



Submission

to the Senate Legal and Constitutional Committee Inquiry into the Provisions of  
the Australian Human Rights Commission Legislation Bill 2003

By

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In making this submission I welcome the decision by the Senate to refer this important piece of legislation to an appropriate Senate Committee. The Bill raises fundamental issues in terms of the definition and delivery of human rights in this country. Sadly, there are many aspects of the legislation which will serve to remove significant and important powers of the existing Human Rights and Equal Opportunity Commission (HEROC). Certainly on the face of it renaming HREOC the Australian Human Rights Commission has merit in consolidating matters, and from one perspective focuses attention on equal opportunity matters as properly being issues of human rights. Yet there are significant problems with such a reading.

I make this submission as a person who lives with disabilities whose long been involved in advocating not just for human rights for people with disabilities in this country but for the broader human rights agenda. Sadly, despite the powerful rhetoric to the contrary, in so many ways, those of us who live with disability are at best second rate citizens.

While there certainly is a case for creating an executive structure of a President and three human rights commissioners, I am not convinced that this is overwhelming. Certainly, there is an argument that this will recognise the cross-sectoral nature of the diverse communities served by human rights legislation. This is certainly important. Yet nowhere is the current unsatisfactory situation mentioned and how this is indicative of some systemic problems. For example, the way in which current portfolios are only filled by acting appointments is a scandal which reflects sadly upon the delivery of human rights in this country. Whilst the new structure may be seen as advantageous and certainly may even be seen to be inclusive, I am not certain that Australia is yet at the stage where it can just appoint generic human rights commissioners while doing away with the advantage of having particular portfolios identified.

For example Australia still has significant work to do towards fostering the continuing process of reconciliation (as a spiritual and political phenomenon) in the everyday. We need a commissioner preferably from Australia's indigenous communities. That is to highlight human rights issues and do so in such a way that it is not just talking about Aboriginal and Torres Strait Islander people but where a member of such a community is actually a Commissioner for and of that community.

Likewise, very few Australians with disabilities ever make it to statutory positions and it is a matter of deep sadness for me that there has been an apparent back-peddalling on the delivery of a human rights agenda for Australians with disabilities. We are still at the stage of needing someone who lives with disability and is actually a recognised member of the Australian disability community to be seen as a Commissioner to be listening, thinking and speaking out. Much of such a role lies in defining issues and especially the private troubles which are so often indicative of public issues.

We need a designated commissioner who can even identify the shortcomings with the current legislation that are increasingly being identified by those of us who live with disability. In my case everyday I am confronted with what can only be termed forms of

legal discrimination under the Disability Discrimination Act 1992, where non-disabled notions of “reasonable” dominate. We need a designated commissioner who can speak out about these issues recognising the international disability rights motto of “Nothing about us without us”.

In terms of the existing inadequacies of the Disability Discrimination Act, I commend the Committee to look at the fact that key aspects of the lives of Australians with disabilities are excluded. In particular, in the areas of immigration, social security legislation and in insurance.

Upon this theme it is disturbing to see that despite this legislation being about human rights, there is no recognition of the fact that fundamental issues of equity in employment are not considered in this legislation. For example, the notion of a full-time commissioner. Many people with disabilities and men and women who perform particular care giving roles may have enormously important life experience and skills to offer to such positions and yet through circumstances be precluded from applying for or participating in such positions because they exist as full-time entities only. Legislation which does not just talk about human rights but actually models it should allow for such flexibility as job sharing and people fulfilling tasks on a fractional basis. Without it this legislation serves to perpetuate what disability activists and disability study scholars refer to as disablism. In such a situation so-called notions of equal opportunity can become “equal disappointment opportunity”. In so many ways those of us who live with disability are subject to disablism, and we need a designated Commissioner to explore this. As Professor Mike Oliver, a leading Disability Studies scholar expresses it:

If the category disability is to be produced in ways different from the individualised pathological way it is currently produced, then what should be researched is not the disabled people of the positivist and interpretive research paradigms but the disablism ingrained in the individualistic consciousness and institutionalised practices of what is, ultimately, a disablist society.<sup>1</sup>

I also have a significant concern at the refocussing of the new Commission in terms of education dissemination and education. There are a variety of ways in which otherness is created and perpetuated in Australian society. We need structures which actually say that due to the dignity of the human person extraneous factors such as disability, race, gender, etc are not acceptable grounds for discrimination and indeed that there are structures which will prohibit this.

On this refrain I recall publishing some years ago about the problem of just having legislation without having any form of human rights prosecution. This is still an existing problem with the current legislation where individuals are required to make significant

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<sup>1</sup> Oliver, M. *Understanding Disability From Theory to Practice*, Houndmills, MacMillan Press, 1996, p. 143.

sacrifice, and these days to be prepared to put their house on the line, in pursuing costly legal action. As I wrote in the early days of the Disability Discrimination Act 1992:

The rhetoric which supported the passage of the *Disability Discrimination Act* rightly objected to the existing discrimination which occurs for people with disabilities. It would be good to see that rhetoric matched with a commitment of resources, perhaps even an Office of Human Rights Prosecution which investigates complaints and seeks to prosecute potential offenders. The political reality is that such a prosecuting body would not be widely accepted by those who control and influence many of the resources in society. ... the recently funded legal advocacy services regarding the legislation still seem to require individuals or groups to instigate action. They are not as effective prosecutors as the Departments of Public Prosecutions in the criminal justice system.<sup>2</sup>

I am also deeply concerned at the curtailing of the Commission's power with regard to instigating inquiries and intervening in court proceedings. Australia needs a strong human rights watchdog. It needs a watchdog which can be represented in court proceedings in putting a strong human rights perspective and it needs a watchdog which is capable of being able to speak out about government policy in ways that may not be viewed favourably by any government, whatever the political party in power at the time. One caveat I would add to this is that such action must be based upon evidence rather than narrow ideological views and be firmly linked to human rights not just in terms of narrow forms of Australian legislation but the Universal Declaration of Human Rights.

I would welcome the opportunity to appear before the committee further to discuss these issues that I raise in my submission.

*C J Newell*

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<sup>2</sup> "Consumer Reflections on the Disability Discrimination Act", *Australian Disability Review*, No 2, 1995, pp 60-65.