

NATIONAL ASSOCIATION FOR RETRAINING

THE DISABLED IN OFFICE WORK

ANNUAL PRESENTATION OF NADOW AWARDS

North Sydney, 29 February 1980

5.30 p.m.

LAW REFORM AND THE DISABLED

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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THE LAW REFORM COMMISSION

I am delighted to be invited to take part in this occasion. It is always a pleasure to join with those who raise the human spirit by showing how adversity can be overcome and handicaps can be conquered. I congratulate all those who are receiving awards. I applaud employers, voluntary agencies, government officers and indeed everyone who helps those with a handicap to reach a greater fulfilment in life.

I am the Chairman of the national Law Reform Commission. It is therefore not entirely irrelevant that I should be invited to perform this function in 1980. 1981 will be the International Year for Disabled Persons. Designation of the year for this purpose, will undoubtedly heighten public awareness, further community understanding of the needs of the disabled and perhaps even encourage lawmakers and those who advise them to an improvement of the legal system as it affects people with handicaps.

The Law Reform Commission was established in 1975. It is set up in Sydney. At any given time there are about ten Commissioners, half of them full-time, and a staff of 20. It is a small national investment in the improvement of the legal system.

None of the projects which have been given to the Commission by the Attorney-General is specific for the needs of people suffering physical or mental handicaps. But a number of our tasks concern such issues peripherally and I will mention a few of them.

When we reported on the improvement of criminal investigation by Federal Police, we suggested that regard should be had to four particular groups who need special protection to make sure that police dealings with them are fair. These groups we identified as Aborigines, migrants without a fluent command of the English language, children, except in the presence of their parents and persons with mental disabilities. The last mentioned class we left for a future time. I hope that in the course of time the Law Reform Commission will be asked to tackle the project on the reform of the laws affecting mental disability generally. There are few areas of the law more in need of a thorough overhaul than this.

We were asked to report on the law which should govern the transplantation of organs and tissues from one person to another. In a sense, a person needing a cornea or a kidney, a bone marrow graft or some other radical transplantation is a person with a distinct physical handicap. The miracles of transplant surgery have released many such people from daily dependence upon machinery support to an almost normal life. In the course of dealing with this project, we had to consider the redefinition of 'death' for legal purposes. This arose because many of the most suitable donors of organs and tissues are young people artificially sustained for a time by mechanical means in a hospital. Obviously, in such circumstances, potential conflicts of interest and duty can arise between those who are looking after the living and those who are looking after the dying. In such circumstances the law must speak with a clear voice, giving guidance to the medical profession, the patients involved, their families and the community generally.

In our most recent report, we had to deal with an issue which is undoubtedly relevant to people with handicaps. We were asked to advise the Commonwealth on the laws that should protect privacy in the computer age. We were asked to give specific advice in relation to the national Census. Many of you will recollect the objections that were raised, at the time of the last Census, to the questions concerning handicapped persons contained in the Census form. It was said to be an intrusion into personal privacy. Yet, unless such questions can be asked, government cannot plan and efficiently provide support and facilities for people with disabilities. Our report dealt with the machinery which should be provided to balance the competing needs for government information, on the one hand, and individual privacy, on the other.

One matter, upon which the Government disagreed with us, is also relevant. Until now, in Australia, we have destroyed the national Census returns once the data has been transferred to anonymous statistics. This massive destruction of information, in an identifiable form, provides certain protection for privacy at a time when privacy records can be computerised. But medical witnesses told the Law Reform Commission that we should keep the census forms, as they do in Britain and the United States, under strict security, for at least 75 years. It was said that, in the future, inherited diseases would be traced by just such material as the census return. Destroy the personal identifiers and it was said, you destroy the basis upon which medical science may be able to combat genetic-based disease. We in the Law Reform Commission were persuaded by this argument. The Government, acting on the advice of the Bureau of Statistics, rejected our view. The Census in Australia will continue to be destroyed. Doctors say that future generations will pay the price of this unique destruction of personal and family information.

A number of other tasks upon which we are engaged may be relevant to people with handicaps. For example, we are examining the law that should govern class actions and "standing to sue" in courts. In the United States, active groups have pursued court cases on behalf of large numbers of people similarly affected. They have used the "muscle" of

large scale litigation to bring the courts into the battle for social change. We do not have these procedures in Australia. The Law Reform Commission has been asked to say whether we should have them. Should we, for example, have a legal procedure by which NADOW and other groups like it could sue in the courts on behalf of all handicapped people of a special class?

There are many other important projects. I will not take you through them all. Suffice it to say that in all of our efforts we are endeavouring to make the law more sensitive to the rights of the disadvantaged, the poor, the inarticulate, the handicapped. Great forces for change are at work in Australian society and in its laws. These forces are fuelled by the concurrent development of widespread literacy, the new technology of distributing information, the changing moral and social attitudes of our country and the tremendous driving force of science and technology. It is little wonder that the law and its institutions are coming under challenge today as never before. I have no doubt that the law will meet the challenge. I hope that bodies such as the Law Reform Commission can help Parliament to make the law more relevant to the problems of today. The law can be an accessible force for the improvement of society.

THE LAW AND DISABILITY

In the United States awareness of the special needs of the handicapped is growing. One of the most remarkable features of the last few years has been a series of law suits by which, using anti-discrimination legislation, handicapped people and their legal representatives are fighting to gain further rights for the handicapped. In the forefront of the effort towards erasing discrimination against the handicapped are various legal service programmes. A typical example is the Handicapped Person's Legal Support Unit set up in New York City's Community Action for Legal Services. The head of the unit, a lawyer, has himself been in braces and on crutches since the age of one when he had polio. Accordingly, he is in a good position to know what it means to be handicapped.

According to the latest legal literature now reaching us from the United States 'handicap law' is the new area of the law. It is being expanded. A large number of legal questions are now being brought out in the courts of that country. Handicap legislation was formulated in the United States by the passage of the Vocational Rehabilitation Act in 1973. That Act provides that nobody (whether it is a school, hospital or other facility) may receive supportive Federal funds in the United States if it is shown that the body discriminates against 'an otherwise qualified handicapped individual ... solely by reason of his handicap' (Rehabilitation Act 1973, para.504 (U.S.)).

This general statement of principle has been adopted with vigour in the United States. It has encouraged large national programmes to cater for the needs of the disabled. The Act has been used in precisely the areas where handicapped people are at a particular disadvantage: housing, employment, education and access to public facilities. The experience of the United States has been that the area in which the greatest number of complaints come is discrimination in employment. The weapon provided by the Act is a denial of Federal funding, if it can be shown that discrimination has occurred against a person otherwise suitable for a job, solely because of a handicap.

Of course, some people do not get to first base. An epileptic pilot could not be said to be 'otherwise qualified'. A nearly blind person could not demand to be an ophthalmic surgeon. The limits of the U.S. legislation are obvious. In the first place, it is limited to the public sector or those depending on its funds. In the second place, it puts the handicapped person to the test of establishing discrimination and this is not always easy.

As recently as last June, the Supreme Court of the United States had to deal with a difficult case in South Eastern Community College v. Davis 47 LW 4689 (1979). Frances Davis suffered from a serious hearing disability. She wanted to be a registered nurse. She was denied admission to the College, a body that was receiving Federal funds. Medical evidence showed that she could not understand speech directed at her, except through lip reading. The College refused to accept her into

the course. She claimed discrimination. She was supported by the Court of Appeals. The Supreme Court, however, held otherwise. In doing so, the judges pointed to the difficulty of deciding such cases and the way in which times change:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [the Department of Health, Education and Welfare].
Powell J. (for the Court) at 4693.

DEVELOPMENTS IN AUSTRALIA

We in Australia have different constitutional arrangements. We have nothing equivalent to the Rehabilitation Act of 1973 of the United States. A great Inquiry by the Woodhouse Committee into National Compensation and Rehabilitation seems to have come to nothing. The opposition of the legal profession, the insurance industry and the trade union movement, in combination with difficult economic times, seem to have postponed a national, comprehensive approach to compensation and rehabilitation in Australia. For all that, things are happening.

In the State sphere, the Anti-Discrimination Board of New South Wales has published a close analysis of the discriminatory provisions of legislation in New South Wales affecting people with physical and mental handicaps. It is a splendid report with many hard cases of discrimination both in the language used by Parliament and in the conduct of otherwise good citizens, discriminating against people because they have

In South Australia, a Committee under Sir Charles Bright has delivered a report on the legal aspects of discrimination against the handicapped. In the Commonwealth sphere, I was privileged to attend a conference organised recently by the Department of Social Security. I expect that we will see progress in the reform of the Commonwealth statute book as it affects the handicapped and in the provision of means to redress complaints by handicapped people and to conciliate and improve their lot by persuasion and agreement.

CONCLUSION

One of the basic problems of society in coming to terms with the handicapped arises, I believe, from the atavistic fear that exists in all of us of injury, death and disability.

The lawyer in charge of the New York Handicapped Persons Legal Support Unit put it this way:

Looking at why the handicapped are discriminated against ... I attribute it to an unconscious fear of injury or death. When able-bodied people come into contact with someone with a disability, they see a potential threat to themselves - a reminder of the fragile nature of life. And the able-bodied people don't want to be reminded.

I believe that this statement adopts too pessimistic a view of the relationship between the able-bodied and the handicapped, at least the physically handicapped. Initiatives taken in the legal area are paralleled by the work of voluntary agencies and not least the splendid work of NADOW. Although I am sure that their practical help to one individual is worth hours of talk and the dreams of academic debate, I also believe that the law should come to play its proper part. This will be:

- * to encourage a new sensitivity to the needs of the handicapped;
- * to provide redress where there is unwarranted discrimination;
- * to facilitate the provision of needed services and in particular in education, employment, housing and access;

- * to reinforce the work of handicapped people themselves and those who help them and to sustain bodies such as NADOW and those who participate in its work.

I applaud what you are doing and I am proud to have been invited to present these awards.