



Physical Disability Council
New South Wales

Physical Disability Council of NSW Inc

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The Secretary

Senate Legal and Constitutional Legislation Committee

Parliament House

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15 July 1998

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HUMAN RIGHTS LEGISLATION AMENDMENT BILL

1. INTRODUCTION

1.1 The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities in NSW.

PDCN was formed in 1994 and membership is open to individuals with physical disabilities, organisations representing people with physical disabilities and other interested individuals. The committee of management is comprised of a majority of people with physical disabilities.

PDCN takes this opportunity to make its submission to the Senate Committee in relation to the **Human Rights Legislation Amendment Bill (No 2) 1998** ('HRLAB2'). We were not sufficiently resourced to be able to comment on the **Human Rights Legislation Amendment Bill 1996** ('HRLAB1') when that Bill was before the Senate Committee in 1997, and would like to take this opportunity to comment on our concern about "costs" in that Bill.

1.2 PDCN is concerned about the content of a number of aspect of both Bills, but has particular concerns in *HRLAB2* in relation to the:

- change in the structure of the Commission to remove specialist Commissioners
- change to the right of the Commission to intervene in court hearings with a human right component
- removal of compensation and damages and the change of focus of the Commission.

1.3 PDCN's main concern however is with the *HRLAB1* amendment relating to the issue of "costs following the event" in disability discrimination cases, particularly in view of the amendment in *HRLAB2* which removes the compensation and damages which were suggested as one of the justifications for making costs follow the event.

2. REMOVAL OF SPECIALIST DISABILITY COMMISSIONER

2.1 The amalgamation of the functions of the Disability Commissioner into the functions of the Deputy President responsible for human rights and disability discrimination is an improvement of the initial plan to have only generalist Deputy Presidents, but falls far short of making people with disabilities feel any confidence about the future direction of the Commission.

2.2 Experience with numerous government programs is that when the needs and rights of people with disabilities are amalgamated with the needs and rights of another group (the aged, the ill, 'minorities' etc.), the needs of people with disabilities are relegated to a secondary position. This is all the more likely when the specific rights of people with disabilities is amalgamated with the broad category of human rights.

PDCN fears that the rights of people with disabilities could be made secondary to a wide range of other human rights grievances e.g. related to age, health, religion, industrial relations, voting etc. There is no guarantee that other cases will not be seen as more important than disability discrimination. This will be exacerbated if persons discriminated against on the basis of sex and race make their complaint with a human rights slant rather than a social justice or equal opportunity slant because lawyers and advocacy organisations see advantage in doing so.

2.3 Although we accept that it might be possible for a person without expertise and/or experience with disability to come to grips with the wide range of diverse forms of disabilities and forms of discrimination, an awareness and understanding is dependent on the time and resources available for developing such awareness and understanding. This is always a challenge but will be all the more difficult given funding recent cuts to the Human Rights and Equal Opportunities Commission and the additional responsibilities on a Deputy President under *HRLAB2*.

2.4 The loss of the Disability Commissioner will also undermine the leadership that past Disability Commissioners have shown in relation to disability discrimination. They have shown that people with disabilities can and should be central to the discussions and policy development needed to ensure equal opportunity, social justice and human rights.

Furthermore, given that human rights are more general than disability, it is possible that

the responsible Deputy President will never again be a person who has personal experience of the disadvantages imposed on people with a disability by ignorance, intolerance and prejudice.

3. COMMISSION INTERVENTION IN COURT HEARINGS

3.1 PDCN is concerned about the need for the Commission to seek the approval of the Attorney-General when intervening in proceedings involving human rights issues including disability discrimination issues. Our concern is that this power can give rise to a conflict of interest, particularly where the Federal government is a party to proceedings. Cases where the Federal Government has been involved in human rights cases have occurred in immigration, family law, and industrial relations matters.

3.2 The Federal Government has been a respondent in disability discrimination cases either directly or indirectly in *Telstra vs. Scott*, *Disability Action SA vs. The Minister for Employment*, *NCID vs the Office of Disability* and it is not at all inconceivable that it may be a respondent in future cases since it is a major employer, service provider, and funder of non-government organisations.

3.3 This additional hurdle for the Commission to clear before it is able to seek leave of the court for an intervention is:

- inefficient because it will involve duplication of resource effort when the Commission seeks to intervene in a case and
- inconsistent with *HRLAB1*'s intention to facilitate the Commission's role in acting as *amicus curiae* in anti-discrimination matters.

4. OTHER ISSUES

4.1 PDCN is concerned about the removal of the Commission's power to recommend the payment of compensation for breaches of unlawful discrimination and human rights abuses. Although our experience is that people making disability discrimination complaints do not seek damages and compensation but merely seek redress of wrongful discrimination, we believe that the power of the Commission to recommend compensation is an important residual power.

4.2 PDCN is also concerned about the possibility that a person proving a breach of their human rights will lose the right to compensation under the proposed *Human Rights and Responsibilities Act*. This amendment:

- sends a signal that disability discrimination is not a serious matter and
- takes away the right of an individual to seek compensation even when the complainant has suffered serious financial loss due to discrimination.

4.3 PDCN supports efforts to reduce the level of ignorance of anti-discrimination laws, but is concerned about the Commission's increased education role if the increased function is at the expense of resources being allocated to the important function of complaints handling and policy development.

4.3 It has been claimed in some circles that a lower priority to the complaints function is

justified by the lower than expected number of complaints that have been lodged by people with disabilities. PDCN believes that because “complaining” is very much anathema to Australian culture, and because people (with disabilities) are unaccustomed to “complaining”, expectations of early success with a complaints process were exaggerated. For people with disabilities to make complaints involves an education and empowerment process which PDCN believes is only now beginning to take root. It would be a strike to the heart of the complaints process to allocate fewer resources to the complaints function.

5. COSTS FOLLOWING THE EVENT

5.1 PDCN would like to take this opportunity to re-iterate what others have pointed out in earlier submission to this Committee – that the “costs following the event” rule would be equivalent to repealing the Disability Discrimination Act.

5.2 We are led to believe that the argument in support of the “costs to follow the event” amendment is that more lawyers will be attracted to disability discrimination cases because they will be better rewarded than under a regime in which each party pays its own costs, and that as a result, there will be more anti-discrimination cases and more precedents affirming the rights of people with disabilities.

5.3 The PDCN believes on the basis of the experience of its members that that the demand for legal services from people with disabilities will be all but eliminated. People with disabilities will stop making complaints because:

- while they can control their own costs, they cannot control the costs of well resourced opponents
- even if they, together with their legal representative, are certain of the justice of their case
 - they are unlikely to risk the financial cost of a loss unless they are certain that these costs can be contained rather than unlimited
 - they will not proceed with a complaint because they will fear that the defence of “unjustifiable hardship” will succeed
 - they are likely to expect respondents to take cases to the Federal Court merely as a strategy to defeat the opponent because they will estimate that most complainants will be under-resourced to risk proceeding to the Federal Court
 - they are unlikely to have sufficient faith in the legal system as a deliverer of affordable justice.

5.4 PDCN also believes that to the extent that the “increased supply argument” relies on earnings from awards, the argument appears to miss the point that many people making complaints are in general not so much interested in seeking monetary awards but are instead seeking to assert their citizenship rights to an accessible environment. In any case, where the complainant is seeking damages, the value of the damages is likely to be small, particularly if the Commission loses the power to recommend the payment of compensation for unlawful discrimination.

It is likely to be zero if a person who alleges and proves a breach of their human rights

loses the right to compensation – as is intended under the amended *Human Rights and Responsibilities Act*. In either case, the damages are unlikely to lead to the type of rewards which will attract many contingency lawyers to disability discrimination cases.

Yours sincerely,

John Moxon

PRESIDENT