

Advocate For Change:

Interview with Dr Ben Gauntlett, Disability Discrimination Commissioner

By Joe Edwards



Ben Gauntlett was just 16 when he suffered a serious spinal cord injury while playing rugby union in his hometown of Perth. The injury left Ben quadriplegic, but also revealed a wellspring of determination he didn't know he had. Ben went on to obtain law and commerce degrees from the University of Western Australia, a Master of Law from New York University and a D.Phil in Law from the University of Oxford, where he studied as a Rhodes Scholar. Ben has also worked as a solicitor in private practice, as an associate to the Honourable Justice Kenneth Hayne AC at the High Court of Australia, as Counsel Assisting the Solicitor-General of the Commonwealth and as a barrister in Victoria and Western Australia. In 2019, Ben was appointed Australia's Disability Discrimination Commissioner.

Ben discussed his life in the law, and the challenges facing legal practitioners with a disability, with Joe Edwards.

Joe Edwards (JE): *Ben, can we start with the usual first question: why did you decide to become a lawyer?*

Ben Gauntlett (BG): I had never wanted to be a lawyer, and in fact I went into medicine after I finished school for about two years. Ultimately, I decided to go into law because it was the degree I felt was most compatible with my physical circumstances, both because of the non-physical nature of what was required but also the number of contact hours and the time of those contact hours relative to my need to access health services at the time.

JE: *When you mention the number of contact hours, are you talking there about the number of contact hours at the university level?*

BG: Yes. When I initially started at university, they were only just starting to bring in online classes. So, a really big consideration was the need to attend class. The contact hours for medicine were quite high, and in engineering they were even higher, same as mathematics. I actually had enjoyed maths and sciences at high school more than other subjects, but I felt that law was a degree that would give me flexibility and options without really knowing that much about what was involved and certainly not having thought about it a lot before doing it.

JE: *You've had a range of different professional experiences in the law before your statutory appointment. You've been in academia, you've been at a large private law firm, government legal service, in the courts, and then ultimately at the Bar. Can you tell us about your experiences as a person with a disability in those different parts of the profession? Perhaps we could begin with working as a solicitor?*

BG: I think it's probably important to start with some high-level comments. One is that 19.1% of Australians have a disability and only 20% of those disabilities are 'seen' disabilities. So, 80% is unseen. It's a very small proportion of people with disability who have a visible disability like mine.

For me, being a permanent wheelchair user who has difficulties using their hands, it did mean that adjustments needed to be made. And what that meant, I think, was that there was a need to constantly communicate with my superiors as to what was necessary to perform the role. So, as a solicitor working in a big team, realistically I would be often assigned tasks which were easier for me to undertake, like research, rather than going out to speak to a witness and drafting the witness statement. That in turn meant that you got very good at doing a certain type of task without doing other aspects of the work. This can result in disjointed professional development. When you look at how to employ people with disabilities, there's an important lesson within that to be really conscious of, particularly with junior staff, exposing them to the full range of experiences even if that means you may have to, on occasion, go out of your way to ensure you give them that exposure.

As a solicitor, the obvious benefit was information technology, economies of scale and scope. But the flipside is that you could in a sense fall into a certain role within a team that you always performed.

JE: *How about government legal service, working in the office of the Solicitor-General?*

BG: There were two challenging aspects of the role. One was that Canberra is not set up that well for a disability like mine. Canberra

is quite a small town, so you don't necessarily have the services to enable you to perform at your best. When you employ people with disabilities, one of the constraints that can exist concerns the services that exist in the location, including services relating to housing, in-home support, etc. A difficult aspect of living in Canberra is that those services do not exist in the same way as they do in other cities. It would be very difficult, even now in my current role, if I was in Canberra a lot, to discharge my function because they don't have the services. So, I haven't looked for a job in Canberra for a very long time. Not that Canberra doesn't have a very good physically built environment and things like that, but it just doesn't have the services on the ground.

This points to an aspect of disability that people may not always appreciate: the 24/7 nature of it. When you're looking at employing someone, you've got to ask, 'How do they get to and from work?' So, if a person has a vision impairment for instance, it's not enough that once they get to the office or to chambers they can get around. They actually have to get in and out each day and get to court; it's okay if they're always in the Supreme Court next door, but if they're in the Local Court, how do they get to the Local Court?

The other challenge was the unpredictability of the role: you didn't always know what was coming in etc, so it was very hard to plan. When you have challenges at home in terms of access to support services, you do need to have a certain amount of consistency with the role to know what you're doing each day so that you can plan things like your information technology needs.

Working at the High Court was a little bit different in that the Court is highly regulated in terms of what occurs each day...

JE: *More predictable?*

BG: Ridiculously predictable. And that predictability meant that you could plan ahead and fit in with what's required. I was also quite lucky to work for a judge, Justice Hayne, who went out of his way to use information technology to make my life easier. So, his Honour would work solely off iPads, PDFs etc. I never had to push the trolley, things like that. His Honour would just use an iPad for the case hearings I was on, including very large cases. So, that did change the dynamic.

It's also true that it is a little bit easier to control the environment when you're the decision-maker, rather than in other roles, because you don't have clients in a sense. A judge can just say to court, 'We'll be hearing the argument at 10:30am and you'll have the following papers ready' etc.



Dr Gauntlett speaking at the United Nations headquarters in New York in June 2019, for the 12th Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities.



Dr Gauntlett at the United Nations in Geneva in September 2019, during the 22nd Session of the Committee on the Rights of Persons with Disabilities

JE: *How about the Bar? You went to the Bar in Melbourne initially?*

BG: Yes. Understanding the structure or the nature of a role means that you can plan accordingly for your reasonable adjustments to ensure that you can participate to the best of your ability. But developing that understanding can take time. Certainly the first six months of a role or the first twelve months can be challenging while you develop an understanding of what is needed.

At the Bar, it was definitely the case that it took some time to adjust to what was needed to get a practice that fitted with my circumstances. And the reason for that was, first, there was a need to negotiate – constantly and persistently negotiate – access to bathroom facilities and where they were located relative to my chambers. And then there were, and remain, issues with accessing courts in older buildings. Those physical requirements meant that it took time to get into situations where I was briefed to appear in court, particularly unled.

I think the Bar has a need to evolve in terms of the perceptions of disability and the

benefits that disability can provide. Not just in the actual court hearing but potentially in areas like settlement negotiations, where understanding the perspectives of clients, opponents and witnesses can be crucial. In a sense, much of what the Bar looks at is when someone has lost something. So, it can be useful to have a person speaking with a client who themselves has some real empathy for the client to obtain a better outcome.

JE: *If I can be blunt, do some parts of the legal profession do better than other parts?*

BG: It's not that one part of the profession necessarily does better than another part of the profession in including people with disability, but I do think there is a natural ease with enabling inclusion when a person is part of a team rather than as a sole practitioner, unless there is a support structure put in place to enable that person to, for the first year or years of their career, resolve issues which may not necessarily be the same for a person who does not have that disability. That takes time and, above all, really good communication. You need to

be able to have communication about what's occurring and why it's occurring, and that takes trust.

JE: *You've mentioned the need to negotiate about bathroom access and access to older court facilities. What were some of the other barriers to practice as a barrister that you experienced or that you noticed others in similar situations experiencing?*

BG: The preponderance of briefs to be provided in hardcopy was challenging.

JE: Yep.

BG: The need to attend hearings with little notice while taking a number of books with you. The need to have physical legal resources close by. The expectation, for reasons of tradition, that you as the more junior barrister would attend on certain people at certain places rather than have people come to you. Weather was a really big one in Melbourne. That was sort of unexpectedly challenging. If you have to go five hundred metres in the rain, you're absolutely soaked for the whole day. It's okay to get somewhere when it's dry but when it's absolutely pelting down, you turn up at the meeting not looking in the manner you'd hoped.

Also, I didn't have a lot of role models or colleagues who I knew had a disability at the Bar. I was aware that some people may have a disability or were potentially considering the Bar with a disability. But it's important to note here that everyone's disability is different, so role models can be hard to find. For example, someone who is an amputee and uses a wheelchair has quite a different life circumstance to someone who's got a spinal cord injury and uses a wheelchair. There are physiological differences.

But also there was perhaps a lack of discussion as to the needs of people with disabilities and often people with disabilities do not wish to discuss it: that's been found in employment situations, that people will not disclose their disability. So, it's not a widely discussed issue and what you really do need is senior members of the profession to take an interest. A person with a disability often does not know what issues and options exist in going through their career because they haven't been through their career. Someone has to, in a sense, forewarn them as to what the issues and options are.

JE: *It is depressing to have to ask this, but do you think that there are solicitors or clients who are less willing to brief barristers with a disability? Or it's hard to know because you don't know who considered briefing you and then decided against it?*

BG: You don't know what goes into a briefing decision. An aspect of this question also needs to consider senior barristers recommending people as their juniors, which

is an increasing area of work. Obviously, the issue of unconscious bias comes into this area, just as much as with other diversity characteristics. I'd like to think that it was more a matter of uncertainty than any actual unwillingness; that the uncertainty led to a choice to use others.

What's perhaps not always appreciated is that sometimes, because of circumstances beyond my control, I had to say no to briefs and that had nothing to do with the person who was offering it. It was to do with, for example, the fact that my life circumstances were such that I wasn't in a position to accept the brief. For example, at least until the NDIS becomes fully operational, there has been a reasonably patchy home-care regime in Australia where, for example, support services just don't turn up: so, they don't turn up to help put you to bed and you're up all night. Things like that can and do occur. Sometimes, then, the reasons for not being involved had nothing to do with the legal profession.

But it should be acknowledged that while unconscious bias is undoubtedly an issue and statistics would definitely support there being a lack of a structured involvement of people with disabilities, there were a couple of members of the profession who did try and make sure that I was included. And often those members of the profession who did so had some prior exposure to disability, such as they had a child with a disability or a sibling with a disability and so they would go out of their way to include me. That was really appreciated, and so it would be remiss of me not to mention that.

JE: *Practising at the Bar, at least in places like New South Wales and Victoria, is different to being an employed solicitor. Barristers are required to be sole practitioners and they work for themselves. Do you think that that makes it harder or easier for a person with a disability to practise at the Bar?*

BG: I think the answer is a balanced one. It does make the upfront challenges an issue, for example, a chambers that does not have the built environment to enable a person to attend. But the flipside is that a person with a disability can, if their career is going in a direction of their choosing, get in place things like IT and support staff which are precisely what they need. So, for example, they may have four screens up and running in their office. Well, I had a particularly large screen where you could open an incredible number of documents, rather than having to print, and I also had a particularly good printer. And for a while when I was quite busy I had an EA whom I employed just for me, which was reasonably rare for someone of my seniority to have an EA, but it worked for me. So – there is a balance.

I think the issue is that, to get to that position, you do need to have opportunity, you need some luck, you need people to take an interest in you, and you need probably a few senior members of the profession to watch out for you and to communicate with you as to why certain things may or may not be occurring. For example, I think my first appearance in any court room was easily the last of my reading cohort in Victoria. I think I'd completed my reading and a QC just said, 'You better come to court with me because you haven't appeared yet'. So, that was quite odd that someone who had my background would never appear in a single hearing. A lot of written work or pleading or research, but not appearing. You do need that interest from others to make sure you don't get pigeon-holed into doing a certain role.

JE: *That connects with what you were saying about life as a solicitor: you get pigeon-holed into doing certain tasks like research, which are considered to be easier to give you. Is the same true with written submissions or advice work at the Bar?*

BG: Yeah. You can have a situation develop where you've not seen a trial but you're five years at the Bar. Now, I should say that you may seek to have a practice like that, where it fits with your life circumstances. So, you might go into tax, public law and a few other areas because there are short hearings, they're quite discrete and there's not so much paper. But you want to be in a position where you can choose that and where you've got all the relevant experiences to say, 'Well, this is what happens in that type of hearing'. Otherwise, it can mean that you become a little bit asymmetrical in terms of your development. So, you might be very good at certain aspects of practice, but other aspects of practice, because you haven't had the exposure, you don't have that development.

For people with disabilities, I think there is a need, at an early stage in their career, to be very conscious of their exposure to all aspects of the profession, and what I would advocate for is that they have multiple mentors of different levels of seniority appointed to enable those issues to be discussed and developed. It's not that you have to do murder trials if you're not going to practise criminal law, but you have to have seen certain things along the way if you're going to be a barrister of a particular type. An example would be if you're a public law barrister, you really should have seen a certain number of hearings in the Federal Court by a certain stage of your career.

I think that understanding what can and should occur in relation to people with disabilities is perhaps no different to the gender issue where women can be given roles in cases but they're non-speaking roles or they're on the team but they're not really included.

JE: *You get to write the written submissions but not necessarily go to the hearing and so forth?*

BG: Yeah, and that's a challenge that can exist across other diversity characteristics. It's important that, as with other diversity characteristics, it's openly discussed, data is collected and people have the discussion in a non-threatening manner. Because often, people just don't think. They just want to take someone on a case with them who's like them or who might be like one of their kids or something like that.

JE: *Chambers here in New South Wales and I'm sure elsewhere have started taking at least some baby steps to ensuring the inclusion of people who traditionally haven't been given a fair go at the Bar and something that's talked about a lot here in Sydney is the increasing adoption of parental leave policies by different chambers. What would you say are some steps that individual chambers can take to ensure that barristers with a disability have a fair go?*

BG: I think they have to be quite vigilant about their built environment, and that includes more than just access to bathroom facilities. Chambers also have to understand that room size and room location may need to be driven by things other than seniority. And obviously, while all forms of disability are different, it's very important for chambers to think about things like the information technology architecture that's used, access to the library, and so forth.

I think also there probably needs to be an understanding that it's enormously costly to have a disability and to work, and there's a lot of unseen costs which are still borne by the person with the disability, particularly when home care or certain types of services are not fully operational in a location. A person with a disability often has to pay an enormous premium just to ensure that they can turn up, for example where there's an expectation of travel to be part of a case.

I think where this can be dealt with the best is to actually ask the person with the disability, 'What are your needs?', but also then frequently check in with the person and look at objective evidence as to how they're going. There is a real element of having good communication and a feedback loop to ensure that people can make the most of their career.

And that's what it is about. It's about enabling the person – and it's also about enabling the person to find practice areas which they find enjoyable.

JE: *Okay, so we talked about steps that can be taken at the chambers level. Do you think there's a role for professional associations?*

BG: Undoubtedly there is very important role for the peak professional association to take an interest in disability, to acknowledge the issue, to recognise disability as a diversity

characteristic that is the equivalent of other diversity characteristics, and to require that data be collected so that issues can be dealt with in an objective and transparent manner. There's also a role for professional associations in dealing with complaints etc – for example in circumstances where a person may behave in a manner that's less than ideal – to ensure that a person with a disability is supported. Often a comment relating to disability can seem reasonably innocuous to a person who does not have a disability, but can be incredibly offensive to a person who does, and that's about education. If issues are dealt with quickly, respectfully and expeditiously, then often the person will continue in the profession. If they aren't, they might leave. So, it's really important that you have good communication and good training.

But it doesn't work unless the leaders of the profession own the issue of disability. We rank 21st out of 29 in the OECD for employment for people with disabilities, and we rank last in the OECD for people in disability in poverty. And the reason for this is we've had a cultural silence about disability within Australia for too long. Instead of discussing the issue, we've just thought, 'Oh well, it's someone else's issue'. That's part of why we have the Royal Commission into Violence, Abuse, Neglect and Exploitation of People With Disability.

JE: *Do you think that people with a disability face particular barriers in obtaining access to justice?*

BG: Yes, definitely. To take just one example, over 40% of complaints to the Australian Human Rights Commission concern disability discrimination and that's by far the leading diversity characteristic. No doubt there are a lot of people who don't even make a complaint. And for a complaint-based mechanism to be relied upon to prove discrimination is incredibly challenging. So, if a person has a difficulty with employment, they've got to challenge the person directly in what then comes to the Australian Human Rights Commission for mediation and conciliation. Then two years later they can get to the Federal Court, or they just settle.

And this plays out not just in a discrimination setting but also in relation to access to the NDIS, where you see a high number of applications to the AAT and a high number of decisions being overturned. That's a hard thing for a person with a disability, who by the very nature of being eligible for the NDIS has quite a significant impairment, to expect them to run through those processes.

There are other issues relevant to access to justice, too. One is the issue of when people are deemed unfit to plead. A second is equal

recognition before the law, particularly with respect to the appointment of a guardian, essentially as a substitute decision-maker. That can be a real gateway to violence, abuse, neglect and exploitation. And a third is forced medical procedures. That's something that I think we need to look at quite closely as to whether our laws in that area – Commonwealth, State and Territory – are reflective of present conceptions of people's human rights.

JE: *What can you tell us about your role as Disability Discrimination Commissioner and what you've been doing since your appointment?*

BG: The role is a systemic role. You do not deal with individual complaints. You deal with matters of policy, law reform, sitting on a number of committees and so forth. There are also a number of treaty bodies where you have to discharge Australia's reporting functions. So, for example, with Australia's Periodic Review under the Convention on the Rights of Persons with Disabilities, I had to go over to Geneva and present on behalf of the Australian Human Rights Commission in front of the Committee on the Rights of Persons with Disabilities. Obviously, that's an enormous honour and privilege, but it does require quite a bit of preparation.

Back in Australia, there's often a nuanced question as to how to get government to pick up recommendations for law reform. To be fair to government, I think they would like to see law reform, they just want to find a way of achieving it that's consistent and systemic across the country, and so it's a matter of getting everyone on the same page on issues such as support and decision-making. There is, I'm hopeful, an understanding that there is a need for law reform given more modern thought processes as to the recognition of people with disability in the community, particularly with respect to people with intellectual disability.

I also sit on a number of committees relating to the NDIS and have a role in relation to the National Disability Strategy, which is developed every ten years and is basically a policy document which coordinates Commonwealth, State and Territory disability policy. It affects all manner of things such as transport, education, health, justice, the built environment in housing etc.

JE: *What are some of the key or emerging issues in disability policy?*

BG: One of the big issues going forward is data and implementation: ensuring that we have objective criteria as to what improvement means, which apply across all manner of diversity characteristics but particularly for disability. It's incredibly important to get the objectivity that enables constructive policies to be developed.

In Australia, we haven't had a systemic

data collection mechanism. So, for example, we don't necessarily know in country Western Australia whether certain policies are working. That's a huge concern because if you look at Aboriginal and Torres Strait Islander people with a disability such as foetal alcohol spectrum disorder, and you consider their interactions with the justice system, that can be incredibly concerning. So, there's a lot of policy work on those issues to make sure you have both the data on the ground or the data collection, and then also the laws and the resources to enable people to live the lives that they want. That's a work in a progress. I'm very optimistic about it, but it will take time and an enormous amount of effort.

JE: *You mentioned the Royal Commission earlier, do you have any role intersecting with the work of the Royal Commission?*

BG: The Australian Human Rights Commission is independent from the Disability Royal Commission but it has historically been the role of the Australian Human Rights Commission to file submissions, principally on human rights grounds, relating to issues that may arise and to play the role of respectful contradictor.

An example of where I played such a role was when I appeared in the Aged Care Royal Commission relating to young people being housed in nursing homes. That was an issue that was disability specific and one that I felt it was important to raise.

I see the role of the Australian Human Rights Commission in relation to disability as this: we shine the brightest light into the darkest places. There are people with disability who literally cannot speak; their disability means they cannot communicate. One of the important roles that the Commission has – and I think the legal profession has it too – is to give those people a voice. They may have had something really egregious happen in their life but no one takes the time to actually take a witness statement from them. Someone has to say, 'There is a person here who needs to be listened to. We will take the time to ensure they're included'. **BN**

This interview was conducted in December 2019, prior to the outbreak of the COVID-19 pandemic.

Dr Ben Gauntlett appeared as a witness at the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability in December 2020, during a public hearing focussed on barriers to employment for people with disability.