Disability and the Bar

By Brenda Tronson and Aditi Rao

The daily practice of law has at times an uneasy relationship with disability. Barristers, we may unconsciously think, should seem invulnerable: in control, and impervious to obstacles. Clients, solicitors and judges (we perhaps assume) want counsel to be a 'safe pair of hands' in litigation and to handle with ease anything thrown at us. We might worry that if we are seen to have a disability, we might be seen to be less able in general.

What, then, for those of us with a disability? If we have an invisible one, we may perhaps be tempted to hide it. And if a disability is obvious for all to see, appearing on Phillip Street might make us feel discomfort or embarrassment for so obviously defying the medicalised idea of the 'normal' or 'able' body.

Underpinning such instinctive responses is, we suspect, the entirely legitimate desire to be seen as able counsel; not to be defined in the eyes of others by disability but to transcend it.

There is really no good reason why a barrister with, say, a mobility impairment should be any less of a barrister for that. The widespread availability of hearing loops today ought to mean that many kinds of hearing impairments should be accommodated readily in court. And literally thousands of us overcome our visual impairments by the use of eyeglasses.

Currently, there are other impairments currently seen as diminishing the capacity to be a barrister which ought not be seen as disabling at all. But ideally, a talented lawyer who may happen to have a disability should be able to participate fully in all aspects of the legal profession.

In the interests of maintaining the excellence of the Bar, such talented lawyers ought not be turned away by irrational barriers. It is thus a matter of enlightened self interest that the Bar should strive to reduce such barriers wherever possible.

Medical and social models

In considering which apparent barriers can be overcome in this way, it is useful to understand the two broadly accepted 'models' of understanding disability: the medical model and the social model.

Under the ***medical model***, which is the one many unconsciously adopt, a person's disability is caused by their impairments. A disability is primarily a health condition which needs to be treated, fixed or managed. The person with the disability is seen as broken, they are a 'disabled person': something is wrong with *them*. This manner of thinking tends to dehumanise people with disabilities. They become 'less than' others; the burden of disability – responsibility and ownership of it – tends to fall upon the individual.

Under the ***social model***, disability is caused by an interaction between the environment and impairment. In effect, a person is disabled by an environment which is not appropriate to their circumstances, rather than any impairment as such. The barriers leading to that disability or disablement might be physical (such as steps), but they might also arise from the attitudes of others or society generally, or be communication barriers. This model allows the burden to be understood to include aspects of the world that are external to the person. There is also a moral dimension: we *should* be making environmental adjustments to enable full participation and inclusion.[1]

Under this model, it is more readily apparent that all persons are equal and have equal rights to participate in society. Addressing disability in this context involves a consideration of how the environment might be modified to ensure that all can participate, rather than on trying to 'fix' any person.

The social model is reflected in the United Nations Convention on the Rights of Persons with Disabilities (see, for example, para (e) of the Preamble), which 'mark[ed] the official paradigm shift in attitudes towards people with disability and approaches to disability concerns.'[2]

The social model is also reflected in developments in Australian law. Section 5(2) of the *Disability Discrimination Act 1992* (Cth) (DDA) requires reasonable adjustments to be made 'for' a person with a disability. In *Watts v Australian Postal Corporation* [2014] FCA 370; (2014) 222 FCR 220 at 228 [23], Mortimer J's description of what is required by s 5(2) was as follows:

> 'To what does the adjustment relate? By s 5(2), it is made 'for' the person with a disability. It is not made 'to' the position the person occupies. It is not made 'to' the equipment a person uses. In the context of discrimination at work in Div 1 of Pt 2 of the DDA, it is an alteration or modification 'for' the person, which operates on the person's ability to do the work she or he is employed or appointed to do. The adjustment is to be enabling or facultative.'

The concept of an 'enabling or facultative' adjustment is consistent with the social model of disability. That is to say, it posits that the environment in which the person with a disability operates can be adjusted so as to reduce the barrier to participation. And the policy of the law is that this should be done unless it would cause 'unjustifiable hardship'.

Increase in accessibility

The installation of hearing loops in courtrooms in relatively recent times is an example of reducing barriers to access. Robinson SC has worked with the NSW Department of Justice and Attorney-Generals Department on such projects.

This demonstrates an important feature of the moral or social model of disability: the removal of barriers should not be individual crusades but a shared responsibility.

Another beneficial consequence is that, by making adjustments required for a particular disability widespread, both the disability and the need for adjustment will cease to be a deviation from a norm and instead be *included within* the norm. Like the rollout of hearing loops, the accessibility of courtrooms for the mobility impaired provides a good example of how this norm has shifted in recent memory.

As the Judicial Commission of New South Wales has observed in the Bench Book *Equality before the Law*:[3]

> 'If such adjustments are not made, people with disabilities and/or any carers are likely to:
- not be able to participate fully, adequately, or at all in court proceedings
- feel uncomfortable, fearful or overwhelmed,
- feel resentful or offended by what occurs in court,
- not understand what is happening and/or be able to get their point of view across and be adequately understood,
- feel that an injustice has occurred,
- in some cases be treated with less respect, unfairly and/or unjustly when compared with other people.'

The shift is important not just in equipment and facilities, but also in attitudes. So, for example, the accessibility ramp not only needs to exist, it needs to be kept clear. Technology should not only be installed: it needs to be switched on, updated and be maintained in working order. And so on. Ensuring this occurs can become a hidden burden, and another part of the attitudinal shift is to seek to avoid this burden falling only on those for whom the equipment and facilities is an absolute necessity.

Every-day adjustments

It is also useful to remind ourselves that every-day tools are, or can be, adjustments.

Consider the speed with which many barristers have adopted tablet technology. Most did so because tablets are useful and convenient. They can also provide adjustments or accommodations for disability. For example, the person who cannot carry five folders no longer needs to do so; the person who needs large font for legibility can zoom in; the person who cannot write or type can use portable voice-recognition technology.

Prescription glasses provide another example of an every-day tool which is an adjustment or accommodation. Without glasses, many people would not be able to perform (would be disabled in relation to) essential tasks of lawyers. The ubiquity, and acceptability, of glasses means we do not commonly think of them as redressing disability. If all adjustments or accommodations were so matter-of-fact, a large number of other conditions which are presently seen as, or as causing, disabilities would not be seen as disabling at all.

Room for improvement

One of the most useful things the social model of disability does is to remind us to ask the question: is the way we are used to doing something the only way, or the best way?

For example, the installation of a ramp or an elevator in addition to, or to replace, steps ensures that wheelchair users can access the premises in question. It also makes life easier for many other people, including people with document trolleys or wheeled bags and people carrying heavy bags or folders.

Another example pertinent to the legal profession is the long working hours that apply across the board. This is relevant to disability in two ways:

- if a person has a disability which impacts on the number of hours they can work, they may (seem to) be a less attractive candidate for a job, or they might decide not to apply at all; and
- the long working hours undoubtedly have something to do with the high levels of mental illness (which can also be, or cause, a disability) found in the legal profession,[4] whether that relationship is causal or simply aggravating, or perhaps a natural human response to the extended high stress that is all too common in our line of work.

A recent pilot study at a financial services company in New Zealand has demonstrated significant success in moving to a four-day week.[5] Productivity did not diminish. Stress-levels did.

On this basis, in the right circumstances, making an adjustment such as this could permit a person who could only work reduced hours to have as successful and productive a career as a person who is able to work the traditionally-expected hours per week. In other words, changing the social attitudes and expectations could remove or diminish the barrier which previously existed.

Further, extending the adjustment to everyone might result in greater productivity (and potentially career success) across the board, and better mental health outcomes as well.

Overall, by approaching questions of adjustments with an open mind, it is possible to benefit not only those persons with a disability for whom the adjustment might remove a direct barrier, but all. That benefit can extend beyond the individuals concerned and provide broader societal goods. For barristers, that might be measured not only in productivity but in a greater general capacity for good advocacy and good advice.

ENDNOTES

1 The addition of the moral dimension has been attributed to a 'human rights model' of disability also: https://nhri.ohchr.org/EN/News/Documents/Human_Rights_and_Disability_Manual.pdf

2 People With Disability Australia website, 'Social Model of Disability' <https://pwd.org.au/resources/social-model-of-disability/> (accessed 20 February 2019).

3 https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality_before_the_Law_Bench_Book.pdf

4 See, for example, Medlow S, Kelk N and Hickie I, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771, 790.

5 'White Paper – the Four Day Week: Guidelines for an outcome-based trial – raising productivity and engagement' (2019, Coulthard Barnes, Perpetual Guardian, The University of Auckland, Auckland University of Technology and MinterEllisonRuddWatts); also reported in *The Guardian Australia edition*, 'Four-day week: trial finds lower stress and increased productivity' < https://www.theguardian.com/money/2019/feb/19/four-day-week-trial-study-finds-lower-stress-but-no-cut-in-output> (accessed 20 February 2019).