

## LAW AND CHANGE

### THE DISABILITY DISCRIMINATION ACT 1992: GENESIS, DRAFTING AND PROSPECTS

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*[This article analyses the issues surrounding the Disability Discrimination Act 1992 (Cth). It briefly examines the extent and nature of disability discrimination in Australia, traces the evolution of the legislation, and then comments on the potential effectiveness of the legislation to address this discrimination. Despite significant reservations, the author concludes that the legislation will have a positive impact on such discrimination and thus should be applauded.]*

#### INTRODUCTION

Australia, as a country that prides itself on its commitment to human rights, has often legislated to create a more 'just' society. The Disability Discrimination Act 1992 (Cth),<sup>1</sup> deserves our attention, both as an attempt to secure human rights for all people living in Australia, and as a new stage in the development of anti-discrimination law in this country. The legislation was inspired by a:

vision [of] a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights . . . where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference.<sup>2</sup>

This article seeks to briefly trace the evolution of the legislation, from its inception to its commencement, and then consider the factors which might impact on the Act's potential to realize this vision.

In order to appreciate the Act's capacity to counter disability discrimination, it will first be necessary to examine the extent and nature of discrimination. Thus, Part 1 of this article will attempt to convey a sense of the pervasiveness and various experiences of disability discrimination in our society, and will canvass some previous legislative responses to the issue.

Secondly, the genesis of the legislation will be outlined, focusing on the

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<sup>1</sup> Henceforth, 'the Act'. The second reading of the Bill in the House of Representatives was received on the 26 May 1992 (Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750). In the Senate, the Bill received its second reading on the 8 September 1992 (Commonwealth, *Parliamentary Debates*, Senate, 8 September 1992, 534). The Senate Standing Committee on Community Affairs conducted a hearing on the 8 October 1992 to examine the legislation and recommended a number of amendments in a report presented to the Senate on the 14 October 1992 (Commonwealth, *Parliamentary Debates*, Senate, 1808). These amendments were accepted by both the House of Representatives, 15 October 1992, 2332 and the Senate (Commonwealth, *Parliamentary Debates*, 15 October 1992, 1887). The Bill received royal assent on 5 November 1992.

<sup>2</sup> See the second reading speech of Mr Howe, Minister for Health, Housing and Community Services, Commonwealth, *Parliamentary Debates*, 26 May 1992, 2755.

processes of consultation and drafting undertaken. In Part 3 the provisions of the Act will be broadly described, as well as some of the Act's weaknesses and problems which are likely to eventuate. Fourthly, criticisms of the legislation from both the 'right' and the 'left' will be briefly raised.

From this background, finally, I will consider the prospects of the legislation to meet the aims of those who proposed, supported and realized its creation. My conclusion, although necessarily speculative, is that while the Disability Discrimination Act is likely to have some beneficial impact upon the incidence of discrimination in Australia, it is extremely unlikely in itself to meet the great expectations placed upon it by its drafters. Nevertheless, any attempt to ameliorate the prevalence of discrimination based on disability in Australian society, is a measure which ought to be applauded.

### 1. DISABILITY DISCRIMINATION IN AUSTRALIA

The Disability Discrimination Act 1992 is designed to meet three purposes: to eliminate discrimination, as far as possible; to ensure, as far as practicable, the right of people with disabilities to equality before the law; and, finally, to promote acceptance within the community of the fundamental rights of people with disabilities.<sup>3</sup> In order to appreciate the effectiveness of the Act in realising these aims, it is essential to consider the extent of disability within our community, the nature of discrimination suffered by people with disabilities, and the history of government attempts to address this injustice.

#### 1.1 *Disability Within the Australian Community*

For a long time there have been very few statistics available concerning people with disabilities in Australia.<sup>4</sup> The most comprehensive data presently available is from the 1988 Australian Bureau of Statistics study.<sup>5</sup> In this study, which relied upon personal assessments of disability (and therefore probably underestimated its figures<sup>6</sup>), it was reported that 15.6 *per cent* of the Australian population suffered from some disability (defined by a list of selected impairments<sup>7</sup>) and that in 13 *per cent* of the population this disability led to some handicap or limitation in the person's abilities in relation to self-care, mobility, spoken communication, schooling or employment.<sup>8</sup> Four *per cent* of the population defined their handicaps as severe. The proportion of people with disabilities among the Australian population, already high, is expected to further rise over time through factors such as the increase in motor vehicle injuries, improved medical care and higher life expectancies.<sup>9</sup>

<sup>3</sup> Disability Discrimination Act 1992 (Cth), s.3.

<sup>4</sup> Department of Community Services, *New Directions: Report of the Handicapped Programs Review* (1985) 8.

<sup>5</sup> Australian Bureau of Statistics, *Disabled and Aged Persons Australia* (1988), (Cat. No. 4118.0).

<sup>6</sup> *Ibid.* 34: there may have been under-reporting of sensitive conditions (e.g. schizophrenia, mental retardation, degeneration, alcohol or drug-related illness), intermittent conditions (e.g. asthma, epilepsy) and less obvious conditions (e.g. mild diabetes).

<sup>7</sup> *Ibid.* 37: impairments listed included loss of sight or hearing, loss of consciousness, incomplete use of parts of the body, restriction on various activities, speech difficulties, slowness of learning, long-term treatment for an emotional condition, and disfigurement or deformity.

<sup>8</sup> *Ibid.*

<sup>9</sup> Mathews, J., 'Protection of Minorities and Equal Opportunities' (1988) 11 *University of New*

## 1.2 Experiences of Discrimination

Discrimination, by its nature, is not a commodity that we would expect to be shown in reliable statistics. Thus figures as to the occurrences of discrimination on the ground of disability in Australia are understandably scarce. However, statistics which are available clearly indicate that discrimination is prevalent, although its extent may not be readily apparent.<sup>10</sup> Thus, a large number of complaints regarding disability discrimination are received in those states that make it illegal, ranging from 24 *per cent* of written complaints in Victoria to 12 *per cent* in South Australia.<sup>11</sup> This trend suggests that, at the very least, some members of the community believe they are experiencing discrimination.

In addition, it is impossible to ignore the large amount of anecdotal evidence that indicates widespread discrimination against people with disabilities. This is reflected in the recent increase in the number of people with disabilities talking and writing about their experiences of disability, as well as in a number of government and independent reviews that have recently been undertaken.<sup>12</sup>

Personal reports suggest an endemic pattern of largely unintended (but nonetheless damaging) discrimination that could be termed attitudinal discrimination.<sup>13</sup> Some studies even report that negative attitudes towards people with disabilities are predominant in the community.<sup>14</sup> The major effect of discrimination is reported to be a sensation of exclusion that limits the opportunities of people with disabilities in all spheres of life.<sup>15</sup> Personal accounts of discrimination suffered can be quite shocking.<sup>16</sup>

In employment, common complaints are that employers can only see what people with disabilities cannot do (not what they can), that they are concerned by how clients and co-workers might react to a disabled person, that they assume that people with disabilities can only do boring, repetitive tasks, and finally that they are cautious when dealing with an unknown quantity: it may be safer for them to employ non-disabled people.<sup>17</sup> Discrimination is reported to have an impact in recruitment, in superannuation and other benefits, and in access to

*South Wales Law Journal* 1, 24. For example, the U.S. Department of Health, Education and Welfare estimated in 1974 that 50 *per cent* of the world population will be 'disabled' by the year 2000: Tay, A., *Human Rights for Australia* (1988) 52.

<sup>10</sup> See, for example, Bradshaw, S., *Discrimination against Disabled Persons: Results of a Survey Conducted December 1980-January 1981* (1981); New South Wales Anti-Discrimination Board, *Discrimination and Physical Handicap* (1979) vols 1-2; New South Wales Anti-Discrimination Board, *Discrimination and Intellectual Handicap* (1981); Committee on the Rights of Persons with Handicaps, *The Law and Persons with Handicaps* (1978) vols. 1-2.

<sup>11</sup> See summary of Equal Opportunity Commission reports in Ronalds, C., *National Employment Initiatives for people with Disabilities: A Discussion Paper* (1990) 221, 224.

<sup>12</sup> At times this trend is resisted, for example, note this reply to a 1981 survey: 'Yes, I am severely disabled, but the only discrimination I suffer is people like yourselves and socially conscious organisations discovering my condition and address and reminding me of the fact. See Bradshaw, *op. cit.* n.10, 32.

<sup>13</sup> In a 1981 survey, of those who returned a questionnaire a majority stated that they had experienced discrimination at some time: *ibid.* 46.

<sup>14</sup> The same survey reported community attitudes as experienced by people with disabilities to be predominantly negative: 41 *per cent* of respondents considered community attitudes negative as against 27 *per cent* who thought that they were positive: *Ibid.* 31, 47.

<sup>15</sup> Johnstone, R., 'Physical Disability in Employment' (1989) 63 *Law Institute Journal* 728.

<sup>16</sup> Observe the many examples of discrimination noted in Bradshaw, *op. cit.* n.10, 10-32.

<sup>17</sup> *Ibid.* 10-15.

training and promotion. There are reports of the dismissal of employees after they became disabled.<sup>18</sup>

In education, discrimination is often blamed for the generally low educational standards of people with disabilities. Similarly, the designs of transport and travel, housing and accommodation and public places are seen to prevent meaningful participation in society by people with disabilities. Access to goods and services is also often claimed to be discriminatory.<sup>19</sup>

Such personal reflections suggest a huge social problem that is unlikely to be completely solved by legislation. Many note the continuation of discriminatory and patronising attitudes,<sup>20</sup> negative and protective attitudes,<sup>21</sup> or negative and sympathetic attitudes<sup>22</sup> in the community. As one respondent explains: people just don't think logically about disability.<sup>23</sup> Although it is difficult to know how representative such comments are, the frequency and consistency of reports of discrimination are powerful evidence that widespread problems exist.

Clearly these experiences impact on the opportunities of disabled people and thus poverty appears to be a natural corollary of disability.<sup>24</sup> To put it bluntly, poverty is the norm for a disabled person in our community,<sup>25</sup> apparently more or less regardless of the severity of the handicap suffered.

In any case, the negative effects of discrimination upon people with disabilities, even if its incidence is not as widespread as is claimed, should not be underestimated. Discrimination against people with disabilities does not just limit their employment opportunities and financial position: judgments made by others have wider effects on the availability of social contacts and support and, naturally, upon self-esteem.<sup>26</sup> In many cases, people with disabilities may be more constrained in their lives by other people's perceptions than they are by their actual disabilities.<sup>27</sup>

It is hardly surprising then, given the number and seriousness of these complaints of discrimination, that 95 *per cent* of the participants in National Consultations held in 1991 supported the concept of federal disability discrimination legislation.<sup>28</sup> Clearly there is a widespread perception that disability-based dis-

<sup>18</sup> *Ibid.* 11.

<sup>19</sup> See generally Shelley, M., (Disability Advisory Council of Australia), *Report of the National Consultations with People with a Disability* (1991), especially at 18-26.

<sup>20</sup> Lawrence, A. (ed.), *I Always Wanted to be a Tap-Dancer* (1989) x.

<sup>21</sup> Department of Employment, Education and Training, *New opportunities for People with Disabilities* (1990) 6.

<sup>22</sup> Storey, H., 'Opening Address' in Cummins, R. and Baxter, C. (eds.), *Disability, Human Rights and Law Reform* (1982) 3, 4.

<sup>23</sup> Report of interview with Laurie Alsop contained in Lawrence, *op. cit.* n.20, 7.

<sup>24</sup> Australian Government Inquiry into Poverty, *Third Main Report: Social/Medical Aspects of Poverty in Australia* (1976) ch.4 as cited in Bradshaw, *op. cit.* n.10, 7.

<sup>25</sup> McCredie, L., 'IYDP: Breaking Down the Barriers' in Cummins, R. and Baxter, C., *Disability, Human Rights and Law Reform* (1982) 7, 9.

<sup>26</sup> For example, in a 1983 survey of the attitudes of women and girls with disabilities the factors causing personal anxiety were reported as 'Independence' (58 *per cent*), 'Social Contacts' (50 *per cent*), 'Other People' (41 *per cent*) and 'Self-Perception' (15 *per cent*). In so far as a negative self-image is created and reinforced by overt or hidden discriminatory attitudes, this response shows that the effects of discrimination will be more than purely economic: Steinberg, M. (National Women's Advisory Council), *Special Consultations with Disabled Women and Girls* (1983) 22.

<sup>27</sup> Scotch, R., *From Good Will to Civil Rights: Transforming Federal Disability Policy* (1984) 28.

<sup>28</sup> Ronalds, C., *National Employment Initiatives for people with Disabilities: Report of the National Consultations with People with Disabilities* (1991) 29.

crimination is an important social issue. However, one must question the ability of legislation to effectively address such potentially widespread discriminatory attitudes and practices in light of the very pervasiveness of such reported experiences.

### 1.3 *The History of Government Attempts to Address Disability Discrimination*

Considering the long-term history of the treatment of people with disabilities in Australia, the Disability Discrimination Act should be considered something of an innovation. Thus, most previous legislative efforts are of little assistance in seeking to ascertain the likely practical and attitudinal changes that may result from the new legislation.

In Western countries, the history of government intervention until very recent times has been basically paternalistic, based upon notions of ‘charity’ rather than entitlement:<sup>29</sup> an attitude that defines the disabled as ‘deserving poor’ who are dependent upon the state through no fault of their own.<sup>30</sup> In the United Kingdom, for example, early legislative efforts were confined to ‘white cane laws’ and ‘guide dog laws’ or provisions in non-specific poor laws.<sup>31</sup> In the United States, some states still provide such laws as their only protection.<sup>32</sup>

The ‘charity-medical service paradigm’ also used by Australian legislatures, in fact created, through its emphasis on the provision of specialised services to people with disabilities, an environment of negativity and stigma in which people with disabilities were constructed as not ‘fully paid up’ members of society.<sup>33</sup> Government experience from such an era of segregation and exclusion has little to offer to an age immersed in the rhetoric of ‘normalisation’:<sup>34</sup> legislation based on this premise can only continue the cycle of disadvantage suffered by people with disabilities.<sup>35</sup>

Interestingly, later this century more innovative laws have begun to achieve some popularity in many Western nations, such as the United States’ Architectural Barriers Act of 1968 and Rehabilitation Act of 1973<sup>36</sup> and the United Kingdom’s Chronically Sick and Disabled Persons Act 1970.<sup>37</sup> Such measures reached their logical conclusion in the sweeping Americans with Disabilities Act 1990. To a greater or lesser degree all these pieces of legislation have begun to deal with problems of disability more as issues of entitlements or ‘rights’ rather than as charity. Accordingly, they form part of a global movement for human rights or civil liberties<sup>38</sup> that has been replicated in Australia.<sup>39</sup> However, the extremely

<sup>29</sup> McCredie, *op. cit.* n. 25, 7.

<sup>30</sup> Scotch, *op. cit.* n.27, 9.

<sup>31</sup> Topliss, E. and Gould, B., *A Charter for the Disabled* (1981) 77.

<sup>32</sup> See the tables contained in Sales, B., Powell, D. and Van Duizend, R., *Disabled Persons and the Law: State Legislative Issues* (1982) 158-168.

<sup>33</sup> Law, G., ‘Public Policy and Social Constructions of Disability’ [1991] 2 *Australian Disability Review* 16, 19.

<sup>34</sup> Tay, *op. cit.* n.9, 51.

<sup>35</sup> *Ibid.*

<sup>36</sup> Described in Scotch, *op. cit.* n.27, 29.

<sup>37</sup> Topliss, *op. cit.* n.31, 77.

<sup>38</sup> See, for example, Topliss, *ibid.* and Sales, *loc. cit.* n.32.

<sup>39</sup> For example, the political climate by 1985 was such that a government report concentrating on the delivery of services to people with disabilities included as part of its discussion a human rights section: Department of Community Services, *New Directions: Report of the Handicapped Programs*

different focus of the overseas legislative measures preclude their use as an indicator of the possible effectiveness of the Disability Discrimination Act.<sup>40</sup>

Of greater aid are the recent Australian state and federal legislative schemes that deal with discrimination on the ground of disability. In some cases, these schemes have been in operation for up to a decade: New South Wales amended its Anti-Discrimination Act in 1981 and 1982 to incorporate discrimination on the ground of physical<sup>41</sup> and intellectual impairment<sup>42</sup> respectively following the Anti-Discrimination Board's surveys and reviews.<sup>43</sup> Victoria included impairment, which is broadly defined, as a ground of discrimination in 1982<sup>44</sup> following a report by the Office of Equal Opportunity favouring its inclusion.<sup>45</sup> In 1981 South Australia legislated with regard to physical handicap.<sup>46</sup> However, despite two commissioned reports in South Australia, recommendations to include intellectual handicap in the Act have not been implemented.<sup>47</sup> Western Australia amended its Equal Opportunity Act to include a broad definition of impairment, similar to that in the New South Wales legislation.<sup>48</sup> Most recently, the Northern Territory Parliament enacted the Anti-Discrimination Act 1992, which also makes discrimination on the ground of impairment illegal.<sup>49</sup> Plans by the Tasmanian Government to legislate in a similar manner do not appear to have come to fruition as yet.<sup>50</sup>

Each of these pieces of legislation set up a commission and/or a board or tribunal to deal with complaints under the Act and to fulfil certain broader functions such as research or education. All the systems have received a number of complaints yearly, some of which will be conciliated and some of which will require quasi-judicial determination.<sup>51</sup> However, measurements in terms of activities undertaken by these bodies tend to beg the question of whether the legislative régimes are fulfilling their purpose of discouraging discrimination or not.

*Review* (1985) 20-1. In the report there was a perception that special services for those with disabilities should be seen more rightly as a transitional measure: 'Generic or mainstream services should ultimately assume responsibility for ensuring that their services cater fully for people with disabilities', 120.

<sup>40</sup> The Chronically Sick and Disabled Persons Act of 1970, for example, deals almost exclusively with the obligations of Local Government to provide services for disabled residents and is thus not a helpful comparison. In a similar manner, the Americans with Disabilities Act 1990 is a rights-based (rather than complaints-based) mechanism which bears little relation to the Disability Discrimination Act.

<sup>41</sup> Anti-Discrimination (Amendment) Act 1981 (N.S.W.) Schedule 1 (which inserted s.49(A) in the principal Act).

<sup>42</sup> Anti-Discrimination (Amendment) Act 1982 (N.S.W.) Schedule 1 (which inserted s.49(P) in the principal Act).

<sup>43</sup> Anti-Discrimination Board of New South Wales, *Discrimination and Physical Handicaps* (New South Wales, 1979) as cited in Bradshaw, *op. cit.* n.10, 7.

<sup>44</sup> Equal Opportunity (Discrimination Against Disabled Persons) Act 1982 s.2.

<sup>45</sup> Bradshaw, *op. cit.* n.10, 44.

<sup>46</sup> Handicapped Persons Equal Opportunity Act 1981 (S.A.).

<sup>47</sup> Ronalds, C., *National Employment Initiatives for people with Disabilities: A Discussion Paper* (1990) 223.

<sup>48</sup> Equal Opportunity Amendment Act 1988 (W.A.) s.4.

<sup>49</sup> Anti-Discrimination Act 1992 (N.T.) s.19(1)(j).

<sup>50</sup> Evidence before the Hearing of the Senate Standing Committee on Community Affairs, Parliament of the Commonwealth of Australia, held in Canberra, 8 October 1992, presented by Mr Kim Duggan of the Attorney-General's Department.

<sup>51</sup> See, for example, Commissioner for Equal Opportunity, Victoria, *Fourteenth Annual Report 1990-1* or Ronalds, C., *National Employment Initiatives for people with Disabilities: A Discussion Paper* (1990) 87-95, 215-226.

There are some real difficulties in determining whether anti-discrimination legislation that is, ultimately, an instrument of social policy, is 'working' or fulfilling its aims at all. As Rosemary Hunter points out, a simplistic inquiry:

immediately beg[s] the question of how the Act's contribution to eliminating discrimination . . . can be measured, or how, indeed, it can be determined whether discrimination is being eliminated at all. Further, what level of complaints might indicate that the Act is working? Can an ideal pattern of outcomes . . . be posited?<sup>52</sup>

With regard to complaints, one might assume that publicity given to successful discrimination cases might deter other potential discriminators from such conduct. However, cases to date, being randomly brought, have only covered a small number of the situations in which discrimination is alleged to be rampant: in fact, most cases have been confined to those involving people with mild disabilities or who have acquired their disabilities after birth in relation to an employment accident.<sup>53</sup>

Furthermore, anti-discrimination legislation aims at a 'ripple effect' through which progressive education is intended to change community attitudes. Yet the fulfilment of such aims is almost impossible to verify, let alone to measure. For this reason, it is difficult to conclude what success the state disability discrimination schemes have had to date.

Under Commonwealth legislation the Human Rights and Equal Opportunity Commission has some responsibility for the human rights of people with disabilities. The Declaration on the Rights of Mentally Retarded Persons (1971) and Declaration of the Rights of Disabled Persons (1975) are both scheduled to the Human Rights and Equal Opportunity Act 1986 (Cth), giving them some limited effect in Australia. The Commission can review existing and proposed legislation in the light of their principles, and can conduct inquiries, research or educative activities.<sup>54</sup> In fact, the Commission has been remarkably active to date in upholding the rights of those with disabilities, given its limited mandate in this area.<sup>55</sup>

Unfortunately, assessing the effectiveness of the Human Rights and Equal Opportunity Act is as difficult as judging the state régimes, above. It is extremely difficult to determine whether these pieces of legislation have met their own aims, let alone whether it follows from this evidence that the Disability Discrimination Act will be able to meet its aims. What is clear is that the state and federal provisions, although supported and encouraged by a majority of commentators, are not considered to have been sufficient, by themselves, to eliminate discrimination nor are they seen to provide complainants with complete redress.<sup>56</sup> The number of calls for Commonwealth legislation on the issue reveal, at the very

<sup>52</sup> Hunter, R., 'Equal Opportunity Law Reform' (1991) 4 *Australian Journal of Labour Law* 226, 227.

<sup>53</sup> Ronalds, C., *National Employment Initiatives for people with Disabilities: A Discussion Paper* (1990) 87.

<sup>54</sup> See s.11(1)(e)-(h) Human Rights and Equal Opportunity Act 1986 (Cth). See further the Sex Discrimination and other Legislation Amendment Act 1992, for recent changes to the power of the Commission.

<sup>55</sup> See generally, Human Rights and Equal Opportunity Commission, *Annual Report 1989-90* (1990).

<sup>56</sup> Shelley, *op. cit.* n.19, 8-9.

least, that the experience of disability discrimination has not been eliminated by existing legislation. The problem remains a live one that the Disability Discrimination Act has been designed to remedy.

## 2. THE GENESIS OF THE ACT

There have been some misapprehensions about the genesis of the Disability Discrimination Act. For example, what little media attention there has been concerning the legislation has focussed upon the aspect of HIV/AIDS-related discrimination.<sup>57</sup> It is, however, clear that such discrimination, although it will be covered by the legislation, was not in fact the catalyst that produced it.<sup>58</sup> In fact, the Disability Discrimination Act began life as a fairly limited proposal to improve the employment opportunities of people with disabilities. From this base, the proposal broadened to encompass discrimination in areas like employment and education also. By the time the legislation was drafted, the expectations placed upon the Act had increased dramatically, with obvious consequences as to its likelihood of achieving its stated aims.

In 1990 the then Minister for Health, Housing and Community Services, Mr Brian Howe, commissioned Chris Ronalds to prepare a report on the barriers to employment for people with disabilities.<sup>59</sup> This was part of a more general government programme of review and did not respond to any specific development. The discussion paper produced recommended, as one of its key measures, that the Commonwealth enact 'national, comprehensive legislation' to prohibit discrimination on the ground of disability in employment.<sup>60</sup> This recommendation was based upon national consultations in which over 95 *per cent* of participants supported the introduction of legislation.<sup>61</sup>

Discrimination by employers was identified by consultation sessions as one of the greatest barriers to employment of people with disabilities,<sup>62</sup> as was discrimination by co-workers<sup>63</sup> and harassment on public transport.<sup>64</sup> Mobility issues of transport and access, which were also identified as barriers, were considered to be the results of discrimination. Other barriers, such as job design or lack of flexible work arrangements, were also seen as amenable to change through anti-discrimination legislation.<sup>65</sup>

Following this recommendation, the proposed ambit of the legislation was broadened beyond its original employment focus. An inter-departmental committee was set up which consisted of representatives of the Attorney-General's Department, the Department of Health, Housing, and Community Welfare and a representative from the Disability Advisory Council. Its task was to examine

<sup>57</sup> *Age* (Melbourne) 22 April 1992.

<sup>58</sup> Interview with Chris Ronalds, Frederick Jordan Chambers, Sydney, 14 July 1992.

<sup>59</sup> Department of Health, Housing and Community Services, *Social Justice for People with Disabilities* (1991) 14.

<sup>60</sup> Ronalds, C., *National Employment Initiatives for people with Disabilities: A Discussion Paper* (1990) 101.

<sup>61</sup> Ronalds, C., *National Employment Initiatives for people with Disabilities: Report of the National Consultations with People with Disabilities* (1991) 29.

<sup>62</sup> *Ibid.* 9.

<sup>63</sup> *Ibid.* 16.

<sup>64</sup> *Ibid.* 12.

<sup>65</sup> *Ibid.* 11, 13.

options concerning discrimination against people with disabilities, not merely in an employment context, but in other areas throughout our society.<sup>66</sup>

Consultation was immediately undertaken by Disability Advisory Council consultant Maureen Shelley. Her brief was to consider the need for anti-discrimination legislation, to assess the required scope of the legislation and determine appropriate modes of redress.<sup>67</sup> Her consultation process, outlined in the report,<sup>68</sup> appears to be comprehensive on most measures; however, there has been some criticism raised<sup>69</sup> of her method of excluding non-disabled persons from her sample. It appears that this criticism, even if valid, should not bring her results into question. Once again, an overwhelming majority of participants supported the need for Commonwealth legislation.<sup>70</sup> It is noteworthy, however, that there were at least five separate reasons given for this support: the perceived need for the legislation was already broadening, bringing an unavoidable fragmentation in the aims that the legislation was supposed to achieve.<sup>71</sup>

Together with public discussion following Chris Ronalds' Report these results were interpreted by the Commonwealth Government as indicating 'strong support for the introduction of national, comprehensive legislation'.<sup>72</sup> As might have been expected, the strength of community support was contested by opponents and critics of the legislation in the Senate's Committee hearing.<sup>73</sup> However, it is fair to say that complete (as distinct from 'broad' or 'strong') support has never been claimed by supporters of the legislation.

Considering the evidence obtained through this process, the committee recommended that anti-discrimination legislation be introduced and a drafting committee was established. To guide it in its work, the committee was able to draw upon a number of opinions and sources. Participants in Maureen Shelley's National Consultations had been given the opportunity to express preferences on detailed issues, to aid in drafting. In addition, the committee received a large number of submissions following the release of its 'Outline of the Proposed Bill' in 1992.

The Committee was also able to take into account the experience of other Australian jurisdictions and overseas legislation. The Attorney-General's Department confirmed that evidence from the United States, Canada and other Australian jurisdictions was considered in the drafting process. It was conceded, however, that the major focus had been Australian legislative experience because 'it's the closest'.<sup>74</sup>

<sup>66</sup> According to Chris Ronalds (Interview, Frederick Jordan Chambers, Sydney, 14 July 1992) the original plan was to "'hand it over"' to the Attorney-General's Department'; however, it was eventually decided that some involvement by the people who had originated it should be maintained: 'You can make your own assumptions about why.'

<sup>67</sup> Shelley, *op. cit.* n. 19, 1.

<sup>68</sup> *Ibid.* 3-6.

<sup>69</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50: the criticism was raised by Sue Taylor and Damien Lacey of the Australian Council on the Rehabilitation Of the Disabled (ACROD).

<sup>70</sup> Shelley, *op. cit.* n.19, 8-9.

<sup>71</sup> *Ibid.*

<sup>72</sup> Department of Health, Housing and Community Services, *Social Justice for People with Disabilities* (1991) 15.

<sup>73</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50: criticisms were raised by Ms Taylor and Mr Lacey of the Australian Council on the Rehabilitation of the Disabled (ACROD).

<sup>74</sup> Hearing of the Senate Standing Committee, *op. cit.* n.50: evidence given by Kim Duggan of the Attorney-General's Department.

The process of drafting thus reveals the divergent views of participants on the need for legislation and its purpose. These tensions are perhaps reflected in the mixture of innovation and conservation apparent in the provisions of the Act.

### 3. THE DISABILITY DISCRIMINATION ACT 1992

#### 3.1 *The Scheme*

As outlined in the explanatory memorandum:

The Act makes unlawful discrimination on the grounds of disability in the areas of employment, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the activities of clubs, sport, the administration of Commonwealth laws and programs and in requests for certain information. Harassment on the grounds of disability is also made unlawful.<sup>75</sup>

Thus the Act follows the recognised Australian model of prohibiting discrimination on certain grounds when it takes place in certain defined areas.<sup>76</sup> The definition of 'discrimination' offered, that of less favourable treatment, is again similar to other régimes and breaks no new ground.<sup>77</sup> Unsurprisingly, both indirect and direct discriminations are proscribed.<sup>78</sup> In addition, discrimination by reason of the use of palliative and therapeutic devices, interpreters or readers and guide dogs is covered by the legislation.<sup>79</sup>

The definition of 'disability' included in the Act is by far the broadest of any yet offered in an anti-discrimination statute. This drafting reflected community concerns that no one should 'fall though the gaps' of the definition.<sup>80</sup> The definition of 'disability' in the Act is also the clearest case of the Commonwealth benefiting from the mistakes of the state legislation. The Commonwealth definitions are clear and unlikely to cause litigation.<sup>81</sup> Certainly a decision such as that in *Kitt v. Tourism Authority of New South Wales*<sup>82</sup> (in which an epileptic was defined as intellectually impaired) would not be possible. The definition is also wide enough to cover HIV-infection unaccompanied by the onset of any disease.<sup>83</sup>

In a similar manner to other discrimination régimes, permanent or temporary exemptions from the operation of the Act have been granted to certain organisations or certain types of activities.<sup>84</sup> These exemptions came under close scrutiny in the Senate Committee, resulting in some alterations.<sup>85</sup> The migration exemp-

<sup>75</sup> Parliament of the Commonwealth of Australia, Disability Discrimination Bill, 1992: Explanatory Memorandum (House of Representatives, 1992) 2.

<sup>76</sup> These areas are defined in ss 15-40: Disability Discrimination Act 1992 (Cth).

<sup>77</sup> Disability Discrimination Act 1992 (Cth) s.5.

<sup>78</sup> Disability Discrimination Act 1992 (Cth) s.6.

<sup>79</sup> Disability Discrimination Act 1992 (Cth) ss 7-9.

<sup>80</sup> Shelley, *op. cit.* n.19, 10.

<sup>81</sup> For example, there will be far fewer problems of proof in cases of intellectual disability as there is no need to prove any defect in the structure and operation of the brain, only that a person suffers from a 'disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction': Disability Discrimination Act 1992 (Cth) s.4.

<sup>82</sup> (1987) EOC 92-196; 92-209.

<sup>83</sup> Disability Discrimination Act 1992 (Cth) s.4.

<sup>84</sup> Disability Discrimination Act 1992 (Cth) ss 45-58: these are for special measures designed to ensure equal opportunity or to meet special needs, for superannuation and insurance, for acts done under statutory authority, for infectious diseases, for charities, for telecommunications, for pensions and allowances, migration, and combat and peacekeeping duties.

<sup>85</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

tion, although questioned, was not likely to be removed. By contrast, the broad exemption granted to telecommunication carriers came under attack in three of the eight submissions made to the hearing.<sup>86</sup> The Committee finally made a compromise recommendation (which was accepted by both the full Senate and House) that only the provision of pay phones be exempted from the operation of the Act.<sup>87</sup> Interestingly, there was a strong perception in the Committee that the exemptions were too widely drafted, and probably were unnecessary.<sup>88</sup>

### 3.2 Novel Provisions

The Act contains three interesting innovations for Australian anti-discrimination law: firstly, it incorporates the United States' concept of 'unjustifiable hardship' within the definition of disability discrimination; secondly, it provides for the establishment of disability standards in particular industries; and finally, the device of voluntary action plans are created<sup>89</sup> to stimulate accommodation of people with disabilities and to provide standards to judge unjustifiable hardship.

The 'defence' of unjustifiable hardship is provided for in each individual section prohibiting discrimination on the ground of disability. For example, in s.15, which prohibits discrimination in employment, s.15(4)(b) provides that the section does not render discrimination unlawful if, taking into account certain information, the person, because of disability:

would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.<sup>90</sup>

Section 11 of the Act lays down guidelines for the application of this standard. Relevant circumstances will include the nature of the benefits likely and the financial expenditure required to be made.

According to Chris Ronalds, who was heavily involved in the drafting of the Act, the unjustifiable hardship provisions make the Act 'the most interesting and radical disability legislation in Australia . . . [e]mployers will have a higher onus to meet than they have under any of the state legislation'.<sup>91</sup> In particular, she believes that 'spelling out the criteria' in s.11 will make the provisions more effective. However, as will be discussed below, some doubts have been raised as to the exact interpretation of these provisions.

The provision for disability standards is also an innovation for Australian anti-discrimination law. The Act provides by Section 31 that regulations may prescribe standards in relation to the various areas of employment, education, accommodation, public transport and Commonwealth administration.<sup>92</sup> The contravention of a disability standard is made unlawful by the Act<sup>93</sup> and, most importantly, exemptions do not apply to such standards.<sup>94</sup> These innovative provisions 'cast a positive

<sup>86</sup> Helen Marsh and Gerard Goggin of the Telecommunications Network; Mr Harper, Australian Association of the Deaf; Damien Lacey, ACROD.

<sup>87</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 October 1992, 1898.

<sup>88</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>89</sup> Disability Discrimination Act 1992 (Cth) ss 59-65.

<sup>90</sup> Disability Discrimination Act 1992 (Cth) s.15(4)(b). All prohibitions contain similar clauses.

<sup>91</sup> Interview, Frederick Jordan Chambers, 14 July 1992.

<sup>92</sup> Disability Discrimination Act 1992 (Cth) s.31.

<sup>93</sup> Disability Discrimination Act 1992 (Cth) s.32.

<sup>94</sup> Disability Discrimination Act 1992 (Cth) s.33.

role on employers.<sup>95</sup> In addition, such standards were seen to be an excellent way to allow the Commonwealth to exercise some power over issues of access, an area over which it has no obvious constitutional power.<sup>96</sup> Such standards are likely to be drafted once the Disability Discrimination Commissioner has settled into her position. There have been frequent assurances that community consultation will precede the proclamation of any standards.<sup>97</sup>

### 3.3 *Potential Problems with the Act*

A number of potential problems were predicted by witnesses before the Senate Standing Committee during its consideration of the Act.<sup>98</sup> Some of these fears are easily disposed of, or are unlikely to eventuate; however, others remain of real concern and may cause difficulties when (or if) any cases fall to be determined under the Act.

Firstly, the Australian Medical Association made strong submissions that the wording of the definition of disability that includes 'the presence in the body of organisms capable of causing disease or illness'<sup>99</sup> is impossibly wide and should be altered. Instead they suggested that the definition be confined to 'the presence in the body of a notifiable infectious disease, including HIV and AIDS'.<sup>100</sup> An amendment based on this proposal was defeated in Committee.<sup>101</sup> As was pointed out by Senator Lees, it is difficult to see any problems arising from the breadth of the definition of disability: although it is true that certain organisms within the bowel, for example, might be within the definition, it is hard to imagine circumstances where this would be used as a ground of discrimination. Thus there is unlikely to be a problem in practice. Similarly, definitional problems relating to the word 'accommodation' raised by the Australian Council on the Rehabilitation Of the Disabled are unlikely to become an issue.<sup>102</sup>

It is more difficult to predict whether the second complaint made by the Australian Medical Association,<sup>103</sup> that information must be able to be sought from patients to safeguard their health as well as the health of their doctor, may become a problem in the future. It seems likely that the situations envisioned by the Australian Medical Association would indeed be covered by the exemption in Division 5 of the Act regarding public health and infectious diseases: this exemption is broadly worded and might be expected to be broadly interpreted. In such circumstances, it appears that the fears expressed are probably unjustified.

In comparison, it seems that the submission made by the Villamanta Legal Service raises an issue of concern.<sup>104</sup> It was pointed out that the wording of the

<sup>95</sup> According to Chris Ronalds, Interview, Frederick Jordan Chambers, 14 July 1992.

<sup>96</sup> *Ibid.*

<sup>97</sup> See, for example, the second reading speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2754.

<sup>98</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>99</sup> Disability Discrimination Act 1992 (Cth) s.4.

<sup>100</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>101</sup> Parliament of the Commonwealth of Australia, *Journals of the Senate* (No.196, Thursday 15 October 1992) 2918-9.

<sup>102</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>103</sup> *Ibid.*

<sup>104</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

legislation itself, as distinct from the outline of proposed legislation or explanatory memorandum, does not make clear exactly where the burden of proof lies with regard to the issue of unjustifiable hardship.<sup>105</sup> One reading of the legislation would be that a complainant has to negatively prove that there would be no unjustifiable hardship in order to make out a claim of discrimination. In contrast, the second reading speech and explanatory memorandum,<sup>106</sup> as well as the previous outline of proposed legislation, make clear that an evidentiary burden to raise the defence of unjustifiable hardship rests upon the respondent: if some evidence raising the defence is offered, it would then be the task of the Human Rights and Equal Opportunity Commission (or the Federal Court if required) to decide whether an accommodation would involve an unjustifiable hardship. This was further confirmed by the Minister for Justice, Senator Tate, in the Senate hearing.<sup>107</sup>

It is to be hoped that interpretation of the admittedly ambiguous provisions in the legislation would go hand in hand with the extrinsic materials as to legislative intention that are available. However, if this were not done, it would be possible for a complainant under the Act to have to prove the absence of the element of unreasonable hardship as a part of his or her claim. More careful drafting might have prevented this possibility.

Other potential problems raised at the Senate hearing, for example, the possibility of abuse of the scope of the exemptions or of action plans,<sup>108</sup> or problems of funding, appear to be issues that will only be possible to consider after the Act has been in operation for some time.

#### 4. CRITICISMS OF THE DISABILITY DISCRIMINATION ACT

Along with the problems that have been predicted in relation to its actual operation, there have been many criticisms made of the basic scheme of the Disability Discrimination Act. They divide broadly into those who believe that the Act is too radical, or that it is unnecessary, and those who criticise the Act for being insufficiently transformative. Both opinions deserve some attention.

##### 4.1 *Criticisms from the Right: A dangerous or a wasteful measure*

Although the Act was not actually opposed by the Coalition, their response was to seek the formation of a joint select committee to consider the legislation.<sup>109</sup> However, many serious criticisms of the Act were raised by Opposition members in both Houses of Parliament.

Notable among the criticisms levelled at the Act were that it was not necessary,<sup>110</sup> that it would place an intolerable burden upon business,<sup>111</sup> that its funding would be at the expense of service delivery<sup>112</sup> and that it would unduly

<sup>105</sup> See, for example, the wording of ss 15(4)(d) and 4.

<sup>106</sup> Parliament of the Commonwealth of Australia, Disability Discrimination Bill, 1992: Explanatory Memorandum (House of Representatives, 1992) 7.

<sup>107</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>108</sup> *Ibid.*, raised by the Villamanta legal service.

<sup>109</sup> Motion of Mr Bruce Scott: Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 144.

<sup>110</sup> *Ibid.* 208-9 (Mr Bradford).

<sup>111</sup> *Ibid.* 203 (Mr Broadbent).

<sup>112</sup> *Ibid.* 207 (Mr Campbell).

'bureaucratise' an issue that would be better left to the family.<sup>113</sup> None of these criticisms seem to be supported by sufficient evidence to militate against the adoption of the Act.

As seen in the evidence outlined in Part 1 of this article it appears that a Commonwealth anti-discrimination law is 'necessary': although state systems do exist, there are obvious advantages which flow from the implementation of a single, national disability discrimination law. It appears that community mechanisms do not, at present, prevent the occurrence of discrimination against people with disabilities: for this reason, some action should be considered necessary.

It is conceded that the cost of the Act remains unclear. Certainly, on-going funding is needed by the new Disability Discrimination Commissioner and further funding should be given to the Human Rights and Equal Opportunity Commission. However, there is no evidence that this will derogate from service delivery. As to the cost to business, it is hard to see why the defence of 'unjustifiable hardship' will not provide a complete protection for business interests. Such criticisms appear to originate from a lack of understanding of the legislation.

#### 4.2 *Criticisms from the Left: Too little imagination*

Criticisms of the conservative format of the Act have also been made. For example, the Australian Council for the Rehabilitation Of the Disabled lobbied for the inclusion of tax incentives for businesses to change discriminatory practices,<sup>114</sup> and the Australian Democrats would have preferred an Act that went further in protecting and advancing the rights of people with disabilities.<sup>115</sup> However, both groups did support the Act as a necessary 'starting point'.<sup>116</sup> Other critics might note the lack of affirmative action provisions in the legislation<sup>117</sup> and a few lament the loss of the 'equality before the law provisions' suggested in the original proposals.<sup>118</sup>

The most common criticism, however, of the Act is likely to be that it has remained within the traditional Australian anti-discrimination law design instead of adopting a new model more appropriate for people with disabilities. It is important to note that other options were clearly open to the government:<sup>119</sup> the most obvious example would be, of course, the 1990 Americans with Disabilities Act that is based broadly upon the setting of standards rather than upon a complaint-based method.

Commentators have also questioned the applicability of the model of anti-discrimination legislation to the 'new case' of disability discrimination.<sup>120</sup> The

<sup>113</sup> *Ibid.* 215-6 (Mr Tuckey).

<sup>114</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>115</sup> Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1320.

<sup>116</sup> *Ibid.*

<sup>117</sup> Note the criticism of similar legislation in Johnstone, R., *loc. cit.* n.15.

<sup>118</sup> Disability Discrimination Secretariat, *Outline of the Proposed Bill* (1992).

<sup>119</sup> In 1985 a report sponsored by the Ministry of Community Services considered a number of options to implement the human rights of people with disabilities in Australia. These included: (1) inclusion of the rights of the disabled in a national Bill of Rights; (2) encouragement of the rights of the disabled through government-funded citizen advocacy; (3) entitlement to generic services, such as education, to be assured for disabled people through legislative mandate; and (4) appointment of a Disability Discrimination Commissioner. Another intriguing suggestion was for the creation of a union of disabled people to protect disabled peoples' rights: Department of Community Services, *New Directions: Report of the Handicapped Programs Review* (1985) 21.

basic problem identified with the model of anti-discrimination legislation in the disability context is that it relies upon a basic test of comparability.<sup>121</sup> Where there are real differences between the persons who are being compared, so the argument goes, then comparison will be impossible. Interestingly, this was one of the few recommendations made by Maureen Shelley's report that was effectively ignored by the drafting committee. The preference of 'many participants' for the Americans with Disabilities Act approach of legislating 'a right to fair treatment', thus avoiding the need to make comparisons with others,<sup>122</sup> was not followed. This was strongly criticised by Senator Lees in the Senate hearing who herself advocated a rights-based, rather than 'victim-based' approach.<sup>123</sup> Chris Ronalds admits that there was great debate about this:

I think that there are problems with comparability in direct discrimination in relation to disability complaints, and I think that time will tell that, and has already told in NSW . . . But Attorney-General's were very keen to follow the model of the existing legislation.<sup>124</sup>

It appears that the importance of consistency between jurisdictions was considered paramount. Special provisions in the Act deal with issues peculiar to disability discrimination, for example the issue of access, however, it was clearly considered too radical to change the whole paradigm to deal with the issue of disability. Whether this will hamper the effectiveness of the legislation is an issue which will be considered in the next section.

## 5. PROSPECTS: WILL THE ACT ACHIEVE ITS AIMS?

As previously mentioned, the Act as concluded has three purposes: to eliminate discrimination, as far as possible; to ensure, as far as practicable, the right of people with disabilities to equality before the law; and to promote acceptance within the community of the fundamental rights of people with disabilities.<sup>125</sup>

### 5.1 *The prevention of discrimination*

The first two purposes, which are concerned with the prevention of discrimination, in great part form the practical focus of the legislation that underlies all the machinery provisions of the Act. The elimination of discrimination is apparently to be achieved by the Act through a mechanism that allows individuals to bring complaints of discrimination and, concurrently, provides community education services through the Disability Discrimination Commissioner.

Whether a complaint-based mechanism will be successful in discouraging discrimination is something that will only be determined by speculation and by extrapolation from existing legislation and its achievements to date. A comprehensive study of these factors is beyond the scope of this article. However, it has already been noted above that there are real problems with determining criteria by which to judge existing anti-discrimination régimes.<sup>126</sup> It is probably true to

<sup>120</sup> McCredie, *op. cit.* n.25, 10-11.

<sup>121</sup> Johnstone, *loc. cit.* n.15.

<sup>122</sup> Shelley, *op. cit.* n.19, 15-6.

<sup>123</sup> Hearing of the Senate Standing Committee on Community Affairs, *op. cit.* n.50.

<sup>124</sup> Interview, Frederick Jordan Chambers, 14 July 1992.

<sup>125</sup> Disability Discrimination Act 1992 (Cth) s.3.

<sup>126</sup> Hunter, *loc. cit.* n.52.

say that we do not know whether the existence of complaint mechanisms alters discriminatory behaviour. However, the consensus of 'common sense' is probably that some behaviour is deterred. The truth is that discrimination is a complex process, consisting of:

a plethora of formal and informal practices modified by societal acculturation and intertwined with messages from the inner consciousness.<sup>127</sup>

It is my opinion that legislation is able to affect such processes but that this cannot be quantified. For this reason, it is impossible to determine by deduction from empirical evidence whether or not the Disability Discrimination Act will help to eliminate discrimination.

However, although it is not proven that legislation can discourage discrimination throughout a society as a whole, clearly such legislation can be used successfully by complainants to prevent further recurrence of discrimination and possibly, any future discrimination by that person. At the very least, the provision of such a mechanism is a step, however small, towards the elimination of discrimination.

## 5.2 *Legislation and Attitudinal Change*

The matter is somewhat different for the third purpose of the legislation, however. It has been strongly argued that change in community attitudes can never be achieved through legislation and that thus the Disability Discrimination Act will be ineffective in changing the underlying attitudes of prejudice in the community.

This is a criticism that has, at some time or other, been levelled at all Australian anti-discrimination schemes. For example, one critic notes that although anti-discrimination legislation now exists in almost all states, 'there are still no guarantees that these same individuals can enter a building or even take a train if they rely on a wheelchair.'<sup>128</sup> There are justified fears about how far legislation can ever really go in changing the situation of a socially disadvantaged group.

Against this opinion is the position that recognises that changing attitudes in any community is a long and difficult process.<sup>129</sup> Changing laws has an 'educative and practical effect', but cannot be expected to automatically lead to the required changes in perception by the public or by people with disabilities themselves.<sup>130</sup> It is hoped by proponents of this view that even small steps may have effects that may lead to greater changes in the society in future years.<sup>131</sup>

However, it appears that both positions rest on a flawed distinction between changing 'behaviour' and 'attitudes'. It would appear that the two concepts cannot so easily be divided and that, in a sense, to alter one is to alter the other.

It is fair to say that the 'causes' of discriminatory conduct are not known. Various explanations have been offered for the existence of discriminatory attitudes in the community; some put it down to an unconscious fear of injury or death that is activated by the sight of a disabled person,<sup>132</sup> others to the entrenched

<sup>127</sup> Thornton, M., *The Liberal Promise* (1990) 7.

<sup>128</sup> Lawrence, *op. cit.* n.20, xi.

<sup>129</sup> Storey, *op. cit.* n.22, 4.

<sup>130</sup> *Ibid.* 6.

<sup>131</sup> McCredie, *loc. cit.* n.25.

<sup>132</sup> Kirby, M., 'Law Reform and disabled people' (1980) 4 *National Rehabilitation Digest* 19, 22.

human desire to be surrounded by others similar to ourselves.<sup>133</sup> In one study to address this question directly, the major factor isolated was 'cognitive anxiety' on the part of a person who feels uninformed and is uncertain how to behave or what to expect from the person with a disability.<sup>134</sup>

Positive attitudes were found to be significantly related to the amount of prior close contact with disabled people.<sup>135</sup> In such a case, the strategies of forcing people to modify their behaviour and meet with people with disabilities seems a valid one. It is through such changes that attitudes will change and the need for further complaints will disappear. That is, discriminatory attitudes and behaviour have been found to be strongly interlinked, if not identical. Changes in behaviour are likely to lead to changes in individual attitudes towards people with disabilities.

### 5.3 *An assessment*

Perhaps the key to assessing the potential of the legislation to change attitudes is to recognise that the legislation is not supposed to be the only tool through which progress is achieved: it is precisely the interaction of the legislation and other means of persuasion that is likely to have an effect in changing attitudes. Research and community education are very important in providing a barrier-free environment and will interact with legislation to achieve this objective.<sup>136</sup> It is interesting to focus upon Chris Ronalds' spirited defence of the legislation:

Anyone who thinks that it is the sole or only answer is a fool. It's simple. There are many people who obtain enormous benefits from the legislation. That in itself should justify its existence. It was always only one mechanism. I think that people criticise it a lot because they fail to understand: (a) the real politics of Australia, and (b) what the legislation could ever achieve and what it was ever designed to achieve. That's why you need all sorts of other mechanisms, affirmative action being only one of them.<sup>137</sup>

Even if it is unclear whether the legislation would change even one person's attitudes towards disability, it seems to me that the attempt would be worth making. In fact, the indications of the legislation's success are much stronger than this and suggest that the legislation will have some beneficial effects, even if only for those who actually use the complaint mechanism.

One concern is that the aim of community education cannot be met without full media coverage and interest. Unfortunately, indications of media concern with disability issues are not positive. For example, there are frequent complaints that people with disabilities cannot get coverage of their stories, as evidenced by the minimal coverage preceding the proclamation of the Act.<sup>138</sup> This is perhaps symptomatic of a wider disregard.

The 'national public education and awareness campaign' announced in the second reading speech of the Act may go some way to addressing this deficiency.<sup>139</sup> In addition, it is to be hoped that a Disability Discrimination Commissioner

<sup>133</sup> Rayner, M., 'Disability and Discrimination' [1992] 2 *Australian Disability Review* 31, 39.

<sup>134</sup> Gething, L., 'An investigation of attitudes towards disabled persons in Australia' (1982) 6 *Australian Rehabilitation Review* 46, 47-8.

<sup>135</sup> *Ibid.* 47.

<sup>136</sup> *Ibid.* 48.

<sup>137</sup> Interview, Frederick Jordan Chambers, 14 July 1992.

<sup>138</sup> *Age* (Melbourne) 22 April 1992.

<sup>139</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2755.

would be able to change this situation. Of course, this will depend on the budget allowed to the Commissioner and on the priorities of the individual appointed.

However, with even minimal publicity, it appears to me that the Disability Discrimination Act has the potential to go some way to meeting all of its aims. How far it is able to impact upon them is a matter that will be only seen with time.

## 6. CONCLUSION

Undoubtedly the introduction of such legislation, with its far-reaching implications for all people with disabilities, will be regarded as one of the most important of the many legislative and administrative reforms initiated by the government since 1983. It also signifies a major step forward in legislative reforms for disadvantaged Australians.<sup>140</sup>

The Disability Discrimination Act is a significant step both for the development of Australian anti-discrimination law and for the cause of people with disabilities in Australia. Barring constitutional challenge, the Act is likely to be with us for some time.

I have attempted in this article to assess the prospects of the legislation meeting the aims envisioned for it by its drafters and supporters and by the community as a whole. Such legislation deserves both examination and criticism, if necessary, because of its importance, at least symbolically, to the large number of people with disabilities in Australia.

To assess the prospects of the legislation I examined the incidence of discrimination against people with disabilities, in order to understand the problem that the legislation was attempting to ameliorate, and focussed briefly on the experience of other attempts at government regulation in Australia. I then outlined the scheme of the the Act, considering criticisms raised in Parliament and by community groups and possible problems in its operation. From this background, it was my conclusion that the Disability Discrimination Act had some potential to meet all of its three aims, although I consider that it is figuratively impossible to quantify its chances of success.

If the potential of the Act is to be met, its introduction must be accompanied by publicity and education of Australian society. An introductory campaign could be a positive impetus for the formation of better attitudes towards disability in Australia. Discrimination, although its causes are not known, is clearly related to unease, inexperience and ignorance. If the new legislation can combat any of these factors that still exist in Australia, then it will have been a positive step for the human rights of people with disabilities in Australia.

<sup>140</sup> Department of Health, Housing and Community Services, *Social Justice for People with Disabilities* (1991) 16.