

Submission to the Department of Justice and Regulation

Access to Justice Review
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Access to Justice

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Background

1. The writer is a Disability Advocate and supports law firms in running disability discrimination matters at the Federal Court of Australia. The writer has lodged approximately 45 discrimination in education complaints in the last 10 years, and other non-education discrimination complaints.
2. At the end of 2012, frustrated with watching barristers and lawyers get bamboozled by teachers and health practitioners on issues such as teaching pedagogy and disability - concerned that people with disabilities or their families could not access the Disability Discrimination Act due to their fear of losing their house or their savings, the writer decided to offer her assistance in representing people with disabilities at VCAT.
3. Given the long-standing claim by VCAT to be the "people's court", and working in the area of disability discrimination, the writer believed that she could assist those who may in other circumstances, have to represent themselves.
4. Given a commitment to see complaints to the end, the experience lasted for approximately two years.
5. Due to a number of complaints settling, only three cases actually ran.

About VCAT (Victorian Civil and Administrative Tribunal)

6. VCAT claims to "*provide Victorians with a low cost, accessible, efficient and independent tribunal delivering high quality dispute resolution.*"¹
7. Amongst other commitments, VCAT claims to be "accessible", "affordable", "fair", "impartial" and "consistent".²
8. In the writer's experience, the singular reason for any complainant accessing discrimination legislation through VCAT rather than the Federal Court of Australia/Federal Circuit Court, is that VCAT is (with exception) a no cost jurisdiction. There is simply no other reason to take complaints there.
9. Clients who are impecunious often choose the federal jurisdiction as they have the benefit of more progressive decisions and more qualified people (Judges) hearing their complaint.
10. However one important and deleterious aspect of complaint hearing at VCAT is that the very reason people will choose VCAT (mainly because it is a no cost jurisdiction) for their substantive hearing, is the reason they will often not appeal a VCAT decision. As VCAT appeals go to the Supreme Court - a costs jurisdiction - poor decisions are often left to form case law due to the

¹ VCAT website <https://www.vcat.vic.gov.au/about-vcat/who-we-are-0>

² VCAT website. Service Charter. <https://www.vcat.vic.gov.au/about-vcat/service-charter-0>

complainant's concern about costs orders against them if the appeal is unsuccessful.

Terms of Reference

Term of Reference 4 - *potential reform to the jurisdiction, practices and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible.*

11. In order to highlight what is needed to change, the writer provides the following examples of areas for reform.

Case #1. Child vs private school.

12. The writer represented the client, a mother with a disability, on behalf of her child with a disability. She was opposed by a barrister and private law firm, representing the Respondent. During the expert witness testimony for the respondent, the expert voluntarily raised the issue of a specific disability assessment not raised before in her expert report, in order to justify a claim that the child in fact did not have the disability attributed to him. The client was not able to afford transcript, so the writer attempted to obtain the recording of the expert witness. VCAT informed the writer that due to an error, the recording was not available due to some technical malfunction. This malfunction applied to the expert witness testimony only.
13. The expert witness for the respondent admits to being a colleague of the respondent's solicitor. VCAT, at the urging of the Respondent, finds the client doesn't even have a disability. This is despite the Respondent referring to the client's disabilities through all its paperwork, applying for funding on the basis of the disability and the disability running genetically through the family.
14. The Complainant's medical reports were not accepted due to their authors not appearing at the tribunal.
15. Historical medical reports are accepted routinely at the Federal Court.
16. No consideration was given to the complainant's ability or non-ability to pay for such attendance from professionals. The complainant's next friend was a pensioner.
17. Just prior to the decision coming out, having approximately 5 matters before VCAT at this time, the writer had gone to some trouble to ensure they understood that she was about to leave the country for four weeks through repeated formal written notification.
18. On the first business day of the writer's four weeks of leave, the decision came down. The writer was aware that the decision had been made at least a week before, as she had been involved in a compulsory conference the week prior, and the VCAT member had made it clear that an education case had

been decided upon in favour of the Respondent. Listening to the details it could only have been the case the writer had been involved in.

19. The coincidence of the decision being released on the first day of a lengthy overseas holiday was cause for concern. Communication with the client relied mostly on telephone. Attempts were made through the Public Interest Law Clearing House to obtain advice on an appeal however by the time they replied, the appeal period had expired. In addition, the writer did not have access to her files being overseas.

20. Issues highlighted by this case:

- technical malfunctions negatively impact clients
- inability of disadvantaged Victorians to pay for transcript is an impediment
- while operating at a level of formality that seems to attempt to emulate Federal Court processes, thereby creating barriers for self represented litigants, those on the bench do not have the same sophistication or experience
- shadow cast on timing of release of decision

Case #2. Child vs same private school.

21. The writer is again representing the mother on behalf of child with a disability. The Respondent is represented by a barrister and private law firm.

22. Lawyers for the respondent put in an expert witness statement one week before the hearing. No reason given for filing and serving outside of the timetable and orders. This is their one and only expert witness statement. VCAT allows the witness statement and offers an adjournment on the first day of the hearing. The client, having built up to the hearing for quite some time, in a new job and having just organised leave, felt she had no real choice but to proceed. This immediately put the complainant at a disadvantage. Interestingly, the expert witness was the same witness in Case #1 above whose evidence was inadvertently not recorded.

23. Due to anomalies in the expert witness's previous testimony in the aforementioned case, the writer asked the expert witness to give any evidence of the claims that she had made in Case#1. The expert witness admits that she has no personal knowledge of the evidence she gave in the previous case, but as her staff held this particular view, and she trusts her staff, that was sufficient for her to repeat the evidence and claim it as her own in the Tribunal. In other words, the expert witness, a professor, had given expert evidence to the Tribunal in the previous case, resulting in the writer's client suddenly not having a disability, on the basis of what her junior staff told her. Immediately after this evidence, the writer put in an urgent request for the recording of that admission. Despite numerous telephone calls and approaches to the Tribunal and the authorised recording providers, the writer

did not receive the recording until many days after. The authorised providers advised that they simply could not get the recording from VCAT. Again, the writer's client was not in a position to pay for transcript.

24. Keen to have on record the respondent's expert witness admitting that her opinion was not her own, the writer was flabbergasted upon eventually receiving the transcript, to discover that the recording started only after the expert witness had given her evidence. Another error which conveniently disadvantaged the client and involved the most pivotal witness in the hearing.
25. It seemed inconceivable that acts two crucial times, when evidence had been given by one of the most important witnesses, crucial to the complainant's case, that recording mistakes had been made.
26. Having reached a high level of frustration at this stage, the writer wrote to VCAT and asked if she could have the Judge's notes, given that they had failed in their responsibility to record the proceeding. The request was refused, but the writer was told it would be looked into and someone would get back to me. Six months later the writer inferred that she would never hear back, and she did not.
27. The same barrister makes the case, again, (no doubt due to the surprising success in the previous case of this approach) that my client does not even have a disability. Amazingly, it is found that my client's behaviours are not because of his cognitive disabilities, but basically, because he is just a nasty little boy. He is even vilified for using the term "pedo" [sic] to his classmates, when the Tribunal was provided with evidence in camera that fully explained why a number of children at the school work using the term. The Tribunal, even though it has this information, repeats this behaviour in the decision, knowing that anyone reading the decision would not have the knowledge that was provided in camera, could not be repeated due to a court order, and very well explained such behaviour. It was disappointing and disrespectful to the child with a disability to have the accusation repeated in the decision, but information that reflected poorly on the school that explained the action kept private.
28. The decision was that the writer's client had not been discriminated against because of his disability, he had been "*discriminated against because of his bad behaviour*". The writer's understanding was that one could only be "discriminated" against if one had an attribute under the Act.
29. New tests were created, whether they were in the legislation or not. The judge complained in the decision that the Complainant unreasonably required the adjustments to be "effective" and "guarantee results"³. It was hard to imagine how an adjustment could be deemed to be "reasonable" if it did not have any effect. An interesting comparison is the 2014 Federal Court Decision *Watts v Australian Postal Corporation* [2014] FCA 370.

³ *USL obo her son v Ballarat Christian College (Human Rights)* [2014] VCAT 16 all 3

30. The case law on reasonable adjustments could not have two more stark opposing conclusions. One incomprehensible, one the result of legal analysis.
31. The client's expert witness, whose name was misspelt throughout the decision, was viewed as being too "academic". The writer inferred that what that meant was that the Judge hadn't actually understood the evidence. In the writer's view, the complainant should not have been disadvantaged due to the limitations of the Tribunal.
32. The expert witness was also accused of having given her opinion in "hindsight".
33. Most if not all expert witnesses were always giving their evidence in hindsight. That is why they are expert witnesses, rather than treating practitioners. They are called to examine documents and give an opinion. The hindsight expert evidence of the respondent's expert, who admitted giving evidence that was not her own, did not have the same criticism applied. It did not bother that Tribunal that she had admitted to giving evidence underwrote that was not her own.
34. It was also interesting that the complainant's expert was criticised (or rather it may have been criticism of the writer) for not having been given the extensive list of documents that had been given to the respondent's expert. There seemed to be no understanding that the complainant did not have the money, unlike the respondent, to have expert witnesses spend hours and hours reading every available document.
35. Complainant could not afford the risk of appealing.
36. Issues highlighted by this case:
 - technical malfunctions negatively impact clients
 - inability of disadvantaged Victorians to pay for transcript is an impediment
 - while operating at a level of formality that seems to attempt to emulate Federal Court processes, thereby creating barriers for self represented litigants, those on the bench do not have the same sophistication or experience
 - lack of impartiality
 - failure to follow up or investigate serious administrative problems

Case #3. Child v Department of Education

37. The writer represents a mother of a child with a disability. The respondent is represented by two barristers, a private law firm and their internal legal Department.
38. The writer is shut down in her cross-examination repeatedly. Barristers for the respondent object any time the writer raises something that is not specifically contained in the particulars of complaint, but only if it is damaging to their

case. Meanwhile, they grill a subpoenaed witness, not about an issue linked with the case, but about a holiday she had in Queensland and whether she told the Principal about it. The member routinely agrees with the State.

39. Barristers for the respondent object when the writer raises something that is a few days outside of the period of complaint. On the other hand, the writer's client is cross-examined about the birth of her youngest children a few months before the hearing and almost a year after the complaint period.
40. It is clear that the writer does not have the legal knowledge to argue with the respondent's barristers, and the Tribunal when it supports the respondent. This is particularly concerning due to the fact that the State of Victoria are running the case with the same level of aggression and technicality that is found in the Federal Court. It is only the writer's analysis afterwards, when reading the transcript (provided by the Respondent), that the writer can thoroughly compare the liberties that the respondent's barristers are given, compared to those afforded her.
41. The writer listens to teachers say that the reason documents are not available for the proceeding is not because they don't exist, but because they took them home and put them in their garage. The writer listens to a principal who has produced policies and procedures about evidence-based interventions, give evidence that she cannot name one evidence based intervention. The writer listens to the Tribunal member who says that if teachers have to collect behavioural data, she wonders how they have time to teach their class. Clearly, any sophistication in relation to disability intervention is lost - even though the respondent and the complainant both admit it is required. The member makes her own views clear.
42. The writer issued subpoenas. The third subpoena, made over a month before the hearing, was not processed by the Registry. The writer contacts the Registry in writing and asks if the Registry was refusing to issue the subpoena. The question is not responded to. Eventually the writer is advised that it would be heard on the first day of the hearing. Given the hearing was only listed for a week it was clearly going to be too late. On the first day of the hearing when the matter is raised, the writer is asked if this witness would have anything new to add. The writer admits that she did not, however it was one more witness supporting her client's version of events. The Tribunal makes their view known that it should be withdrawn. Even if permission had been provided, by the time the subpoena was processed and issued, the client's case would have been closed.
43. The Department of Education attempted to strike out witness statements that provided eyewitness accounts of restraint and seclusion at the school the subject of the complaint, and two subpoenas. The writer obtained assistance from a QC in the strike out hearing and we were successful. This was of no use whatsoever, as at the substantive hearing when the writer was again on her own, she was prevented from asking any questions about the documents produced (or not produced) as a result of one of the subpoenas. The

interlocutory hearing had been a waste of time. The Respondent with the assistance of the Tribunal prevents the writer from asking anything about the subject matter that had been fought so hard for by QC to be included.

44. In the decision on the subpoenas, the member stated that she did not know why the writer had not been able to produce witness statements instead of issuing subpoenas. The writer had assumed it was clear that she was issuing subpoenas because the individuals did not wish to voluntarily give evidence. This is why people issue subpoenas. The written interlocutory decision set out that my client's claim was one of direct discrimination. It was not.
45. The writer had to make a decision about whether in final submissions she would list every adverse decision made against the complainant in the course of the hearing and antagonise the member, or simply lose because we were not able to put our case properly. In the end the client and the writer decided to make a submission and raise what we deemed to be unequal treatment in a general fashion.
46. Case lost. Complainants expert witnesses ignored - no experts put forward by the Respondent. Complainant cannot afford the risk of appealing.
47. Issues highlighted by this case:
 - It is abundantly clear that clients cannot self represent or be represented by nonlegal personnel when they are confronted with the highly technical proceedings of VCAT and the money and power of respondents
 - while operating at a level of formality that seems to attempt to emulate Federal Court processes, thereby creating barriers for self represented litigants, those on the bench do not have the same sophistication or experience
 - lack of impartiality
 - advantage taken of nonlawyers

Incident #1.

48. The most shocking part of the writer's experience, was a compulsory conference she had with a mother of a child with a disability who had been subjected to repeated restraint and seclusion in a government school. At one stage we were in a breakout room with the Tribunal member, a Deputy President. The writer's client was very upset, as she recounted finding her son on the ground restrained by Department of Education staff.
49. At one stage, the member stated in response to a comment by the writer's client "*Rubbish! How dare you say that!*". The client, already upset, was even more distressed and attempted to leave the room to have a break as she was overcome. Imagine our shock when the member, before my client got to the door, stood up, reached out her arm, shut the door which was open a few inches, and blocked her from leaving. She told the client that she was not

going anywhere as it was a compulsory conference. We were both so shocked we could not speak. After a few minutes, perhaps realising that a line had well and truly been crossed, and perhaps considering the definition of false imprisonment, the member then gave the client permission to leave.

50. A quick discussion between us during this break led us to arrive at a plan which was that that we would do anything we needed simply to get out of the building.
51. The writer had never been in such a situation before and was shaken for the rest of the afternoon, as was the client. It was that day the writer resolved to resolve every matter that she had before VCAT as quickly as possible. As that involved putting the clients' best interests first, another year went past.
52. The client made a complaint to the President of VCAT about the conduct of the member. The President, decided that it was not necessary to speak to the witness, (the writer), and simply made a decision that there was no case to answer because he had spoken to the member and she said there was no case to answer. One can only hope the police do not adopt these investigatory techniques any time soon.
53. The client formally asked the President what the next step in the complaints process was. She received no reply. Ultimately, as she had a matter before VCAT, she was too nervous to press the matter.
54. Issues:
 - intimidation
 - arrogance
 - complaints procedure either non-existent or not followed

Summary

55. Having been involved in many Federal Court proceedings, there is little difference between the formalities of the Courts and VCAT, except the competence of those sitting on the bench. Strikeout applications, interlocutory manoeuvring, complaints about pleadings, requests for further and better particulars, constant threats of costs - and one gets the sense that members are encouraging of the situation despite how deleterious it is for complainants.
56. There is no doubt that if a client was actually self representing and faced with such a high level of legal requirements, they would be completely lost.
57. While the rules of evidence do not apply at VCAT, they seem to apply in every second instance. In fact every time the claim that the rules of evidence did not apply was named, it was followed by the word "however.....".
58. As the 2014 Productivity Commission found (*Productivity Commission Report Overview Access to Justice Arrangements*)

“Tribunals have been accused of creeping legalism

Tribunals are responsible for a wide range of disputes, including administrative law matters, civil disputes and guardianship and anti-discrimination cases. They are intended to provide a low cost alternative to the courts by creating a forum where self-representation is the norm, and where parties generally bear their own costs irrespective of the outcome. Indeed, many tribunals include objectives around timeliness and cost in their enacting legislation. As the Council of Australasian Tribunals (COAT) noted: Most tribunals operate under statutory exhortations to be quick, economical and inexpensive while observing principles of natural justice and procedural fairness. (sub. 98, p. 5)

However, some participants in this inquiry expressed concerns about 'creeping legalism' — with tribunals being seen by users as increasingly formal bodies. As the Springvale Monash Legal Service (SMLS) commented: 'Tribunals are promoted as a user friendly, cost and time effective option in the dispute resolution process. SMLS believes that whilst this was the initial intention of the tribunal jurisdiction there has been a drift away from this ethos.' (sub. 84, p. 9)" p15

59. The writer can only imagine how a person with a disability with no legal background, or a parent, could have coped with the might of the legal teams she was faced with, and the disinterest of the Tribunal in ensuring that proceedings were not too legalistic.
60. It was suggested to me by one member, that the writer should have obtained legal assistance for her client. There was clearly no understanding about the difficulties of qualifying for legal aid, or finding a law firm and a barrister who had experience in discrimination law and were happy to donate 1-2 week's worth of time (not even counting the preparation leading up to the hearing). In any event, it was very clear to the writer in all three hearings that her presence was unwelcome and presented.
61. Indeed the writer ultimately organised for Victoria Legal Aid to represent one of her clients, however after working for a number of months on the case, they suddenly withdrew. The case was terribly important, the subject matter being about the repeated restraint and seclusion of a primary aged school child. The reason given was difficult for the client to understand.
62. The difficulty when one is up against lawyers, is that they only have one interest, which is to win. They will do almost anything to win and whether something is right or wrong, discriminatory or not, is beside the point. People with disabilities and their representatives, who are not prepared to lie on oath, who are not prepared to engage in legal tricks, who simply want justice, cannot compete.
63. Even if the *Equal Opportunity Act* was "friendly" legislation, which it is not (legalised arguments ad nauseam about what constitutes a 'requirement or condition' do not advance the cause for people with disability), the writer has come to the conclusion that VCAT is not accessible. Unless, that is, you have a huge legal team equally proportionate to the respondent.

64. Another concerning factor, was the almost gushing descriptors by the Tribunal of teachers and positive regard for them. The writer sensed resentment from all three members that these parents had dared to make complaints and indeed should have been grateful for any assistance their children received. This is reflective during the hearing and in the decisions.
65. Such a general regard for teachers responsible for the education of students with disabilities is in complete contrast to the many reports since 2012 from organisations such as the Victorian Equal Opportunity and Human Rights Commission⁴, the Victorian Auditor General's Office⁵, Senate Community Affairs References Committee⁶ and Senate Education and Employment Committee⁷.
66. The upshot of all these reports and the ones before them suggest that teachers are generally incapable of effectively teaching students with disabilities and worse, are often treating them with violence and aggression.
67. The writer does not suggest that each case should not be judged on its merits, however it was quite clear that almost all evidence from teachers was enthusiastically accepted without question. The decisions often simply repeated claims by teachers, whether there was evidence for those claims or not.
68. Why is VCAT inaccessible?
- Administrative incompetence? Yes
 - Legalistic nature? Yes
 - Lack of progressive decision-making? Yes
 - Failure to accommodate or welcome non-legal representatives/self represented litigants? Yes
 - Lack of access to equal legal representation? Yes
 - Fear of false imprisonment? Yes
 - Failure to investigate complaints? Yes
69. It would be untrue to say that none of the clients I assisted in taking matters to VCAT were unhappy with the outcome. However this has nothing to do with VCAT, but the fact that the respondent wished to settle and did so.
70. The writer receives approximately one call per week from people wishing to discuss what they believe are discrimination complaints. The writer states without exception that she will never assist any person with a disability to go to VCAT again. Why? Because the person may actually have to go to hearing.

⁴ "Held Back Report" 2012

⁵ "Programs for Students with Special Learning Needs" 2012

⁶ "Inquiry into the Abuse of People with Disabilities in Institutional Settings" 2015

⁷ "Current Levels of Access and Attainment for Students with Disability in the School System" 2016

71. Are their members at VCAT who are capable of progressive decisions?
Perhaps-but the writer never came across them.

Term of Reference 6, 7 and 8

- *the availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth governments to best meet legal need*
- *whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material*
- *the resourcing of Victoria Legal Aid (VLA) to ensure that Government funding is used as effectively and efficiently as possible and services are directed to Victorians most in need, including:*

72. The recent 2014 Productivity Commission Report which suggested \$200 million be put into Australian legal assistance schemes does not really need to be added to.
73. The writer submits that any focus on Victoria Legal Aid should recognise that being part of government, there are many members of the community who do not feel comfortable using them. Their means test limits their services.
74. Whether there is duplication or not should not be considered in the writer's view. Victorians who are not disadvantaged often have choices about which organisation should be able to assist them. Those with money can choose one particular law firm, and if they are not happy with those services, choose another. It is not appropriate that disadvantaged and marginalised Victorians should not have the same choice.
75. For this reason, all legal assistance schemes should be considered equally worthy, however it is important that the community make these decisions. For example the disability sector has strong views on what they expect from people that provide them with a service. They expect to receive service from organisations that are not only physically accessible, but where staff already have a good understanding of disability issues and in the case of discrimination legislation, discrimination issues.
76. It should also be noted that in terms of affording legal assistance, it is not only the poorest and most marginalised Victorians that cannot afford such assistance. Given the private legal sector's commitment to charging more for their services than most average people can ever afford, the pool of Victorians that cannot afford to access the private sector is significantly broadened.
77. Education cases in VCAT have run for at least two weeks. Average Victorians cannot afford to pay tens of thousands if not hundreds of thousands of dollars on lawyers, and therefore equally rely on legal assistance schemes.
78. It is particularly true to say, that the affordability of legal services should not deter or prevent Victorians who are wishing to progress cases under human rights legislation. Human rights are just that - "rights". Those rights are not

optional depending on how much money one has. However given that one often has to fight for those rights, the issue of money is raised inextricably with the ability to have that fight. The writer submits that it should not be so, and this is not what domestic or international legislation intends.

Reform

Access to legal assistance

79. The Productivity Commission recommendations regarding funding should be implemented.
80. The relevant communities, through community legal centres, should be consulted about what they believe best suits their needs.

Access to VCAT

81. If VCAT is going to continue to run with the same level of legal complexity and technicality as the higher courts, then ordinary Victorians should not be expected to run a case without exactly the same level of legal assistance as a respondent has.
82. If that assistance is not going to be provided, then it must be accepted that, particularly in relation to the community that the writer works with, people with disabilities, there is simply no equal access to the law.
83. If that assistance is not going to be provided, then perhaps Respondents should not be allowed to have legal representation either, including government. It is absurd for example to expect a person with a severe receptive language disorder, to be able to access the barrage of letters and legal applications one often receives from "lawyered up" respondents. It simply cannot be done. Reading the material is only the first step - understanding what it means and the legal implications are the next insurmountable hurdles.
84. If VCAT is going to continue to run with the same level of legal complexity and technicality as the higher courts, then those sitting on the bench need to have the same level of expertise and qualification as those sitting in higher courts.
85. In the writer's view, some soul-searching must be done in relation to misguided premise that to date, anyone without legal assistance has had equal access to justice.
86. VCAT members are only going to be held to account for their decisions when appeals to the Supreme Court are as accessible as VCAT is, in terms of costs. Again, there is no equal access to justice when only the rich can appeal a poor decision.

87. VCAT requires an internal review as to why the machinations of simple recordings of hearings cannot be mastered.

88. It is hard to know what recommendations to make to address the issue of some VCAT members feeling comfortable intimidating and bullying clients. It is hard to know what recommendations to make to address the issue of the President failing to respond appropriately to a complaint.

If the review committee wishes to have the actual details of the cases above, please contact the writer.