) bodies that exist to enable consumers to seek redress when an organisation treats them unreasonably – in this case because of their disability.

We pose the question – if these bodies were really working effectively, would they have a positive impact on the resolution of discrimination complaints prior to people feeling they need to take legal action? Are the internal **grievance procedures** of some organisations effective in addressing complaints?

**Taxi** services for people needing wheelchair accessible taxis (or lack thereof) are also discussed. As working groups meet and reports are written, the state of services for people with disabilities remains little changed.

Hot off the press, as of tomorrow Ecuador and Tunisia will have ratified the **UN Convention on the Rights of Persons with a Disability**. This brings to 20 the number of countries that have signed the UNCRP, which in turn means that the Convention comes into force in 30 days. This is very exciting, however if community and government response is equal to their response to discrimination legislation, people with disabilities must expect to actively use the Convention to uphold their rights rather than wait for those around them to change their practices.

Thanks to Patricia Woo and Cassandra Lee for their contributions to this newsletter.

Julie Phillips

3 April 2008

## Legal Action – First or Last Resort?

Commonly shared wisdom to people experiencing problems in any forum where disputes arise, is to only take legal action as a last resort.

It is not hard to think of reasons as to why this is sound advice. Legal action invariably has many costs – finances, an adverse impact on one's mental health, and a huge toll in relation to time spent preparing for and being involved in litigation.

Generally speaking, DDLS clients are often in the worst position to cope with these stressors due to poor socio economic conditions, and perhaps the impact of the disability itself.

Why do so many people take the very difficult step of legal action when in theory there are numerous internal complaints procedures and independent complaints bodies which should be providing some redress to the many problems people with disabilities face?

Scrutiny of these procedures and bodies provides a very quick answer.

### **Ombudsman**

A number of parents who in the last 12 months have complained to the Ombudsman about the Department of Education & Early Childhood Development "DEECD" have found themselves being told that after a call from the Ombudsman's office to DEECD they should simply go back to DEECD to sort out their problem. This is hardly the sort of investigation and assistance people seek when complaining to the Ombudsman. Two out of three of those parents have lodged discrimination claims and the third one is considering doing so.

### **Auditor General**

The Auditor General's limited report last year on the Program for Students with Disabilities run by DEECD was a huge disappointment to people with disabilities and their families. With education being one of the most common complaint areas year after year in relation to support for students with disabilities in primary and secondary schools, the lost opportunity to address those problems in a constructive way rather than leave parents to continue to fight issues in the courts was curious at best. The report caused much consternation in disability and child advocacy organisations and raised questions about independence.

### **Disability Services Commissioner**

While the office of the DSC has only recently been established, there seems to already be a significant amount of disappointment and frustration with the ability of, or lack of enthusiasm from, the DSC to tackle hard issues in a meaningful way. Reports suggest that the DSC's powers are so limited that it simply becomes an extension of current grievance procedures which already exist, and fail to assist, complainants. The inability to appeal a DCS decision, and the lengthy time they take to respond to issues has already created a negative impression within the disability advocacy sector.

## Department of Education & Early Childhood Development

The DEECD has a 'grievance procedure' which simply refers a person to three different levels within DEECD to complain to. There are no processes, timelines or investigatory requirements. Complaints to the regions about principals are returned to the principal for addressing. Complaints about region to the Secretary, boomerang back to the Region to respond to the complainant. There is no surprise then at the high number of complaints against the DEECD under disability discrimination legislation.

In summary, many people with disabilities and their families who over a lifetime have multiple contacts with some of the above organisations have formed a view that the lack of accountability and goodwill within government agencies to treat complaints with respect and in a professional manner is actually contributing to legal action. The inability of 'independent' organisations to address complaints in a robust and decisive manner creates an impression of different government funded agencies simply supporting each other's conduct rather than having any fearless investigation powers and intent.

This result is a very poor one for people with disabilities. When organisations such as the DDLS are funded for 2.7 EFT staff, theoretically covering the state of Victoria, it becomes apparent that from a broad perspective, there is no effective plan by government to protect the rights of people with disabilities.

The DDLS encourages people who have had difficulties with being heard at any of the above government funded organisations to continue to take the matter up with the Attorney General's Office, relevant Minister, or use discrimination or human rights legislation to enforce their rights.

## VCAT - Costs

### Recent case law highlights the continuing issue of awarding of costs at VCAT.

#### Introduction

On 26 February 2008, the Victorian Civil and Administrative Tribunal (VCAT) dismissed a Respondent's application for costs in the case of *Beddoes v Fraraccio*. This is a turnaround from recent decisions of VCAT ordering costs against complainants with disabilities. The seriousness of such an issue will be discussed later in this article. Firstly, a summary of *Beddoes v Fraraccio* is warranted to gain a better understanding of the issue at hand.

#### Facts of the Case

In January 2005, Ms Beddoes who was represented by DEAC, lodged a complaint to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) under the *Equal Opportunity Act 1995* (the EO Act). The complaint was lodged against a company and an individual - Mr Fraraccio. VEOHRC dismissed the complaint pursuant to s 108(1) of the EO Act which permits the VEOHRC to dismiss a complaint on the basis that it is frivolous, vexatious, misconceived or lacking in substance. The complainant referred the matter to VCAT, whereupon both respondents lodged strike out applications. The company was successful, Mr Fraraccio was not. Mr Fraraccio reapplied to have the complaint struck out. At this time, DEAC asked for an adjournment based on a medical certificate stating that Ms

Beddoes was not well enough (due to a psychiatric condition) to concentrate on court matters. This was rejected by the Tribunal. DEAC sought to obtain instructions from Ms Beddoes but was unable to do so. As a result, the Tribunal struck out the matter against Mr Fraraccio with a right of reinstatement (accompanied by medical evidence of Ms Beddoes' fitness to proceed) within a specified period of time. This right was not subsequently exercised by Ms Beddoes and the matter was permanently struck out as against Mr Fraraccio. Consequently, he sought an order for costs from DEAC.

### **Application for Costs and Reasoning**

Firstly, Mr Fraraccio had misconstrued the process for ordering costs. Section 109 of the VCAT Act states that each party bears their own costs unless having regard to a number of factors listed in s 109(3), the Tribunal considers it fair to order otherwise. Factors that the Tribunal may have regard to include whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as: vexatiously conducting the proceeding, whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding, the relative strengths of the claims made by each of the parties, nature and complexity of the proceeding and any other matter the Tribunal considers relevant. Given the circumstances of the case, VCAT did not consider it fair to order costs.

Secondly, Mr Fraraccio submitted that costs should be awarded in his favour on the basis that when the complaint was struck out as against the respondent company, costs were awarded in their favour. In response to this claim, VCAT stated that the ordering of costs to the respondent company was not relevant to Mr Fraraccio's position and that the complaint was struck out on different grounds. In Mr Fraraccio's case, the complaint was struck out because Ms Beddoes was medically unfit to pursue it.

Thirdly, Mr Fraraccio claimed that Ms Beddoes had not substantiated her claim and that it was without merit, unfounded and vexatious. He stated that this was demonstrated by VEOHRC's dismissal of the claim pursuant to s 108(1) of the EO Act. VCAT rejected this claim as neither Ms Beddoes nor Mr Fraraccio had been heard. VCAT determines cases on the basis of evidence and submissions, and thus far, neither party had given evidence, only assertions and denials had been made.

VCAT made the point that if a mere referral were justification for an order for costs; complainants would be substantially deterred from referring their complaints to VCAT.

### **Significance of the Decision**

Recently, there have been several decisions handed down by VCAT requiring complainants to pay costs to the respondent. Costs continue to be highlighted as a risk at VCAT mediations. The increase in instances of awarding costs against complainants continues to be of concern, as it is altering the perception of the purpose of VCAT. VCAT is rightly seen as an avenue for the disadvantaged as parties are to bear their own costs and only in very extreme and specific situations, is a complainant to bear the respondent's costs. There are significant repercussions from the increase in costs orders against complaints, namely deterring such complainants from referring complaints on.

If complainants are at risk of costs, there is no reason why they would have a case heard at VCAT when they can have it heard at the Federal Court.

The decision of *Beddoes v Fraraccio* reinforces the narrow scope of the factors set out in s 109(3) of the EO Act. Only in extreme situations, should the presumption that each party bears its own costs be rebutted. The DDLS believes that a cost free jurisdiction is vital for discrimination law to be accessible to people with disabilities.

## Access to Taxis for people with disabilities

A report into wheelchair accessible taxis has been published by the Victorian Equal Opportunity and Human Rights Commission.

Many issues have arisen in regard to wheelchair accessible taxis.

Firstly, the Disability Standards for Accessible Public Transport under the Disability Discrimination Act (DDA) require that the response times for accessible taxis should be the same as for any other taxis. However, more than five years on, this is still not the case. Consumers submit that there are often late arrivals or even worse, non arrivals of accessible taxis as a matter of course.

The consequences are that people with disabilities are unable to live a life like other people – they cannot guarantee to employers that they can arrive at work on time, they miss social activities, they have no effective independent travel. Such a problem however, cannot be attributed simply to a lack of accessible taxis. According to statistics, around 14% of taxis nationally are wheelchair accessible vehicles. This figure represents a much higher ratio of wheelchair accessible taxis to wheelchair-bound consumers than does the ratio of normal taxis to the rest of the population.

The community has alluded to the fact that the reason for such great dependence of consumers using wheelchairs on taxis is the deficiency in other forms of public transportation such as trains and trams. Hence, the only way to remedy this problem is for the government to either invest more money into wheelchair accessible taxis or to improve wheelchair accessibility for trains and trams. The Department of Infrastructure may not ignore the fact that owners/operators of wheelchair accessible taxis consider it more lucrative to sit and wait for passengers at the airport than to make their specific purpose taxis available to people in wheelchairs

### **Case Study**

*Earlier this year, Christopher (not his real name) booked a taxi one week prior to going to a 40<sup>th</sup> birthday party. Despite booking the taxi for 7.30pm in advance – on a special number allocated for people with special needs - the taxi did not arrive until 8.30pm after a number of calls to the taxi company. The return taxi had been booked to arrive at 11.30pm. At 1.30am Christopher abandoned his wait for a return taxi after numerous calls to the taxi company, and endured the discomfort of travelling in a friend's car – separated from his wheelchair.*

Conveniently, while booking services point their finger at the Victorian Taxi Directorate (“VTD”), and vice versa, the problem is not solved. In the end, it is clearly the VTD that has the regulatory powers to enforce change. Bearing in mind the parties involved in providing taxi services – VTD, booking services (eg Silver Top), owners and drivers, the requirement or condition for an indirect complaint presents many challenges. It may be that a complaint drawn up in a different way, against another of the parties could have more success.

In early March 2008, Victoria's Auditor-General DDR Pearson, released a critical report on the Department of Human Services' (DHS) provision of Shared Support Accommodation (SSA). Under this program, people with severe or profound disabilities share housing in groups of four to six, in a house with 24 hour rostered support staff. SSA is demonstrative of the Government's ongoing aspiration of offering flexible 'person-centred' disability care, whereby support is provided on the basis of resident's needs, goals and aspirations. Despite SSAs being established since the year 2000 to aid this purpose, the Auditor-General's report sadly reveals that 'person-centred' accommodation support is still just rhetoric.

The report identified three core areas in need of significant reform:

1) Support for people with a disability

The most notable weakness in this area, is the preparation of individual residents' support plans. Under the Disability Act 2006, support and individual plans are to be prepared under the aforementioned 'person-centred' approach. However, the meaning of 'person-centred' seemed to be a source of confusion for DHS staff- since the residents' own involvement in preparing the plan, and their role in its subsequent execution was unclear. In addition, the content and format of these reports also lacked consistency. This not only indicates that no established method or assessment framework for these plans were in place, but also that there was very little, or no requirement on the levels of expertise of staff who made these plans. Clearly, having staff of varying skill levels making such important plans as to eligibility against essentially imprecise standards can cause gross injustices as well as neglect of residents. Periodical reviews of these individual and support plans were also perfunctorily completed- if completed at all. The reviews themselves were also inconsistent, and rarely commented on the elements inherent to a 'person-approach' - that is, residents' progress towards their goals as stated when first moving in.

DHS is now being urged to remedy these problems in two ways. Firstly, by adopting a team-based approach to preparing plans, with reference to concrete core elements and criteria. Secondly, to periodically and systematically provide on-the-job training as well as assess the capacity and skill of SSA carers to fulfil their responsibilities. The DHS has officially accepted the recommendations of the Auditor-General, though it is disheartening that the same problem in this area was already highlighted in the year 2000 audit.

2) Accommodation conditions and service delivery standards

Following the discovery in 2004, that 200 SSA houses failed to meet building and occupational health and safety requirements, numerous houses have been 'replaced' or 'refurbished' by major works. Minor maintenance needs were responded to promptly, whereas any major work was resisted as far as possible. In turn, this situation is exacerbated by the current funding framework. SSA houses are currently under the 'Block Model Funding', whereby funding is provided according to the level of support the whole house provides, rather than the support required by the individual. Since funding is tied to the service provider rather than the individual, it reinforces a 'group approach' to service provision rather than a system that services the needs of the individual and their specific accommodation requirements.

In addition, there was no uniform evaluation method for resident satisfaction of SSAs. Aside from periodical surveys, resident meetings and the Disability Services Commissioner, the most common way to lodge grievances was simply through direct dialogue with support staff. The Auditor-General noted that such a process has 'little independent accountability, since staff may have a 'conflict of interest' in ensuring the grievance is relayed and remedied. His

recommendation for a more systematic approach to receiving complaints, as supported by DHS, should hopefully ensure SSA remains relevant to its residents' needs.

### 3) Management of current and future demand for SSA

Predictably, the current levels of SSA available cannot meet current or projected levels of demand. Certainly, it is of concern that while demand for SSA is forecasted to grow by 4-5% each year, 30% of all eligible persons (1370 people) missed out on SSA last year.

While DHS has received additional funding for SSA, this has not eventuated in any net increase in bed space. Most, if not all, extra funding has been diverted to 'replacing' or 'refurbishing' those 200 houses falling short of Building and Occupational Health & Safety Requirements. Those waiting for SSA are still provided with accommodation- either in respite care or hotels – though it is not only incommensurate to their needs, but is also costly for DHS to sustain. The increasing life expectancy of current SSA residents serves to lengthen this waiting time.

The fact that DHS does not systematically measure people in need of support, who have not presented themselves to DHS on a regular basis, will only worsen the existing figures. These people may require high-level care accommodation (such as SSA) in the future, since no other current program is suitable at the moment. Such groups include young people with acquired brain injuries and elderly people with degenerative diseases who do not want to be in a nursing home.

DHS has supported the Auditor-General's recommendation to broaden the range of service options available to those with disabilities, so as to reduce the number of people seeking SSA both now and into the future. The focus will especially be on 'more co-ordinated individualised planning at key life transition points including entry to early childhood services and school.'

The Auditor-General has thus recommended that DHS should systematically measure and monitor demand growth across the State (not just in certain regions, as is the case now). In order to cope with future demand, the impact of aging carers is also to be investigated and collated across the State.

While the legislative inclusion of a 'person-centred' approach to the provision of accommodation is supposed to be demonstrative of the DHS's commitment to human rights, the Auditor-General's report indicates otherwise. Much urgent practical reform and ongoing attention is needed to ensure that such honourable ideals of 'focusing on the needs of the individual' do not lose currency and credibility. As a start, the changes identified in this report, should not continue to resurface again in subsequent audits.

\*\*\*\*\*

This report comes as no surprise to the disability advocacy sector, and people with disabilities and their families who have been bringing these issues up with DHS regularly to no avail. The mention of trained staff is significant. Often, staff in DHS run SSA have very little in the way of relevant qualifications. This is similar to the employment by the Department of Education & Early Childhood Development of Teacher's Aides who are not required to have any qualifications at all.

Clearly, the priority in service provision for people with disabilities is that it is cheap, rather than expert and effective.

## Snapshot of the DDLS

### ***Committee of Management***

Martin Leckey(Chair)  
Jan Ashford (Deputy Chair)  
Robert Pask (Treasurer)  
Tricia Malowney  
Barbara Hocking  
John McKenna

### ***Staff***

#### **Manager**

Julie Phillips

#### **Principal Solicitor**

Placido Belardo

#### **Solicitor**

Deborah Randa

#### **Administrative Officer**

Anna Leyden

#### **Bookkeeper**

Marie Collard

### ***Volunteers***

Patrick Donovan	Belinda Company
Marko Eric	Cassandra Lee
Mohsin Mughal	Chloe Lazaroy
Simon Pitt	Kaitlyn Gullet
Patricia Woo	Adeline Kim
	Angel Ma

## Volunteer Profile

### ***Simon Pitt***

Hi! My name is Simon Pitt and I've been volunteering at the DDLS for close on three and a half years now (although somehow I've managed to avoid writing a profile for the *Advocate* for the whole time I've been here – until now!). While not at the DDLS, I study Law, Commerce and Chinese at the University of Melbourne.

Working at the DDLS has been an incredibly rewarding experience, and over the course of more than three years I've seen a great variety of work: everything from packing boxes and assisting with the DDLS' move from Footscray to the city, to answering the phone and acting as the first screening and referral point for clients, to helping draft statements of claim and letters to clients and lawyers for the other party.

Getting your teeth into this wide range of work and the high level of responsibility that you are often given on tasks at the DDLS is a wonderful opportunity for law students, and I would encourage anyone currently studying law to consider a position at DDLS or at another CLC.

## Disclaimer

DDLS makes every effort to ensure the accuracy of the contents of this newsletter. However, DDLS accepts no liability whatsoever arising from anything published in the newsletter, including liability arising from errors, misprints or inaccuracies. Any opinions expressed therein should not be taken as legal advice. Case studies are presented observing client privacy. Any similarity with any other person's experience or circumstances is purely accidental.

### ***Contact Details***

Ross House, 2<sup>nd</sup> Floor  
247-251 Flinders Street  
MELBOURNE VIC 3000

Tel: +61 3 9654 8644  
Fax: +61 3 9639 7422  
TTY: +61 3 9654 6817  
Country: 1300 882 872

Web: [www.communitylaw.org.au/ddls](http://www.communitylaw.org.au/ddls)  
Email: [info@ddls.org.au](mailto:info@ddls.org.au)