

On: 03 February 2012, At: 07:06

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954

Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



## Australian Journal of Political Science

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/cajp20>

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Available online: 09 Jun 2010

To cite this article: Peter Handley (2011): 'Caught Between a Rock and a Hard Place': Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act, Australian Journal of Political Science, 36:3, 515-528

To link to this article: <http://dx.doi.org/10.1080/10361140120100695>

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# **‘Caught Between a Rock and a Hard Place’: Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act**

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This article offers a critical analysis of some of the practical implications for disabled people of the Disability Discrimination Act of 1992. Specifically, it raises questions about politics and the role of the law as an instrument of social change—taking greater account of the interests of disabled people—on the one hand, and of the reliance of the social model of disability on a strategy based upon legal rights on the other. The article also suggests that the constraining effects of Australia’s constitutional protections of rights and its federal system of government hinder the mildly progressive elements of the Disability Discrimination Act. To illustrate this, the paper employs empirical evidence to suggest that these effects have been exacerbated by the passage of the Human Rights Legislation Amendment Act in 1999.

Over the last 30 years, the Anglo-American liberal democracies have seen a considerable rise in the number and activity of new social movements and single-interest pressure groups amongst which those of the mentally and physically disabled have been relatively prominent. In common with women’s movements for example, disability movements have lobbied hard for anti-discrimination legislation to effect social change that takes greater account of their interests and which establishes new sets of legal rights. Such has been the path followed in Australia, a state with strong political and cultural connections with both the United Kingdom and the United States and which enacted anti-disability discrimination legislation in the shape of the Disability Discrimination Act (hereinafter DDA) in 1992.<sup>1</sup>

However, the author of this article is sceptical about such tactics and suggests that the ‘liberal promise’ (Thornton 1990) of anti-discrimination legislation, that is a more egalitarian distribution of opportunities and resources, is set to deliver at

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<sup>1</sup> All of Australia’s separate States and Territories have general anti-discrimination statutes that cover race and sex discrimination as well as disability discrimination. For example, Anti-Discrimination Act (ADA) 1977 New South Wales, ADA 1991 Queensland, ADA 1992 Northern Territory, ADA 1998 Tasmania, Equal Opportunity Act (EOA) 1984 Victoria, EOA 1984 South Australia, EOA 1984 Western Australia and the Discrimination Act 1991 Australian Capital Territory.

very best only partial progress. The doubts expressed here are not new. For example, some have questioned the efficacy of liberal anti-discrimination legislation with reference to the situation of women (see, for example, Thornton 1990; Smart 1989; Mackinnon 1987).<sup>2</sup> However, only with rare exceptions has such critical attention been focused directly upon a consideration of the effectiveness of anti-discrimination legislation with specific reference to the disabled with the same rigour (Gleeson 1999; Jones and Marks 1998; Gooding 1994). The issue is of particular significance, though, in an age when anglophone governments routinely engage in the rhetoric of 'universal' human rights, a commitment to social justice, the eradication of social exclusion and the role of the active citizen.

This paper represents a contribution to just such a critical approach. More specifically, it raises questions about politics and the role of the law as an instrument of social change on the one hand, and of the reliance of the social model of disability upon a strategy based on legal rights on the other.

Importantly, the social model of disability has enabled us to conceive of disability as more than just something an individual can or cannot do. The social model has identified the disabling capacities of the built environment (such as inaccessible buildings) and of institutional attitudes and practices (for example, in taken-for-granted bureaucratic procedures) and distinguished these from impairment defined as physical and cognitive functional limitations (UPIAS 1976, 3–4). This now dominant orthodoxy in disability studies, albeit in its many variations, is contrasted with the otherwise more societally dominant medical model, with its principal focus upon specific disabling mental or physical conditions. For adherents of this approach the disabled person must be changed—typically via the mediating interventions of the medical professions and their attempts to effect cures—so that the disabled person can be assimilated into society. For adherents of the social model, on the other hand, society must change by dismantling environmental and attitudinal barriers. It is this approach that has informed the disability movement's demands for legal rights as a central part of a strategy for social change.

However, disability movements have adopted this strategy rather too uncritically by failing to appreciate sufficiently the problems of operationalising legal rights in concrete situations (Handley 2000, 319–20). This article examines some of these problems in the context of Australia, a society that places a high rhetorical premium on its claims to possess a democratic political culture established on the values of social justice and inclusivity.

The first part of the article briefly describes the DDA and its theoretical basis, and the arguments for and against such forms of legislation are also briefly outlined. The second part provides an overview of two interlinked elements of the Australian constitutional system that constrain the rights established by the DDA; these are, first, the protection of fundamental rights and, second, the federal system of government. Finally, the third part of the article suggests that disabled people's rights are contingent upon these factors and employs empirical evidence to illustrate this within the context of the current political-economic climate. In particular, it discusses the possible implications for enforcing disabled people's rights in the light of key sections of the recently passed Human Rights Legislation Amendment Act 1999 (hereinafter HRLAA).

<sup>2</sup> Thornton's study also considers the situation of ethnic minorities.

## The Demands of the DDA

The enactment of the DDA in 1992 arguably demonstrated the Commonwealth government's intention to combat the long-standing social exclusion of disabled people by the recognition of their legal rights. In common with their peers in other liberal democratic states throughout the capitalist period, disabled Australians had found themselves institutionalised, infantilised and patronised (see, for example, Gleeson 1999; Barnes 1991; Kanter 1989). Such treatment was premised upon the perceived inability of disabled people to fulfil 'normal' roles in society, eg as employees, employers or parents. The upshot of this situation has been one where the vast majority of disabled people have lived a parallel existence, largely marginalised from the social mainstream in violation of what would generally be considered to be their fundamental human rights.

For a group as consistently disempowered as the disabled, the new rights established by the DDA understandably kindled new hopes and expectations. These centred upon the idea of a future fairer Australia where, as Brian Howe, then Commonwealth Minister for Community Services and Health, put it

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 difference. (Howe 1992)

The DDA held out the promise of vastly improved social and economic opportunities for disabled people to take part in everyday Australian life via the acceptance and accommodation of their difference. For example, to attend cinemas without being refused entry on the basis that one represents a fire hazard, to compete with others in the pursuit of a chosen career in a manner largely taken for granted by able-bodied Australians or to be able to enter public buildings not by the back entrance, because of inaccessibility, but by the front. Thus, it was believed that the legislation would

constitute the legal basis for the protection and promotion of the rights of people with disabilities and ... help to overcome social and economic disadvantage by assisting people with disabilities to participate as equals in Australian society. (Howe 1992)

Change, if it was to come, was not expected in the short term but hopes were high that in the medium term, at least, Australian society would change appreciably for the better for the majority of disabled Australians. One should also not underestimate the extent to which the DDA has had immense symbolic significance for the disabled. Such recognition legitimises one's status and interests—where these were formerly ignored or denied—imbues them with considerable moral import and establishes the recipients as equal participants in a democratic whole.

Initial waves of optimism greeted the DDA in the period 1994–95 which saw 1229 complaints of discrimination lodged with the Human Rights and Equal Opportunities Commission (HREOC), the Commonwealth agency responsible for the enforcement of the legislation (HREOC 1995). Year on year, the number of complaints lodged under Commonwealth anti-discrimination legislation have stead-

ily decreased, prompting suggestions from some quarters that it was clearly having its desired effect upon discriminators (*Sydney Morning Herald* 9 November 1998, cited in Cabassi 2000). For example, in 1997–98 the number of complaints of disability discrimination had dropped to 588 (HREOC 1998). By 2000 this figure had dropped again to 445 (HREOC 2000) down from the previous year's 512 (HREOC 1999). This represents a drop of 63% in lodged complaints over six years.

Despite the suggestion that the reductions in the numbers of complaints lodged indicated the success of the DDA, organisations of disabled people increasingly view the DDA as failing to deter discriminators or to address their marginal status in Australian society. Early expectations surrounding the DDA have been viewed retrospectively as 'unrealistically high' (Moxon 2000). The DDA itself is now seen as a considerable disappointment, which raises questions about even more fundamental progress and change for disabled people. Much criticism has been levelled at Commonwealth political institutions, such as HREOC, by advocates and activists who consider that they have been let down by a failure to match political rhetoric, of the sort exemplified by Howe (1992), with purposive action. The argument continues that such institutions ought to engage in positive action directed at ensuring fully resourced and effective enforcement procedures as well as access to those procedures which is sensitive to, and takes account of, the needs and situations of disabled people.

A number of reasons suggest themselves as possible causal explanations for this decline in complaints. First, as previously suggested, it may be that the DDA has been so successful in tackling societal discrimination against disabled people that they simply do not feel the need to complain of discrimination in the first place. A second possibility is that complainants are opting increasingly for other, that is State as opposed to Commonwealth, remedies for their complaints. A third possibility might be that the decline in complaints to HREOC reflects a sense of disillusionment amongst disabled people with the ability of the DDA to deliver on its 'promise' of social change and so they are failing to complain in the belief that there is little point. However, this article leaves these questions to one side for now and returns to them in its final section.

Like its American role model, the Americans with Disabilities Act (1990), the DDA sought to make discrimination on the basis of disability unlawful. The DDA also *requires* employers, service providers and so on to take disability into account when considering disabled people for employment or in the provision of goods and services, so that substantive outcomes are more equitable. That is to say, in addition to the usual requirement of anti-discrimination legislation of forbearance on the part of others, eg not to refuse to rent premises to a person with a disability simply because they are 'cripples', the DDA also requires a degree of positive action on the part of others to make appropriate adjustments for a disabled person's specific requirements (Jones and Marks 1999, 192). For example, to adjust the *disabling* aspects of a workplace in a bid to accommodate an individual's *impairments* [section 15].<sup>3</sup>

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<sup>3</sup> I do not wish to overstate the power of this notion, for it can be constrained by the countervailing claim of 'unjustifiable hardship' [section 11] by an employer or service provider if it is considered that an accommodation imposes too stringent demands upon them, for example, in economic terms.

Such proactive requirements reflect the influence of the social model and the importance of combating environmental and attitudinal barriers to disability. Additionally, should these positive requirements be neglected, the DDA provides the mechanisms for disabled people to seek legal redress against those who fail to take their disability into account.

Thus, the DDA's requirements reflect moderately measures that, in the American context in particular, have come to be known as 'affirmative action' or, more pejoratively, as 'reverse discrimination'. However, in both theoretical and practical terms, affirmative action has proved troublesome (see, for example, Mosley and Capaldi 1996). Indeed, in recent years proactive measures aimed at blacks and women have been removed in the face of sustained political and economic opposition, as well as increased judicial pragmatism on the part of the Supreme Court (*Washington Post* 27 June 1999). This opposition has crystallised around a neoliberal political and economic agenda (Barry 1987) whose adherents view affirmative measures as infringements of another's liberty to choose and which thus amount to state-sanctioned coercion. Consequently, such measures are viewed as unfair to those individuals who may almost certainly have done nothing directly to the particular disabled person and who are in turn viewed as persecuted innocents.

However, the value of the social model of disability lies in its usefulness in helping us to understand the extent to which discrimination against disabled people cannot be conceptualised in quite such simple terms as the impaired individual and the (typically able-bodied) individual perpetrator. The social model has made clear the complex problems faced by policy makers to the extent that addressing disability successfully demands a consideration of issues not traditionally taken into account by 'classic' liberal anti-discrimination legislation. Attributions of guilt cannot be laid solely upon individual perpetrators, for this ignores the social and historical context within which discrimination takes place (Thornton 1990, 35). Rather, as Schnaffer suggests, 'sustained discrimination [of the sort endured by disabled people] requires institutions and practices which impose burdens and constraints on the target group *without* resort to repeated or individualised discriminatory actions' (Schnaffer 1983, emphasis added). The DDA at least attempts to deal with the complexities of disability via the inclusion of its affirmative measures that highlight the necessity for the needs and situation of disabled people to be taken into account if more substantively equitable outcomes are to be secured. However, despite this, these complexities do remain under-appreciated, if not neglected completely, within many of the taken-for-granted institutional settings and procedures of the liberal state.

The third part of this article illustrates this lack of appreciation of the complex nature of disability implicit in recent Commonwealth human rights legislation.<sup>4</sup> However, before that, the article moves on to consider some of the implications of Australia's constitutional arrangements upon operationalisation of the DDA's rights. These are, first, the protections of fundamental rights and, second, the impact of the federal system.

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<sup>4</sup> I should make it clear here that although this paper focuses upon disability, recent changes to Australian Human Rights legislation are likely to have equally adverse implications for Commonwealth sex and race legislation.

## Australia's Constitution

### *The Protection of Fundamental Rights*

Despite the fact that Australia—in common with the United States—has a codified Constitution, the Australian system's conception of rights owes a good deal more to the Westminster than to the American tradition. Like Britain, Australia has no Constitutional bill of rights guaranteeing fundamental freedoms. Instead, the chief function of the Australian Constitution is to set down the 'disposition of powers between the States and the Commonwealth, and to establish the institutions of federal government' (Maddox 1996, 129). Underlying this are British principles of constitutionalism, based on a system of parliamentary responsible government, which reflected the belief of the drafters that there was no need to append a written bill of rights after the American model. In the Australian system, like the British, fundamental rights were to be protected from tyrannical government by the accountability of the executive to Parliament and, in turn, by Parliament's accountability to the electorate.

To some in Australia, the maintenance of the Westminster tradition represents a cherished continuity with the 'mother country' and confirmation that it has served its purpose of safeguarding individual rights conspicuously better than its competitors. Former Prime Minister Sir Robert Menzies, for example, reflected that 'the rights of individuals in Australia are as adequately protected as they are in any other country in the world' because of 'our inheritance of British institutions and the principles of the common law' (Menzies 1967, 54). However, such optimism neglects the dangers posed to fundamental rights by the increased dominance of the core executive and of the influence of disciplined political parties (Galligan 1995, 158). That is to say, the legal rights of Australians subsist in a state of perpetual danger, contingent upon the discretion of government which has the constitutional power to repeal those rights should they see fit, for example in response to the dictates of economic or political expediency.

To illustrate the extent to which fundamental, yet unexpressed, rights can be threatened in the Australian system we might consider the case of *Kruger v Commonwealth* (1997). The case concerned the forced removal of Aboriginal children from their parents to institutions or reserves under the Aboriginals Ordinance 1918 (NT). The plaintiffs argued that such actions violated a number of unexpressed constitutional rights as well as the United Nations Genocide Convention ratified by Australia in 1948. However, the High Court's decision went against the plaintiffs, prompting former High Court Chief Justice Sir Anthony Mason to conclude that in 'many jurisdictions' such a decision 'would be regarded as a fundamental violation of human rights' (Mason 1998, 43). Critics of the Australian system highlight this and other such instances as evidence of the fragility of fundamental rights and of the consequences of the absence of an American-style bill of rights (see, for example, Charlesworth 1994).

There have been instances, though, where fundamental yet unexpressed constitutional rights have been acknowledged and upheld by the courts, despite the absence of a bill of rights. Hence, we might consider the often cited counter-example of *Australian Capital Television Pty. Ltd. v Commonwealth* (1992). Here, the High Court struck down an amendment to the Broadcasting Act 1942 (Commonwealth) on the basis that the government had infringed citizens' rights to free speech, even though there are no such explicit rights in the Constitution. Similarly,



we might also consider the now famous decision in *Mabo v Queensland (No. 2)* (1992), in which the High Court recognised the principle of native land rights as one based upon implied constitutional rights.<sup>5</sup>

However, despite such instances of the court's willingness to intervene in issues of fundamental rights, its constitutional power to invalidate legislation on the grounds that it infringes such rights comes into conflict with the Westminster-inspired notion of the sovereignty of Parliament, an unresolved tension that it is beyond the scope of this paper to address in more depth.

However, in addition to the impact of parliamentary responsible government upon attenuating rights, the effects of the Australian federal system and the continually changing relationships between Commonwealth and State governments further complicates their exercise in Australia. Therefore, to gain a fuller picture we need to consider briefly the role of the federal system.

### *Australia's Federal System*

The federal system has been a consistent source of contention in Australian political life. Equally, it has often been in a state of flux as State and Commonwealth governments almost constantly redefine and renegotiate their respective responsibilities within it.

For its supporters, federalism has a number of clear advantages. Among them is its role in limiting the power of government and in increasing democratic participation and accountability (Galligan 1995, 51–3); in other words, by devolving a degree of political power to subnational units in specific areas of responsibility, the system brings government 'closer to the people'. However, federalism has had as many critics as it has had supporters (see, for example, Riker 1964; Greenwood [1946] 1976; Laski 1939). In particular, Riker—at least in his earlier work—noted what he saw as federalism's inherent conservatism, whilst both Laski and Greenwood noted how this has tended to constrain the implementation of progressive policy.

Essentially, the arguments for and against a federal system in Australia have mirrored the main party political divisions in the country with the National and Liberal Parties tending to favour it, whilst the Labor Party has tended to oppose it. More recently, though, beginning with the Hawke administrations in the 1980s, the Labor Party has become more reconciled to the concept to the extent that Hawke's tenure saw a substantial reversal in the flow of responsibilities from the Commonwealth to the States in areas such as taxation, education, transportation and social policy, including disability. However, in order to avoid another of the pitfalls of federalism, namely the duplication of responsibilities between the two levels of government, that in Howe's words had been 'greatest in disability' (Howe 1991, 5), the various States' health and welfare ministers arrived at the Commonwealth States Disability Agreement (CSDA) (Yeatman 1996, xiii). The Agreement would be finalised when 'each State had enacted complementary disability related legislation' (Cooper 1999, 221).

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<sup>5</sup> The court's decisions on such issues have not always been so unambiguous. For example, in the aftermath of *Wik Peoples v Queensland* (1996), supporters of both native title rights and of the rights of pastoral leaseholders claimed that the court had attenuated their rights in favour of the other party (CAA 1997).

With this legislation now in place in all the States and Territories, it might be suggested that disabled people now benefit from the choice to employ State or Commonwealth procedures if they seek legal redress against a discriminator. However, a disabled person's choice in this matter is rather more circumscribed in favour of State-based remedies than might at first be apparent. Two related factors in particular lead to this observation; first, reduced infrastructural funding for enforcement of the DDA at the Commonwealth level which, second, has meant that disabled people are consequently under increasing pressure to employ State-based over Commonwealth remedies (Cabassi 2000, 17–18).

The upshot of these two factors has been the hiving-off of rights protections back on to the States. However, as Attridge points out, 'The historical credentials of the States to perform these functions is woeful' (Attridge 1991, 3). It was, after all, the *raison d'être* of the DDA to 'regularise' the unevenness with which rights were protected from State to State by the introduction of Commonwealth legislation in the first place (Thornton 1997, 188).

Today, then, the extent to which one might expect one's rights to be protected and enforced remains dependent upon the amount of resources that one's home State is prepared to commit for that purpose. In this sense, and in terms of concrete effects, the current situation that faces disabled people appears little different from that which preceded the DDA.

In substantive terms these two factors undercut the moderately progressive intent of the DDA, and disabled Australians find themselves caught between something of a 'rock and a hard place'. They are caught between Commonwealth financial retrenchments on the one hand and the recently increased emphasis on the role of the States on the other.<sup>6</sup> Latterly, this has received renewed impetus under the Coalition administrations of John Howard which, true to their historical credentials, have tended to be more sympathetic to the rationale of the federal system.<sup>7</sup> However, if the States are to bear a greater share of the burden for any enforcement provisions, then the historical credentials to which Attridge (1991) refers will need to be addressed. However, the omens for optimism are less than encouraging. There is little or no current evidence to suggest that the States are any more enthusiastic about increasing public spending on rights enforcement infrastructures for disability, or indeed sex and race discrimination, than the Commonwealth government.

This reluctance reflects the significance and influence of wider changes in the political and economic climate throughout the Anglo-American liberal democracies. Namely, from one that displayed a general commitment to social democratic values, and the level of government intervention and spending that this implied across a wide sweep of issues, to one that now displays a general commitment to neoliberal values which tend to eschew such interventions.<sup>8</sup> With particular reference to the issue of disability in Australia these changes, beginning in the mid-1970s in the United States, and in the 1980s in the United Kingdom and Australia, have been characterised by the progressive withdrawal of the state from

<sup>6</sup> There has been a marked increase in disability complaints lodged with the NSW Anti-Discrimination Board, for example (Cabassi 2000; NSWADB 1999; NSWADB 2000).

<sup>7</sup> There is no special disbenefit here for disabled people. Those who lodge complaints of sex and race discrimination confront similar problems raised by the federal system.

<sup>8</sup> I do not wish to oversimplify here. There were, and of course still are, considerable differences in approach between the Anglo-American democracies in their specific commitment to these sets of values.

many former welfare functions. However, whilst the disability movement has welcomed the neoliberal critique of paternalist welfare policy (for example, in the form of institutionalisation) on the one hand, they maintain the necessity for welfare in the form of adequately funded means to seek redress for discrimination on the other. There is no neat fit between these two ideals in the current political and economic climate.

The final section illustrates how this confluence of constitutional factors, in conjunction with the changed political and economic climate, is having substantive effects upon HREOC and thus, in turn, upon disabled people who consider employing legal remedies to combat discrimination. Furthermore, it suggests that recent Commonwealth legislation has exacerbated these effects.

### The Fate of the DDA

To recapitulate, the legal rights established by the DDA are vulnerable to attenuation, if not outright repeal, under Australia's system of parliamentary responsible government. Moreover, recent shifts in State-Commonwealth responsibilities, made possible by the renewed enthusiasm for coordinate federalism, have undermined the coherent, 'Australia-wide', operationalisation of these rights even further. Here, this article turns to practical issues of operationalisation that have been brought into sharp focus by the passage of the Human Rights Legislation Amendment Act (1999). This suggests that major institutional practices still reflect fundamental misunderstandings of the situation and needs of disabled people to which the social model brings our attention.

As in cases of racial or sexual discrimination, if a disabled person considers that their rights have been infringed then recourse to the law is the principal means of redress. However, very many disabled people face problems that may make them think twice about becoming involved in such a process. For example, the social situation of disabled people results in many living on a below average income, often in the form of state benefits (Barnes 1991). To a large extent this financial situation determines the degree to which they will be able to enforce their rights via the legal system.<sup>9</sup> In addition to this there is the strain upon the emotional resources, not only of the individual concerned but also those of close relatives and friends, who typically represent the main sources of such support. It is in these areas that the Commonwealth government's incremental financial retrenchment is set to exacerbate existing disabling barriers.

As already indicated above, after an initial surge there has been a steady decrease in the number of complaints being lodged with HREOC by disabled people since 1995. Indeed, as Thornton (1997, 185) suggests, complainants withdrew many complaints before HREOC's dispute resolution process even began. Of those complaints that were accepted, most were settled privately at the initial conciliation stage. After this, she continues, only 2% of *all* discrimination cases (which includes sex and race, as well as disability cases) continued to the next tribunal stage of the process (Thornton 1997, 185). However, once over these first two hurdles, and assuming that the decision went the way of the complainant, registering the tribunal's decision in the Federal Court would render it binding; the tribunal's

<sup>9</sup> Once again, I do not wish to under-emphasise the extent to which women and Aboriginal people, for example, also face similar 'disabling' barriers via this route.

decision had the force of law (Cabassi 2000, 12). However, such instances were rare, leading to the impression expressed by a former leading New South Wales disability advocate that disabled people's rights were, despite Sir Robert Menzies' optimism, being consistently undermined and undervalued (Banks 1999b).

Moreover, to add to the growing perception of HREOC's inability to adequately enforce disabled people's rights came the decision of the High Court in *Brandy v Human Rights and Equal Opportunities Commission* (1995) wherein the court held that the Commission's powers of enforcement, which were established only in 1994, were unconstitutional. The court held that HREOC's powers infringed the separation of powers in breach of Chapter 3 of the Constitution, ruling that the issue of binding orders lies with the federal judiciary and not with administrative agencies such as HREOC.

It was partly to address the stopgap post-*Brandy* arrangements, which involved a second hearing before the Federal Court with freshly presented evidence, that the HRLAA was conceived. Moreover, the stated rationale was that the new legislation would only serve to make the rights of disabled people more secure (Williams 1999). However, to ensure that these rights were more secure, the new law would need to facilitate, as far as possible, opportunities for exercising these rights. In other words, it would need to ensure that disabled people would not be unduly hindered by considerations of cost. Again, though, the omens were neither optimistic nor particularly encouraging as the political and economic climate has remained one of financial retrenchment in public spending.

Since being elected to office in 1996, the Howard Coalition government has consistently reduced funding for HREOC (Pengelly 1997, 6–7). In the Commonwealth budget of May 1997, the Commission's funding was cut by 43%, whilst funding for legal aid was also to be reduced by \$120m over the subsequent three years (Cabassi 2000, 10). These reductions have increased delays in the time taken to deal with complaints, and have increased pressures upon complainants to opt for State, rather than Commonwealth, remedies. In New South Wales, for example, when expressed as a proportion of all discrimination complaints, there has been a 14% increase in disability complaints over the period 1994–2000 (Cabassi 2000), whilst complaints at the Commonwealth level have continued to decline over the same period (HREOC 1995, 1998, 1999, 2000).

Whilst such financial cutbacks may have rather less effect upon those with more substantial resources, any adverse effects will only be magnified for those whose resources are more meagre. In addition, the Commonwealth government has reduced funds for the Disability Discrimination Legal Centres (DDLCC) established by the DDA as a key element in the enforcement process to act as help and advice centres for disabled people who seek access to legal redress. As Banks (1999a) illustrates, there have been substantive results of this financial retrenchment. For example, the New South Wales DDLCC has sufficient funding to maintain only three full-time workers in a State of some six million people, of which one million self-identify as disabled; in Western Australia, with a land mass approximately one-third that of the United States but with a population of just over a million people, funding is only sufficient for 'just over one person' (Banks 1999a, 361–2).

The overall effect of the HRLAA looks set to compound the problems already outlined. Two elements of the new act pose particular problems for anyone wishing to seek legal redress in the event of being discriminated against. The first of these is the replacement for the post-*Brandy* two-hearing system, and the second

is the 'costs follow the event' rule in all discrimination cases that proceed to the Federal Court.

The HRLAA dispenses with the post-*Brandy* stopgap two-hearing system and transfers the hearing function of the HREOC directly to the Federal Court, thus fusing stages 2 and 3 of the pre-*Brandy* arrangements.<sup>10</sup> However, although removing the emotional burden of two hearings from a complainant, the new system still presents a considerable barrier to disabled people. For example, if a complainant wishes to make the outcome of a conciliation conference binding, then they have no choice but to appeal to the Federal Court with all of the attendant financial burdens and emotional stress that goes with it. However, if we consider the second proposal, concerning costs following the event, then this only serves to compound the impact of the first upon the claimant and in addition re-emphasises the lack of appreciation of disabled people's situations and needs, and thus the disabling capacity of the legal process.

As has already been made clear above, the social situation of many disabled people is frequently unenviable in terms of income, employment opportunities and so on. It does not seem unreasonable to suggest, therefore, that disabled people are likely to be very risk-averse in situations of high uncertainty, and that the choice to take discriminators to court will, for the vast majority of disabled people, represent no choice at all. Faced with the option of letting the matter rest or of engaging in a potentially ruinous court battle, the rational choice would appear to be the first option. However, rather than focus on the disabling implications of the 'costs' rule through a reappraisal of the worth of increased funding for legal aid and the DDLCs, the government has instead addressed the reluctance of lawyers to act for low-income clients if their fees were not secured via the potential for a costs order from the other party. Confident in the belief that lawyers' concerns have now been addressed, the Commonwealth government is convinced that disabled people will opt for litigation in the belief that it will now be easier for them to obtain legal representation (Williams 1999).

It remains unclear how such a strategy will benefit those very many disabled people on a low income or expand their realistic range of choices. Legal aid and the DDLCs represent the most accessible means for disabled people to secure the necessary legal representation if they wish to proceed to court; in a very real sense, given adequate levels of funding legal aid, the DDLCs *do* represent significant 'adjustments' in 'attitude' and practice that 'accommodate' disabled people's difference in line with both the demands of the social model for positive action on the part of government and society to foster social change. Accommodating the interests of the legal profession instead, on the basis of the reasons described here, would appear to be extremely optimistic. Moreover, even for those disabled people who do possess the resources to take a discriminator to court independently, they do so also under the very real threat of financial ruin by losing most of what they own if any judgment were to go against them.

It could be argued, of course, that as the 'costs follow the event' rule is a commonplace in other areas of civil litigation, so its extension to cover discrimination against disabled people represents a form of equality before the law.

<sup>10</sup> The Federal Magistrates Service established by the Federal Magistrates Act (1999) has concurrent human rights jurisdiction with the Federal Court. Complainants therefore now have a further choice of jurisdictions in which to proceed to hearing if conciliation is unsuccessful (Cabassi 2000, 24).

However, if so, then it is equality of the most narrow and formal kind. Moreover, it is one that neither recognises, nor takes sufficient account of, the social situation of disabled people by accommodating their different-ness in the light of this.

To put it plainly: without such recognition, attempts to secure social change via formal liberal equality for disabled people are unlikely to succeed on their own, and the probable outcomes of the application of the 'costs' rule are likely to be highly inequitable for disabled people. The limits of this formal approach were recognised by President Lyndon Johnson, who initiated the beginnings of affirmative measures in the United States to foster social change for women and blacks in his Great Society Program. Johnson argued that formal equality on its own was not enough, that not everyone set out in life from the same starting point or with the same resources and that for these people more proactive measures were both justified and necessary (Graham 1990).

It is, then, fanciful to suggest that the declining number of complaints reaching HREOC is explicable in terms of the overwhelming success of Commonwealth anti-discrimination legislation, such as the DDA, in eradicating discrimination against disabled people (*Sydney Morning Herald* 9 November 1998, cited in Cabassi 2000). A more likely explanation is the confluence of delays in the Commonwealth enforcement process brought about by financial cutbacks that have led to disillusionment with the process amongst disabled people. Consequently, they are increasingly compelled to resort to State remedies that have received renewed status under the increased latitude accorded them by Commonwealth government. However, for moderately 'progressive' legislation such as the DDA, the concerns of Riker (1964), Greenwood ([1946] 1976) and Laski (1939) about the restraining potential of federalism would appear to have some basis in reality in the Australian context and the fate of the DDA would seem to be one that is far from secure.

When considered in the context of those measures in the HRLAA to which this article has drawn attention, disabled people's opportunities to exercise their rights are, as Western Australian Labor Senator Chris Evans concludes, 'being closed off' (Evans 1999). Surely, such a charge poses a direct challenge to Australian claims to be honouring those international human rights instruments to which it has put its signature;<sup>11</sup> additionally, it questions the widely held belief among Australians that their political culture is innately democratic and that Australian citizens, irrespective of disability, race or gender have the right to a 'fair go'.

### Concluding Remarks

Despite the rhetorical commitment of Australian governments to ensuring that 'society accommodates difference' with reference to disabled people (Howe 1992), actions—as it were—have spoken louder than words to the Australian disability movement. Nine years after the DDA was enacted, and despite the rights that it established, it has not become conspicuously easier for disabled Australians to secure those rights.

Moreover, for movements like those of disabled people who struggle for social

<sup>11</sup> With reference to disabled people these include the Universal Declaration of Human Rights (1948), the Covenant on Civil and Political Rights (1966) and the Declaration on the Rights of Disabled Persons (1993).

change, the Australian experience highlights the problematic nature of the relationship between law (embodied in anti-discrimination legislation) as the principal instrument of social change and politics. Enough has been said here to raise doubts about its efficacy in the case of disabled people in Australia in the face of the constitutional opportunities to attenuate rights when set within the current political and economic context.

The extent of the reliance of the Australian disability movement upon legal rights, and thus by implication upon legal and political institutions to protect and enforce them, is therefore something of a double-edged sword. Whilst, on the one hand, these institutions do represent potential 'enabling' gateways into the social mainstream, their failure to appreciate and make adjustments for the socio-historic disadvantages of groups such as disabled people, on the other, results in their being rather less helpful than one would hope.

Given these circumstances, the Australian disability movement faces a very practical problem. Namely, how can the degree of positive action that the social model demands on the part of government, and more widely society, realistically be achieved in the context of a political and economic climate that looks set to be resistant to such levels of intervention for the foreseeable future?

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