

BREAKTHROUGH

THE NATIONAL BULLETIN OF THE INTERNATIONAL

YEAR OF DISABLED PERSONS

COMMENT

DISABLED PERSONS: WHAT SHOULD THE LAW DO?

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

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ANOTHER INTERNATIONAL YEAR?

I used to be against International Years of this and that. International Years for Women, International Years for Children and now for the Disabled. Razzmatazz and hullabaloo : what good did they do?

Well, now I believe that change in society may often be the result less of what lawymakers do in Parliament than what leaders of opinion can achieve in the community at large. Lawmakers and law reformers often over-estimate their capacity to change things long established by the mere enactment of the new statute. Though such legislation is often very necessary and can fortify and encourage changes already begun, the initiative for changed attitudes must often come first in the community, if laws are to be effective.

Doubtless some of the enthusiasm of an International Year will be mis-spent. Some will be wasted. Much will be transient. But the concentration of community opinion on unfair disadvantages and unjust discrimination will be salutary. In the case of the International Year for Disabled Persons, there will surely be many opportunities to raise community understanding of the problems which the disabled face in modern Australian society. Some of the impressions left will last and may provide a sound basis for laws which reinforce and sustain supportive community attitudes of understanding and appreciation.

THE LAW REFORM COMMISSION

The Australian Law Reform Commission works on projects given to it by the Federal Attorney-General. None of the projects so far assigned has been specific to the needs of people suffering from physical or mental handicaps. A number of our tasks have concerned such issues peripherally. In all of our efforts, the Commission has endeavoured 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 a 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 Persons' 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.

In June 1979, 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 so doing, 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 national 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 a desirability and nothing else.

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. 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 supporting voluntary bodies;
- * to encourage community appreciation of the fact that disability can include mental as well as physical disability. There should be no hierarchy of community acceptance of discrimination based on discrimination amongst the disabled between the physically and mentally handicapped.

It is my hope that during the International Year, the law, its personnel, lawmakers and law reformers will play their part in contributing to improved laws. Passing laws to abolish discrimination is not the whole answer. But laws can reinforce informed and sensitive community opinion. Effective law reform could sustain and carry on the achievements of the International Year beyond 1981.