



**Australian Government**  
**Attorney-General's Department**  
**Office of Corporate Counsel**

12/14456

5 October 2012

Mr Bob Buckley  
Convenor  
Autism Aspergers Advocacy Australia

Dear Mr Buckley

**FOI Requests**

I refer to your recent FOI requests made to this Department and the Attorney-General (dated 11 September 2012) seeking copies of all documents relating to the processing of earlier representations made by you to the current Attorney-General and her predecessor (namely letters dated 18 June 2011 and 4 January 2012). As you are aware, your request to the Attorney-General was transferred to this Department under section 16 of the *Freedom of Information Act 1982* (the Act) on the ground that the Attorney-General's Office was not in possession of any documents coming within the ambit of the request.

Decision

I am authorised, pursuant to arrangements made by the Secretary of this Department under section 23 of the Act, to make decisions in relation to this matter on behalf of the Department. I must firstly advise that neither the Attorney-General's Office nor the Department appears to have any record of having received correspondence from you dated 4 January 2012. However, I have located an email from you to the Attorney-General dated 16 January 2012 and marked by the Attorney's Office as requiring 'appropriate action'. In case that happens to be the email to which you are referring, I have enclosed a copy of it as received by the Department with the Attorney's Office's stamp on it. I trust it is useful.

I have also located the documents held by the Department which relate to the processing of your email to the Attorney dated 18 June 2011 and have decided to release them to you in full. They are also attached and I trust they are useful.

Right of Review

Should you wish to seek a review of my decision in this matter you have two options. Firstly, you can seek an internal review by another senior officer of this Department. If you wish to pursue that option you should write to me within 30 days of receiving this letter. Alternatively, you can seek a review by the Office of the Australian Information Commissioner at GPO Box 2999, Canberra, ACT, 2601. If you wish to pursue that option you should write to the Commissioner within 60 days

of receiving this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mal Bennett', with a stylized flourish at the end.

Mal Bennett  
Director  
FOI and Privacy Section  
Phone: 61412550  
Email: [malcolm.bennett@ag.gov.au](mailto:malcolm.bennett@ag.gov.au)

**Kneipp, Gabrielle**

**From:** Roxon, Nicola (MP) [Nicola.Roxon.MP@aph.gov.au]  
**Sent:** Thursday, 19 January 2012 9:27 AM  
**To:** Davies, Kylie  
**Subject:** FW: what disability discrimination law?  
**Attachments:** bob.vcf

RECEIVED  
24 JAN 2012  
BY MCU

**From:** Bob Buckley [mailto:bob@buckley.id.au]  
**Sent:** Monday, 16 January 2012 9:59 AM  
**To:** Roxon, Nicola (MP)  
**Cc:** Brandis, George (Senator)  
**Subject:** what disability discrimination law?

AG - RECEIVED

<input type="checkbox"/> Priority A (Date .....	<input type="checkbox"/> Reply by AG
<input type="checkbox"/> Priority B	<input type="checkbox"/> Reply by MHA
<input type="checkbox"/> Priority C	<input type="checkbox"/> Reply by MEM
<input type="checkbox"/> Information	<input type="checkbox"/> Brief Required
<input checked="" type="checkbox"/> App. Action	<input type="checkbox"/> Reply by CoS
<input type="checkbox"/> NFA	<input type="checkbox"/> Reply by Dept
<input type="checkbox"/> Invitation	Action Area
<input type="checkbox"/> Refer to	Init: <i>KL</i>
	Date: <i>24/1</i>

23 JAN 2012

Dear The Hon Ms Roxon MP

I write to express deep disappointment in the farce Australia has a disability discrimination law. This is clearly demonstrated in the recent decision reported:

- <http://www.disabilitydirectory.net.au/blog/2012/01/16/fact-and-fiction-in-king-v-jetstar-airways/>
- <http://www.abc.net.au/am/content/2012/s3408070.htm>

Notice that it costs Australian PwD at least \$20,000 to raise a complaint and to have it dealt with by a dysfunctional legal system.

Please consider this in addition the issue already raised at <http://a4.org.au/a4/node/396>

yours sincerely  
Bob Buckley

Kerr, Yvette

**From:** Bob Buckley [cnvr@a4.org.au]  
**Sent:** Saturday, 18 June 2011 1:03 pm  
**To:** R.McClelland.MP@aph.gov.au  
**Subject:** disappointing decision on discrimination  
**Attachments:** 20110618 AG Walker.docx; 20110618 AG Walker MR.docx



Dear The Hon Robert McClelland MP

Please finds attached an open letter about a recent federal court decision and a media release.

Our organisation would like to meet you to discuss these and related issues.

regards  
Bob Buckley

<input type="checkbox"/> Priority A (date.....)	<input checked="" type="checkbox"/> Reply by McClelland
<input checked="" type="checkbox"/> Priority B	<input type="checkbox"/> Reply by O'Connor
<input type="checkbox"/> Priority C	<input type="checkbox"/> Brief required
<input type="checkbox"/> Information	<input type="checkbox"/> Reply by COS
<input type="checkbox"/> Approp action	
<b>RECEIVED 20 JUN 2011</b>	
<input type="checkbox"/> Reply by AGD	Action Area
	MRB
	Init EB
	Date 20/6



The Hon Robert McClelland MP  
Attorney-General  
Parliament House  
Canberra ACT 2600

Tel: (02) 6277 7300

Fax: (02) 6273 4102

Email: R.McClelland.MP@aph.gov.au

Dear The Hon Robert McClelland MP

**Subject: Australian law promotes disability discrimination**

I write this open letter expressing the concerns and disappointment of people with autism spectrum disorders (ASD), their families and associates about the ongoing refusal of Governments in Australia to protect people with ASD and their associates from discrimination.

In particular, I refer to the recent Federal Court decision in *Walker v State of Victoria [2011] FCA 258* showing Australian laws, their interpretation and the conduct of the Courts promote discrimination against people with autism spectrum disorders (ASD). Autism Asperger Advocacy Australia (A4) previously expressed concern over Australia's discrimination law as pronounced by the High Court in *Purvis v The State of New South Wales (Department of Education and Training)*. Our concern is now reality.

The Applicant in *Walker v State of Victoria*, Alex Walker, has Asperger's Disorder. The decision says ...

2 .... It was common ground that he [Alex Walker] suffered and suffers from a number of disabilities including ... Asperger's syndrome.

Students with Asperger's Disorder/syndrome are students with a disability. Many students need "reasonable adjustments" in their education. The DDA is meant to ensure that schools make "reasonable adjustments" for people with a disability.

The Respondent [representing schools that Alex Walker attended] did not make reasonable adjustments to their behaviour management policy and practice in respect of Alex's disability; adjustments that are clearly essential in relation to his disability.

The Judge did not expect the Respondent to make "reasonable adjustments" for the Applicant's disability. The requirement to make "reasonable adjustments" was always part of the *Disability Discrimination Act* and of the associated Education Standards. And HREOC claims (see [http://www.hreoc.gov.au/disability\\_rights/legislation/2009.htm#adjustment](http://www.hreoc.gov.au/disability_rights/legislation/2009.htm#adjustment)) the recent changes to the legislation are "intended to remove doubt" on this issue.

The *Walker v State of Victoria* decision shows that the Court and the Respondent have a particularly poor understanding of disability and discrimination ... and of the Applicant and his situation.

The Court shows little or no understanding of Alex's disability ... possibly, it shows a strong prejudice against Alex because of his disability. Throughout the decision, the Judge refers to Alex's disability as "misconduct" and "misbehaviour". The Federal Court must do better than this.

A4 has always been concerned about The Comparator as the High Court set it out in *Purvis v The State of New South Wales (Department of Education and Training)*. The decision in *Walker v State of Victoria* says ...

118 Alex contended that, in excluding him from the playground and from school during recess and lunch breaks between 2005 and 2006, the Department directly discriminated against him, contrary to the provisions of 22(2) of the DDA. This contention must fail.

119 It must fail because it cannot be said that the Department (or Branxholme) would have treated another student without Alex's disabilities any differently from the way in which it treated Alex. This is because the relevant comparator is a student displaying the same behaviour as Alex did but without the disability, not a student without the disability and without the behaviour. Furthermore, Alex has not established that, in imposing the relevant regime, the Department subjected him to any detriment.

The decision fails to explain the Comparator that is used: who precisely is this "student displaying the same behaviour as Alex did but without the disability" (paragraph 119)? Apparently, the Court is unaware of or just ignores the fact that by definition any student who displays the same behaviour as Alex over an extended period also has Asperger's Disorder. Not having a diagnosis does not mean a hypothetical comparator is "without the disability".

The court cannot regard someone with another disorder, such as Oppositional Defiance Disorder (ODD) or some other behaviour/conduct disorder that is also manifest through what the Court regards as "misconduct" and "misbehaviour" (see [http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Oppositional\\_defiant\\_disorder](http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Oppositional_defiant_disorder) or [http://www.healthinsite.gov.au/topics/Maladaptive\\_Behaviours\\_in\\_Childhood](http://www.healthinsite.gov.au/topics/Maladaptive_Behaviours_in_Childhood)), as the comparator. Even if the Court regards such maladaptive behaviour as "the relevant comparator", the Court has not shown in its decision that the school's treatment of Alex was appropriate for the "comparator". But these are not an appropriate "comparator".

Another "relevant comparator" is needed. Is "the relevant comparator" someone who behaves like Alex to ridicule people with Asperger's Disorder? Or is "the relevant comparator" someone who does not have a disability yet behaves like a "retard" or a "spasso" with the purpose of avoiding some task or a responsibility?

Is there any other interpretation for the High Court's *Purvis v NSW* decision?

The Court's view, that Alex should be mistreated as if his behaviour has malicious or idle intent, is cruel and unjust: it is a detriment to Alex and his family.

Another commentator (see <http://rightnow.org.au/news-article/walker-vs-state-of-victoria-and-disability-discrimination/>) says ...

This exclusion from education is contrary to the child's right to an education under Articles 23, 24 and 28 of the *Convention on the Rights of the Child*.

The evidence that the Court presents in its decision suggests that Alex's more challenging behaviours emerged relatively quickly, and in the school context. Apparently, it emerged at school after Alex was made "a member of a small group which [the upper primary teacher] called 'the Treasures'" (see paragraph 73). The school's "behaviour management" practices then escalated his maladaptive behaviour.

The recent story on the ABC's 7.30 Report, *Hidden Shame* (see <http://www.abc.net.au/7.30/content/2011/s3219518.htm> and <http://a4.org.au/a4/node/370>), and the parade of stories about students in cages (see <http://a4.org.au/a4/node/279>), shows inappropriate behaviour management is a chronic problem in schools. Many schools routinely exclude students with ASD ... which is just a part of how Education Departments in Australia mismanage students with ASD and deny many of them an effective education.

Australia's disability discrimination law promotes rather than prevents disability discrimination. The consequent injustice denigrates the Government and embarrasses Australians.

We urge you to take immediate action to redress this gross injustice against Alex Walker and his family, and to prevent any similar injustice against anyone else with an autism spectrum disorder.

Yours sincerely

Bob Buckley  
Convenor

18/6/2011



## Media Release

### Deep disappointment over autism discrimination

Autism advocates wrote an open letter to the Attorney-General, the Hon Robert McClelland MP, to express the deep disappointment of people with autism spectrum disorders (ASD) over the recent Federal Court discrimination decision in *Walker v State of Victoria [2011] FCA 258*.

Autism Aspergers Advocacy Australia, known as A4, is a national grassroots organisation giving a direct voice to people with autism spectrum disorders, their families and carers who are among the nation's most vulnerable citizens. Autism is a mental disorder that involves severe and pervasive impairment in communication, social interaction and behaviour. In Australia, over 1% of children are now diagnosed with autism.

Mr Buckley, A4 Convenor, says "legal officials do not understand autism as a disability. For example, throughout its decision the Court refers to Alex's disability as 'misconduct' and 'misbehaviour'".

"Discrimination law in Australia is supposed to require schools to make 'reasonable adjustments' for students with a disability. The schools Alex Walker attended did not adjust their behaviour management policy despite Alex's communication, social and behavioural needs. The Court did not require the schools to accommodate Alex's disability.

"The evidence showed Alex needed support in school: his education was effective while he had support and fell apart when the schools reduced the support.

"The court's failure to protect people who are severely disabled by their autism is especially disappointing", Mr Buckley says. "Courts should be the safety net for people with a disability: the safety net should not fail."

The Australian Government is reluctant to recognise the distinct needs of people with autism spectrum disorders, and that those distinct needs mean these people need ASD-specific services.

The Australian Institute of Health and Welfare reported that autism is second highest "burden of disease and injury" for Australian boys. But the services available are minimal and often inappropriate. Essentially, the Government's policy can be described as *one wheelchair per 25 children with autism*.

"We want Government to make much more of an effort to understand autism", Mr Buckley said.

Contact: Bob Buckley, Convenor.

mobile: 0418 677 288

18/6/2011





ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

AG-MC11/07093

Mr Bob Buckley  
Autism Aspergers Advocacy Australia (A4)  
27 Fairbridge Cres  
Ainslie ACT 2602

Dear Mr Buckley

Thank you for your email dated 18 June 2011 regarding disability discrimination against people with an autism spectrum disorder, in particular the recent Federal Court decision *Walker v State of Victoria*.

I appreciate that organisations such as Autism Aspergers Advocacy Australia (A4) play an invaluable role in providing an independent voice on a range of issues and make important contributions to public debate on disability policy and legislative developments.

The Australian Government considers that all people with disability have the right to participate as fully as possible in community life, with dignity and comfort. The Government is progressing reforms in a number of areas.

The Council of Australian Governments has recently endorsed the National Disability Strategy, which focuses on mainstreaming the rights of people with disability articulated in the United Nations *Convention on the Rights of Persons with Disabilities*. It is aimed at addressing the needs of people with disability by setting a consistent, national direction for the enhancement of disability legislation, policy and standards.

In response to the increasing prevalence of children with an autism spectrum disorder in Australia, the Government is providing targeted support for these children, their parents, carers, teachers and other professionals through the *Helping Children with Autism* package. The package is being delivered by the departments of Families, Housing, Community Services and Indigenous Affairs; Health and Ageing; and Education, Employment and Workplace Relations (DEEWR). DEEWR is responsible for delivering two initiatives under the package which aim to build partnerships between schools and families to improve the educational outcomes of children with an autism spectrum disorder. The initiatives, which have been named Positive Partnerships: supporting students on the autism spectrum, provide:

- professional development for teachers, school leaders and other school staff to build their understanding, skills and expertise in working with children with an autism spectrum disorder; and

- workshops and information sessions for parents and carers to assist them to work with their child's teachers, school leaders and other staff.

The Australian Autism Education and Training Consortium is currently contracted to deliver Positive Partnerships for DEEWR across Australia until February 2012. The Government will announce arrangements for ongoing delivery of Positive Partnerships over 2012-15 by the end of 2011. For more information, online workshops and other resources, please visit the Positive Partnerships website at <[www.autismtraining.com.au](http://www.autismtraining.com.au)>.

As you are aware, the *Disability Discrimination Act 1992* (DDA) provides that it is unlawful for a person or organisation to discriminate against a person on the basis of disability in a range of areas, including education. *Disability Standards for Education 2005* (Education Standards) have been made under the DDA to clarify the obligations of education and training service providers, and the rights of people with disability. The Standards were developed in consultation with education, training and disability groups and the Human Rights and Equal Opportunity Commission (now called the Australian Human Rights Commission). The Education Standards are currently being reviewed, with a report due later this year.

The Standards are intended to give students with disability the same rights as other students. All students, including students with disability, should be treated with dignity and enjoy the benefits of education and training in a supportive environment which values and encourages participation by all students. This includes the right to comparable access, services and facilities, and the right to participate in education and training without discrimination. If a person thinks that they are affected by a breach of the Standards, they can make a complaint to the Australian Human Rights Commission. The Commission can investigate the complaint and try to resolve it. If the Commission decides a complaint cannot be resolved, the matter can be taken to the Federal Court of Australia or the Federal Magistrates Court.

The Government is consolidating the five Commonwealth anti-discrimination statutes, including the DDA and its Standards, into a single comprehensive law as part of Australia's Human Rights Framework. The project aims to remove inconsistencies and unnecessary regulatory overlap, clarify protections and obligations and make Commonwealth anti-discrimination law more user-friendly for individuals, organisations and business.

The Government's consideration of these issues will include your concerns, including your reference to the Judge's reasoning as applied in *Walker v. State of Victoria*.

Thank you once again for bringing your concerns to my attention.

Yours sincerely

Robert McClelland



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

AG-MC11/07093

Mr Bob Buckley  
Autism Aspergers Advocacy Australia (A4)  
27 Fairbridge Cres  
Ainslie ACT 2602

09 AUG 2011

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The Government's consideration of these issues will include your concerns, including your reference to the Judge's reasoning as applied in *Walker v. State of Victoria*.

Thank you once again for bringing your concerns to my attention.

Yours sincerely



Robert McClelland