

Using the Law to Make a Difference

Graeme Innes AM*

May I begin by recognising the traditional owners of the land on which we meet today, the Awabakal people.

Scarlett Finney was only six years old when she saw the brochures for The Hills Grammar School, set in park-like grounds in Sydney's outer suburbs. She indicated her keenness to attend 'the school in the bush'. Her parents were prepared to pay the fees, and saw the setting and curriculum as providing her with a great education. But the school refused her enrolment due to the fact that she had spina bifida and sometimes used a wheelchair.¹

Marlene Chesson was a hard-working staffer in a community organisation in Perth. She was on her way to an evening

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¹ *Scott and Bernadette Finney on behalf of Scarlett Finney v The Hills Grammar School* [1999] HREOCA 14; *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658.

meeting when she had the misfortune to choose the taxi driven by Alan Buxton. Her ten-minute drive turned into a nightmare of racist verbal abuse when she casually revealed that the organisation for which she worked supported people of aboriginal background.²

Karen Allegretta was a mother-to-be, pulling beers in an outer suburban Perth hotel. She wanted to keep working her part-time shifts until just before the birth of her baby, so that she could save some money for the costs she knew would inevitably occur. But the landlord, when he heard of her pregnancy, was having none of that and dismissed her on the spot.³

These are three true stories of ordinary people just wanting to pursue their lives or aspirations. But in each case someone – for reasons that are hard to fathom – did not let that occur. They all lodged discrimination complaints and I was pleased – either as their advocate or as the Hearing Commissioner dealing with the matter – to play a part in redressing that discrimination. I was using the law to make a difference.

I am honoured, and a little overawed, to have the opportunity to speak with all of you today. Sir Ninian Stephen was a great Australian. His work as lawyer, High Court judge, Governor-General, and with this university – not to mention the various other causes which he championed – place him in the top echelon of achievement, not only in our country but throughout the world. I feel privileged to be giving an address recognising him.

When I received the invitation to give this lecture, a list of some of the previous lecturers was included. Can I tell you that, as a marketing tool for potential lecturers, this did not work. How can I match the wisdom that some of the best legal minds in

² *Chesson v Buxton* (1990) EOC 92-295.

³ *Allegretta v Prime Holdings Pty Ltd t/as Phoenix Hotel & Anor* (1991) EOC 92-364.

Australia delivered, I wondered? Having recovered from my initial funk, I decided to take on the challenge. But, after seeking some advice, I decided to do it somewhat differently. Rather than providing a treatise on a particular topic of legal interest, I thought I would share some stories with you about myself and my involvement in the areas of law in which I have worked. I do so in the hope that it will inspire all of you to continue with your law degrees, and to use those degrees - once obtained - to improve the lives of those around you.

This approach does not mean that I am advocating that you should work only in legal centres, do legal aid or pro bono work, or be employed in organisations running campaigns to protect the environment, promote the recognition of climate change or prevent discrimination. Those areas, whilst very laudable ones, are not the only places where you can make a difference. In most areas of law - yes, even as conveyancers, copyright lawyers, or commercial litigators - you can make a difference. All you have to do is remember that laws, and their application, are really just about people in the end. Within the constraints which surround all of us as lawyers, you always have a responsibility to ensure that justice is done, as well as to work towards the outcome which your client seeks. If you fulfil these commitments, then you will be making a difference in the world.

I will begin this lecture with some details about myself. Whilst growing up, I was lucky on a number of counts. Firstly, I was lucky in the approach which my parents used when bringing me up. I say lucky, but perhaps I should not dismiss the innate good sense they used when they decided - consciously or unconsciously - to treat me as just one of three siblings, rather than as a "special" child with a disability. Many kids with disabilities were not treated this way. Their parents, with the best of intentions, figuratively wrapped them in cotton wool. This meant that they did not enjoy the same breadth and intensity of experiences which I enjoyed.

It must have been quite hard for my parents, knowing that inevitably I would fail on occasions, or have a negative

experience. Those bruised foreheads or scraped knees must have hurt them almost as much as they hurt me. But the advantage for me was their approach: they assumed that I could do things rather than assumed that I could not. Whilst this meant that I ended up with a few more scrapes, bruises and disappointments, it also broadened my experience, and gave me the sense that I could do what I wanted, rather than limiting my options.

Secondly, I was lucky in the sense that I had positive role models. A good friend of my parents was totally blind, and also a member of the NSW Parliament.⁴ This reinforced the positive message my parents sought to instil in me – if he, as a person who was blind, could be a successful politician, then why could not I do the things that I wanted to? As a result, I grew up not being limited in my expectations.

Sadly, one of the largest barriers which people with disabilities in Australia face is the attitudinal barrier. To quote from the *Work-Ability Report on Employment of People with Disabilities*, launched in 2005 by the Human Rights Commission:

Managers see that employing someone with a disability is taking a risk and unless they are supported by senior management and the Board to employ people from disadvantaged groups, they are unlikely to do so. There are two types of risk that appear to be barriers to the employment of people with disability from an employer's perspective – organisational culture risks and litigations risks. Employers say, 'it's all too hard, it might not work, there's too much risk and they'll never fit in'. ... There is also concern that an employee with disability might create an overly-high burden on supervisors: Most employers have no understanding of disability until they have a direct connection with it. They feel that it would be too onerous and high-risk to constantly monitor an employee with a disability.⁵

⁴ David Hunter served as Member for Ashfield from 1959 - 1976.

⁵ Human Rights and Equal Opportunity Commission, *WORKability I: Barriers - People with Disability in the Open Workplace Interim Report of the National Inquiry into Employment and Disability* (2005) 30-31 (citations omitted).

Thirdly, I was lucky because I knew exactly what I wanted to do when I left school. I feel for people who face the dilemma of figuring out what they want to do in life because for many it can mean not going forward with confidence because of that degree of uncertainty. From the time I was about fourteen, I knew that I wanted to study law. And I wanted to study law because I knew that changing laws was one way to improve society, or improve opportunities for people in society. My thinking was not as formulated as wanting to redress discrimination, which is much of what I do today. Rather, it was about changing the way society worked to make it better.

So I studied law. This was in the 1970s, when there were no computers, Internet or web-based legal databases. Many selfless volunteers read law books onto reel-to-reel tapes or cassettes so I could keep up with the reading. Many others manually transcribed books into Braille. I was not the first blind person to study law, but there were not many of us, so trails had to be blazed.⁶

Studying law was just hard work - but I am not telling you anything that you do not already know. Despite the enormous efforts of those volunteers transcribing books, I had limited access to the range of materials which I needed to complete my degree. So I had to compensate for this by knowing the books which I did have better than anyone else. After four years – and only one post – I managed to complete the degree. And whilst the work was hard, I cannot deny that I also enjoyed a few of the extra-curricular activities which go along with campus life, which centred on the university bar. Although I understand that, some 30 years on, the HECS-driven campus is not quite the fun place it used to be – or is that just a bit of baby-boomer nostalgia kicking in?

I completed the College of Law and started the arduous process of finding a job in 1979. Over a twelve month period,

⁶ Vision Australia, *Student Information Handbook - NSW & ACT* (2005), at <[http://www.visionaustralia.org.au/info.aspx?page=1487# Download](http://www.visionaustralia.org.au/info.aspx?page=1487#Download)>.

I applied for about thirty jobs in legal positions - with both government agencies and in the private sector. In about fifteen of my applications I was unsuccessful simply because I was not the best qualified applicant. However, for the other fifteen I was not successful because employers just could not contemplate how a blind person could function as a lawyer. No matter how I explained the methods I would employ, they were just not convinced.

Growing up as a person with a disability, I had experienced discrimination before. But this was the first time that I really struck the wall of discrimination which many people with disabilities face. And for twelve months I could not get past it.

I finally despaired, and took a job in the NSW Public Service as a Clerical Assistant. I used to joke that I was the only Clerical Assistant in the service with a law degree. But it was a job. My first job was with State Lotteries, where one of my duties was to answer the phone and tell people the winning lotto numbers. I was made redundant from that role by an answering machine. I moved to the Registrar-General's office, where I spent most of my time answering phone calls from the public. But at least I was learning about the practical issues around conveyancing.

From there I progressed, still as a clerk, to the Department of Consumer Affairs. Here again I answered telephone calls from the public, but I became immersed in consumer law at a time when the Department – under the stewardship of Minister Syd Einfeld – was making some major changes, and ratchetting up the rights of consumers. It was a good time to be in the Department. And it was this Department which gave me my first “legal” opportunities – first as a clerk in the Legal Section, and then as a Legal Officer. The Senior Legal Officer was not totally convinced that I could work as a lawyer, but he (unlike all of the others) was prepared to give it a go.

So I started as a Legal Officer in Consumer Affairs, working on interesting issues such as the first draft of Push-bike Helmet

Regulations, and some work in the early stages of the Unified Credit Code. I was finally working as a lawyer.

The discrimination I faced in that twelve months looking for a job probably fired my zeal for advocacy. At the same time that I was working my way up through the NSW Public Service, I was spending some of my leisure time participating in various organisations advocating for the rights of people with disabilities. The year 1981 was the International Year of People with Disabilities, and there was much work to do. Amongst other things, disability groups successfully advocated for changes to the NSW *Anti-Discrimination Act* to include discrimination against people with disabilities.⁷ I also joined the Anti-Discrimination Board as one of its conciliators.

Pleasingly, I was not type-cast. Whilst I clearly brought disability expertise from my own experience and my knowledge of the disability sector, my case load included discrimination complaints from all grounds covered by the Act. This included discrimination based on race, sex, age or marital status, to name just a few of those grounds.

Discrimination law was one of the “early adopters” of the mediation or conciliation techniques which are now much more prevalent in many areas of our legal system. The Anti-Discrimination Board strongly advocated the benefit of this type of approach. It still does. Not only did it provide the parties with the opportunity to voice their concerns, and resolve their disputes in a relatively amicable manner, it also provided an opportunity to educate employers and service providers on the impact which discrimination could have on the individual concerned, and on their own workplaces and industries. The vast majority of discrimination complaints are still resolved in this way.

⁷ *Anti-Discrimination Act 1977 (NSW)*, amended by the *Anti-Discrimination (Amendment) Act 1981 (NSW)*.

I worked in this area – and as an advocate acting for complainants in discrimination tribunals – for a decade. This work took me from Sydney to Perth, where I worked with the Western Australian Equal Opportunity Commission. Over that time my colleagues and I resolved many complaints, and – I believe – we made a difference to both complainants and respondents. Some examples include:

- I spent many months resolving the discrimination faced by a chemist, because she was a woman in a male-dominated industry.
- I worked with an Italian man who was continually demeaned in the railway workshops where he was employed because of his accent and lack of English literacy.
- I was involved with a brother and sister who were twins, but who were made to attend single-sex high schools where the availability of subjects was very gender stereotypical.⁸
- I failed to conciliate the complaint of Gwenda Woods, a woman with a disability who was arrested for the cultivation of marijuana which she used for pain relief. She lodged a complaint on the grounds of her disability when the police station to which she was being taken for charging was not accessible to a person using a wheelchair. For that matter, neither was the court-house, or the prison to which she was sent when she refused to pay her fine.

Gwenda Woods was a tireless advocate for access, also taking on the Wollongong City Council about access problems in the Wollongong mall.⁹ However, whilst Gwenda's initial complaints against the justice system were not resolved, they eventually led to a major programme over the last decade or so to make the justice system in NSW far more accessible to a wide range of people with disabilities. Many of our courts are now more accessible for people with physical disabilities, and include hearing loops to assist people with hearing impairments.¹⁰

⁸ *Haines v Leves and Anor* (1987) 8 NSWLR 442.

⁹ *Woods v Wollongong City Council* (1986) EOC 92-174.

¹⁰ See Department of Justice and Attorney General (New South Wales), *So you have to go to court! Video and Resource Kit* at <http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_going_to_court>.

But the story regarding the NSW legal system is not all good. People who are blind or deaf are still barred from serving on NSW juries. This is despite the fact that the then Attorney-General, Bob Debus, referred this issue to the NSW Law Reform Commission for investigation in 2002.¹¹ The continuing exclusion of blind or deaf people from juries is interesting, particularly in light of the recent study conducted at Macquarie University. This study found that a group of people who were deaf had an equal understanding of a criminal trial judge's summing up for the jury, conveyed through a sign language interpreter, as did a group of hearing people who listened to it. Sadly, neither group understood the summing up all that well, but that may have had more to do with the complexity of the evidence and the ability of the judge than the characteristics of the people in the jury.¹²

However, the NSW Law Reform Commission shirked its responsibility on this question. It took almost four years to deal with this reference, only making its recommendations some eight months ago. And then the NSW Attorney joined in the shirking, sitting on the report for eight months without tabling it in Parliament. People who are blind or deaf should be given the equal responsibility of all other citizens to serve in the group of their peers, judging innocence or guilt. This issue should not have been left to gather dust for five years. I call on the Commission and the NSW Government now, as I have on a number of previous occasions, to table the report,

¹¹ The New South Wales Law Reform Commission received a reference from the NSW Attorney-General '[t]o inquire into and to report on whether persons who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors in New South Wales and, if so, in what circumstances'. The Reference was received by the New South Wales Law Reform Commission on 19 March 2002. See generally <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/digest.103>>.

¹² 'Deaf Jurors – A Sign of Law Reform?' *Macquarie University News* (March 2007). See also Jemima Napier and David Spencer, 'A Sign of the Times – Deaf Jurors and the potential for pioneering law reform' (2007) 90 *Reform* 35.

and make the necessary changes to the law. I know that many people who are blind or deaf feel that they can never be totally accepted into our society as equals until they too can fully carry out their responsibilities as citizens.

But I digress. Towards the end of my time in Western Australia – where I incidentally found and married the love of my life – I chaired the Commonwealth Government Advisory Council on Disability Issues. The major achievement of that Council whilst I was its Chair was the enactment by the Keating Government of Commonwealth Disability Discrimination legislation in 1993. I was able to play a part – with a number of others – in the way that legislation was crafted. I view this as one of the most important work tasks with which I have been involved. And now I get the chance to administer that legislation as Commissioner.

Just to prove that you can do more with a law degree than just mediate or litigate, my next progression – in the mid 1990s – was to return to Sydney and work for the private sector. Combining my experience in the discrimination and disability sectors, I was employed by companies such as Qantas and Westpac to help them develop programs to improve facilities for people with disabilities, as both employees and customers. So I was making a difference from the other side of the fence.

From there I was appointed as a part-time member of a number of State and Commonwealth Tribunals, including:

- the Human Rights and Equal Opportunity Commission (HREOC) when it determined cases, prior to this function moving to the Federal Court;¹³
- the Social Security Appeals Tribunal;
- the NSW Equal Opportunity Tribunal;

¹³ In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, the High Court held that by requiring HREOC to register a determination in the Federal Court and by providing that a determination, from the moment of registration, had effect ‘as if it were an order made by the Federal Court’ the Act invalidly purported to invest HREOC with judicial power.

- the NSW Consumer Claims Tribunal; and
- the Residential Tenancy Tribunal.

These Tribunals, plus some consultancy work for HREOC and other organisations, filled my time until my appointment to my current position in December 2005.

Sitting on this diverse range of Tribunals meant keeping up to date with a number of discrete areas of law. This is nothing less than what a barrister or solicitor in a more general practise would have to do. Dealing with the various issues which they raised on a day-to-day basis certainly provided me with variety. But again, it was addressing problems that individuals faced.

I tried to encourage landlords not to terminate tenancies and put people out of their homes. And at the same time I tried to encourage tenants to pay their rent on time, which was a sure-fire method of getting landlords to allow them to stay. In the process, I learned far more than I will ever need to know about how long internal and external paint jobs last, the appropriate level of cleanliness of a kitchen stove and how to eradicate cockroaches.

The Residential Tenancies Tribunal was most memorable for one humorous incident. When I walked into my local ship chandler to buy something for my boat, the woman at the counter said 'I remember you from the Residential Tenancy Tribunal'. I was never certain how to deal with such encounters. The concern must have shown on my face, as she continued 'Oh, it's all right, you found in my favour'. She went on to tell me that – as a student – she normally just wore jeans and a t-shirt. But that day, because she wanted to make a good impression, she dusted off her best dress and spent half an hour on her hair and make-up. She and her father walked into the Tribunal and, upon seeing me accompanied by my guide dog, her father turned to her and said 'well, that dressing up was all wasted effort'.

I dealt with many consumer issues, from poorly made wedding dresses and badly printed photographs – both of which tested my powers of observation – to second-hand cars and poor or no recommendations from dating agencies to which much money had been paid. This sort of work is really law at the coal-face – explaining to traders and consumers that your decision in their case is based on some obscure branch of the postal acceptance rule. But such Tribunals provide a very important service, delivering quick, inexpensive, but fair justice across a myriad of disputes.

I also dealt with some horrific cases of sexual harassment in both the Commonwealth and State jurisdictions. Situations where women – the people harassed in the vast majority of cases – were just wanting to earn a living and get on with their lives. Their male employers thought paying them wages entitled them to treat these women appallingly. This treatment impacted on their lives for years to come. In one case, in a NSW regional town, it was not enough for the employer to sexually harass the woman in question until she resigned from her job. Over the following six months – until she moved to Queensland – he phoned her at home or on her mobile on average five or six times a day, with either cajoling or threatening messages. He often sat across the street from her home in his car, just watching.

Now, as Human Rights and Disability Discrimination Commissioner, I have the opportunity to try to influence policy on a much broader scale than I could whilst dealing with individual cases. The Commission has an education and public awareness function, but is also able to advise and work with the Federal Government on Human Rights and Disability Discrimination policy. So what are the areas in which we at the Commission are currently trying to make a difference? Let me conclude this lecture today by telling you four more stories about the ways in which current law treats people unfairly and explain what we are doing to try to change that situation.

Sue and Leanne have just become the parents of a five week old child. Sue and Leanne have been together for eight and a half

years. They contribute to the community through volunteer work, donations and providing respite care to a foster child. They find it frustrating that they were allowed to care for foster children, yet they were not allowed to adopt children or access assisted reproductive technology. Leanne said the following at the end of her testimony to the Commission inquiry:

We are an average suburban family. We are working hard and contributing to our community. We do not want special treatment – just what others can expect from their legal and social community. Our rights are denied simply because of who we love. We just want equality.

Another story from a different perspective. When Helen was employed by the Commonwealth Public Service, it was compulsory to join the Commonwealth Public Sector Superannuation Scheme (the PSS). As part of the induction program, conducted during Helen's first week of work, she was obliged to fill out the PSS forms alongside her colleagues. It was Helen's intention to name her partner of three years, Susan, as the beneficiary of death benefits from the fund in the form. However, the form indicated that the scheme only provided death and invalidity cover to spouses, the definition of which did not extend to same sex partners.

Helen was forced to ask for advice on filling out the form in front of her colleagues, inevitably outing herself on the second day of her new job, an experience which she felt was both confronting and disappointing. The Commonwealth Public Service did not allow its employees to join alternative superannuation schemes. Helen was left with no choice but to contribute to the scheme and put her mother as her beneficiary.

Helen felt sick when she realised that once again her loving and supportive relationship with her same-sex partner was not supported by the legal and social systems under which she conducts her daily life. To her, it is extremely unnerving to not feel the protection of the state, and subsequently the approval of society.

The Human Rights Commission is currently conducting a National Inquiry into discrimination against same-sex couples in accessing financial and work-related entitlements. Hearings and consultations were held last year and our report will be tabled in Parliament next month. I can not discuss the findings and recommendations in that report as the information is still confidential at this point. I can tell you, however, that we have found around 60 federal laws which discriminate against same-sex attracted couples. I am hopeful that the Commission and its report can help persuade politicians to make a difference to these couples lives by changing those discriminatory laws.¹⁴

Now the second two stories, from the other area of my responsibility:

Greg has been employed as the website co-ordinator for an online bookstore for twelve months. Their office is on the eighth floor of a fifteen-storey building. Greg, who uses a wheelchair, loves his job, but is embarrassed on a daily basis by having to go to the ground floor and ask at the security desk for the key to the one accessible toilet in the building. The building is about to be refurbished, and Greg knows that a unisex accessible toilet is not to be included in the bank of toilets on his floor. He correctly believes that this is a requirement under the *Disability Discrimination Act 1992* (Cth) (DDA), but is loath to risk his job by lodging a complaint. The embarrassment and frustration is finally too much for Greg, and he resigns from his job. He is added to the nine per cent of people with disabilities who are unemployed, which is twice the national average.

My predecessors and myself have – in conjunction with State and Commonwealth regulators, the building industry, and the disability sector – been working on the development of DDA Access to Premises Standards for a decade. These

¹⁴ See Australian Human Rights Commission, <<http://www.humanrights.gov.au/samesex/index.html>> at 30 April 2007.

Standards would mirror proposed changes to the Building Code of Australia, and make it compliant with the DDA. A draft was released for consultation in 2004, and further work has been done since that input. There is broad public support for achieving clarity and certainty in this area. Proposals have been with the Government since mid-2006. Along with Greg, we are still waiting.¹⁵

And, so that I am not tagged as being totally “last century”, my final story is about the web:

Gina, who has always had an interest in computers, decided to supplement the family income by buying and selling on auction sites while supporting their two young children at home. She also prefers to do much of the family shopping online and trades in shares. In order to access many websites, she is required to input a randomly generated set of numbers which appear on her computer screen. Her web browser – which speaks to her as she has a vision impairment – cannot read these numbers because of the way they are generated. She is therefore unable to access these sites, and could lodge a discrimination complaint under the DDA.

The Commission has been working for twelve months with the Australian Bankers Association on guidelines for the implementation of security protocols which do not exclude people with various disabilities. These guidelines are about to be released for comment. This work is a demonstration of the partnerships which we create to try to address much of the systemic discrimination which exists in our community against people with disabilities.¹⁶

¹⁵ Australian Human Rights Commission, *Access to Premises* <http://www.humanrights.gov.au/disability_rights/buildings/access_to_premises.html> at 30 April 2007.

¹⁶ Australian Human Rights Commission, *Access to electronic commerce and new service and information technologies for older Australians and people with a disability* (2005) <http://www.humanrights.gov.au/disability_rights/inquiries/ecom/ecom.html> at 30 April 2007.

Not all of you will be presented with the same opportunities which I have been lucky enough to have. But, as legal practitioners, or holders of a law degree, you will all have some chances to make changes which will improve someone's life. This lecture has not been an attempt to rally you to a crusade. Rather, it has sought to encourage you to view the profession in which all of you seek to embark as one relating to the lives of people, rather than to the development of statute books, case law and electronic databases. These latter items are just the tools you will use – the lives are where you can make changes. Quite often, law is not the dramatic situations which we see in television programmes. Although it is sometimes fun, it is often just a hard slog. But you can make a difference and I encourage you to do so.

Thank you for the chance to speak with you today.