SECOND SUBMISSION TO THE PRODUCTIVITY COMMISSION'S INQUIRY INTO DISABILITY CARE AND SUPPORT.

For every human problem, there is a solution that is simple, neat, and wrong.'
US President Jimmy Carter used this quotation in a speech and attributed it to H. L. Mencken.

Dear Commissioners,

After giving evidence at your Sydney hearings on Tuesday 20th July 2010, and noting the reaction to that evidence, I thought it appropriate to provide a second document, pointing to several apparent anomalies in the "alleged" consensus argument for a National Disability Insurance Scheme. Equally, by the end of this submission, I aim to show the disability insurance is one of those 'solutions' Jimmy Carter was referring to above.

A 'social contract'

The social contract theory is a concept well known to political scientists, and it is not as if it is something new which was articulated only in the 20th or 21st century. Notable liberal thinkers of the seventeenth and eighteenth century contributed much to ideas about a social contract.[1] While not wishing to be diverted into an argument over history, it is important to put some limits on just how far any government can reach into the lives of individual citizens and their families, in the name of this contract.

Implicit in much of what was said both before and after I gave evidence, was the belief that the Federal Government must run a national disability scheme and, that this will somehow guarantee both sufficient funding and flexibility, for both individuals and their families. Further, it seemed to be accepted as a given that all people with disabilities would be covered by this scheme, it would apply retrospectively to all those currently living with disabilities and, we would all receive services immediately *as of right*, dispensing of the need for waiting lists.

The unreality of it all left me feeling that if only I could click my heels three times, I might suddenly wake up in Kansas. Firstly, Medicare is known to have waiting lists for elective surgery, which at their worst have been known to leave people in pain and waiting for procedures for considerable periods.[2] For some people to suggest that a

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[1] For example see the extensive Wikipedia entry for John Locke a 17th century Enlightenment thinker <http://en.wikipedia.org/wiki/John_Locke> as at 24 July 2010. While Locke and other thinkers such as Adam Smith may not have understood 'disability' as we do today, for some people to dismiss everything that occurred prior to the 20th century as a Dickensian 'dark age' is unreasonable.

[2] See for example *Wait lists soar at Albury,* 22 Jun, 2010 11:40 AM, The Border Mail, bordermail.com.au <http://www.bordermail.com.au/news/local/news/general/wait-lists-soar-at-albury/1864995.aspx?src=rss> as at 25 July 2010; Matthew Kelly, *Hunter pensioners fear Medicare cataract changes,* 10 Oct, 2009 03:00 AM, Newcastle Herald, theherald.com.au <http://www.theherald.com.au/news/local/news/general/hunter-pensioners-fear-medicare-cataract-changes/1645593.aspx> as at 25 July 2010; Finally, on the website *Public Hospitals* (www.publichospitals.com.au) it is stated that "*Australia has one of the best health care systems in the world today in large part due to Medicare. Australia's public hospitals have the latest technology and some of the best doctors in the world so if your admitted into a public hospital for an illness then you know your going to get looked after by qualified, professional doctors and nurses."* However, it is

system of disability insurance proposing similarly universal coverage should meet all needs immediately and *as of right* is amazing. No specific figure of how much the Medicare Levy would have to rise by, was nominated by any of the witnesses I heard. Such details need to be pinned down as soon as possible, for any further debate on the issue to be seen as credible. As a current part pensioner, I acknowledge the support Australian taxpayers already provide, being therefore circumspect about asking for additional funds.

To me, the debate over disability insurance is echoing the Australian republic debate during the 1990s. Proponents claim a broad community consensus over the issue; then they claim the need is obvious, while also saying that details like cost and eligible disabilities can be ironed out later. Similarly with the republic, opponents were dismissed as out-dated Anglophiles who could not see the need for Australia to develop as an advanced nation and become a republic. However, the republican model proponents came up with was decried as 'the Camel'[3] by opponents, avowed republicans had great difficulty supporting it[4] and, it ultimately failed at the referendum.[5]

We need to be careful not to create a disability policy camel, and it was noteworthy that the Executive Officer of the NSW Disability Council went to great lengths during his evidence, to argue that the current system of disability services was 'not broken'. This is a point on which I agree with Mr Herd; the current system of both government and non-government services[6] are not perfect, but they are not altogether bad. However, I do not agree with him or other speakers on several other points.

International conventions

Much was made of United Nations statements and conventions on the rights of people with disabilities. While this has some relevance, to be truly effective these documents need to be incorporated into Australian statute law, to constitute laws of the land. While it is possible for judicial officers to take account of international instruments and statements

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also clearly stated that *"To be admitted into a public hospital in Australia the individual must first see their local GP who will then refer them to a specialist. The specialist then will give you a letter that must be passed onto the hospital to set up an appointment. Depending on how urgent the need for treatment is you may be placed on a waiting list. For elective surgery in a public hospital today the waiting list could take quite some time before you are booked in for surgery."* Refer to <http://www.publichospitals.com.au/> as at 25 July 2010.

[3] In an ABC News report, Constitutional Convention delegate David Muir is quoted as saying: 'This two-legged camel is not going to get across the line in the referendum. A referendum of a two-legged camel is going to put the Republican cause in Australia a long way behind. Those who want change and believe in the sovereignty of the people and are not happy with the few words that have been cobbled together by the ARM and others, should abstain.' <http://www.abc.net.au/concon/bcast/tvll13-2.htm> as at 27 July 2010.

[4] See generally, ibid.

[5] See 1999 Referendum Report and Statistics: Summary of Results – Republic <http://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/summary_republic.htm> as at 27 July 2010.

[6] Of which I am a recipient, and also on the Board of one service provider, namely the Spastic Centre of NSW. However, as I made clear at the beginning of my evidence to you, I was speaking to you in a private capacity. My submissions are also made in a personal, private capacity.

of official policy where this does not contradict a statute or common law rule, it can be not be guaranteed that counsel will draw a convention to judicial attention, nor that a convention's terms will be relevant to the facts of a particular case.

This is exemplified by contrasting judgments in the High Court of Australia. In the *Franklin Dam* case[7] of 1983, the State of Tasmania's plan to build a dam was found to be inconsistent with the Commonwealth's acceptance of responsibilities under international heritage conventions. The Commonwealth legislated to bring the relevant convention into Australia's domestic law and, the Court concluded the effect of the federal law was to 'override the State's rights'.[8]

This is in contrast with a view taken by the High Court in 1973[9] that even though the United Nations' *Charter* had been placed in the schedule of an enactment, the Act itself had not clearly stated that the *Charter* was to be part of Australia's domestic law.[10] These cases show how perceptions can change in just a decade. Personally though, I do not take too much comfort from international instruments, as they tend to be documents written in a broad, diplomatic lexicon, whose words can be subjected to almost any interpretation. In short, the sentiments tend to be grand, in inverse proportion to the identifiable and quantifiable commitments, which are minimal.

The words and definitions that are used in legislation, sometimes based on international instruments, can generate anomalies. For example, while making a 2006 submission to a Working Group on long term disability care, I noted that the definition of 'disability' in the Commonwealth *Disability Discrimination Act* was so broad you could have the flu and 'technically' be regarded as being disabled.[11] Other significant issues with that proposal were the means-testing it involved and, the potential negative impacts on ageing parents who were not themselves receiving a pension.[12]

Funding

While an argument against means-testing may well sound inconsistent with my evidence, the Appendix came from a time when I still had a degree of innate confidence in the ability of government to design and implement social support programs. My observation of the Rudd/Gillard Government, along with my difficult relationship with the Attendant Care Program (noted in my first submission) has made me far more circumspect about the true capacity of government (or others hired by the State) to deliver goods or services. Again, while I access some government services quite successfully, my overall view is to caution the Productivity Commission against creating another taxpayer funded, centralised government agency.

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[7] *Commonwealth v Tasmania* (1983) 158 CLR 1.

[8] Sally Anne Frazer, *How to Study Law,* The Law Book Company Limited (1993), p.15

[9] *See Bradley v Commonwealth* (1973) 128 CLR 557

[10] *See* Martin Dixon and Robert McCorquadale, *Cases and Materials on International Law,* 3rd edition, Blackstone Press Limited, 2000, pp. 130 – 131.

[11] See my *Submission to the Department of Family and Community Services Advisory Group on Planning for Sons and Daughters with Severe Disabilities,* Appendix 1, p.1

[12] See ibid, pp. 5 – 6.

Perhaps a useful analogy can be drawn with the Job Seeker Compliance Regime, which I was obliged to become involved with while unemployed. Providing two submissions and attending a consultation meeting, I concluded that the administrative burdens for job seekers and employment agents alike were oppressive and costly. Recommending that much of the compliance system be dismantled, I drew on FA Hayek's famous work *The Road to Serfdom* to suggest that the policy had reduced the unemployed to virtual serfs of the modern day.[13] A centralised, government run disability insurance scheme could do much the same thing to many disabled people, as the dispensing of payments could be delegated to those Hayek termed 'the smallest bureaucrat(s) …(wielding) the coercive power of the state and on whose discretion it depends how I am allowed to live and work?'[14]

As expressed in my last submission to the Commission, there are times when I believe this level of control is already being exercised. Certainly, a disability insurance scheme should not add to state controls on an individual's life. There are already innumerable regulatory burdens and controls on individual citizens,[15] which run counter to everything I have come to believe in as a member of the Liberal Party of Australia. In founding the Party, Sir Robert Menzies explained:

> We took the name 'Liberal' because we were determined to be a progressive party, willing to make experiments, in no sense reactionary but believing in the individual, his rights, and his enterprise, and rejecting the socialist panacea.[16]

In my view, while many supporting the concept of disability insurance claim to be acting from the best progressive motives, they have (to invoke Menzies' words) fallen for a 'socialist panacea'. Just because we are talking about a specialist disability insurer does not mean there will not be bureaucratic requirements for application forms, assessments and other procedural delays, causing distress and difficulty to applicants and their families. As such, there is nothing appealing in the thought of having to deal with another mammoth *Centrelink*-like body, simply because I have a disability. Therefore, if

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[13] See my submission to the Independent Review of the Job Seeker Compliance Review <http://www.deewr.gov.au/Employment/ComplianceReview/Documents/AdamJohnstonSubReviewFinal.pdf>, pp. 39 – 40, as at 28 July 2010.

[14] Friedrich A. Hayek, *The Road to Serfdom: The condensed version of The Road to Serfdom by F. A. Hayek as it appeared in the April 1945 edition of Reader's Digest* <http://www.iea.org.uk/files/upld-publication43pdf?.pdf>, p. 33, as at 11 July 2010

[15] See for example Professor Steven Schwartz, *Living the Legislated Life,* Centre for Independent Studies' 25 Anniversary Lecture, given in Melbourne on October 25, 2001, <http://www.onlineopinion.com.au/print.asp?article=3165> as at 8 July 2010. In particular, I draw your attention to Professor Schwartz's comments that 'Every aspect of our behaviour is already subject to some sort of legislation. There are laws controlling smoking, drinking, schooling, working, buying, selling, driving, holidays, even dying. Nothing is too small to be left to chance. For example, in my state of Western Australia, it is against the law to purchase a new car after 1:00 PM on Saturday.'

[16] The quotation is taken from "Afternoon Light" (1967) by Sir Robert Menzies and available from *Liberals.Net* <http://www.liberals.net/liberalquotes.htm> as at 28 July 2010. I also recall an ABC TV presentation during which a recording was played of Menzies addressing a public meeting, in which he said: 'Liberalism is a philosophy which believes, and believes unanswerably that individual men and women made Australia!' Unfortunately, I cannot cite this quote.

the Commission insists on proceeding with some sort of insurance scheme, it should be voluntary in nature.

A clear danger of making it universal and compulsory is that this provides grounds for State and Territory Governments to begin cost shifting to the Commonwealth those care and support services which have traditionally been the responsibility of the States and Territory Governments. The potentially complex details of an insurance scheme, as well as the scheme's mere existence would allow State Ministers to say 'Service X is now the responsibility of the Commonwealth's insurance scheme. Complain to Canberra'. The administrative malaise that would ensue could well leave some of the most vulnerable people in our society even more exposed than they are now. This is clearly unacceptable and, a risk the Commission should consider in its deliberations.

Additionally, one could not help but notice that advocacy groups that spoke at the hearing did not miss the opportunity to argue that they should receive funding from the insurance scheme as well. This should not occur; reform that is worthwhile should be about more than changing a funding source, only to keep "all the usual (disability) suspects" in their places.

What should happen?

Firstly, it is necessary to put the history of Medicare and the National Health Service (NHS) in the UK up to greater scrutiny. Advocates are keen to see theses systems used as models for national disability insurance. With regard to the NHS, Roy Porter explains that:

> (In) 1911…the (British) Liberal politician Lloyd George launched his National Insurance scheme modelled along Bismarkian lines…It was a measured devised to be popular with the electorate (it gave 'ninepence for fourpence', boasted Lloyd George) while ameliorating the wretched health of ordinary workers. This had been critically exposed when a high proportion of Boer War volunteers had been found unfit to serve for medical reasons.[17]

This quotation bears out two important points. Firstly, the British Government saw the need to intervene in the health of its population because this matter not only influenced an Administration's longevity, but had a real impact on the nation's productive and combat capability. At the time of their introduction, such programs of universal social support had a more limited impact on national budgets. For instance, Mark Latham observes that:

> (At) the time of the establishment of the first universal age pension, by Bismark in Germany (in the 19th century), only 1 per cent of each age cohort was

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[17] Ray Porter, *The Greatest Benefit to Mankind,* London, Harper Collins, 1997, p.638-639, extracts cited in James Gillespie, *POL 341 - The Politics of Health: Readings,* Department of Politics and International Relations, Macquarie University, 2003

> expected to live long enough to access it. Benefits for the aged were made affordable by the small proportion of aged citizens.[18]

In modern times, this has changed significantly, causing the Howard Government to make the *Intergenerational Report* (the Report) a requirement of its *Charter of Budget Honesty Act 1998*.[19] While conventional wisdom argues that the growth in the elderly population will necessarily increase the cost of health care, the Report states that this is only partly true. Another significant factor will be the developments of new medicines and treatments, combined with the public's expectation that "these treatments will be provided to them soon after the technology first becomes available."[20]

It is important to ask what the outcomes of the new treatments are. As mentioned earlier, Porter noted that Lloyd George's insurance scheme was aimed at "ameliorating the wretched health of ordinary workers".[21] Some may argue that things are not nearly so wretched now. If you look at indicators of mortality, morbidity, life expectancy and the like, comparing them with figures from the early 1900s, this is undoubtedly true. However, as we have learned to sustain the life of people, not only with one diagnosed, temporary condition, but multiple, long-term ailments, we have not always managed to care for them, in terms of making people well. Equally, while medical science has learned to sustain many who have very ongoing complex needs, it is another question entirely as to whether many such people have been given a quality of life any of us not so infirmed would want, or merely granted extended misery?[22]

Rejecting the fatalistic view

In light of these questions, it disturbed me that the Disability Council saw insurance as providing for the needs of disabled people for the next 100 years. Indeed, that view was not so much disturbing as it was depressing. In 100 years I do not want anyone to experience any form of disability, and for the phrase to have completely fallen into disuse. Furthermore, it is my view that between 2010 and 2020 we should be able to do for the amelioration of disability, what President John F. Kennedy did for the achievement of manned flight to the Moon. At the beginning of the 1960's many may have seen Kennedy's pronouncement of a manned moon landing "before this decade is out" as fanciful. But by the end of the decade, Western ingenuity had put Neil Armstrong and Buzz Aldrin on the Moon and brought them safely back home again.

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[18] Mark Latham, *Civilising Global Capital: New thinking foe Australian Labor,* Allen & Unwin, 1998, p.200

[19] *See* The Hon. Peter Costello, *Intergenerational Report 2002-03: 2002-03 Budget Paper No.5,* Commonwealth of Australia, 14 May 2002, p.3 <http://www.treasury.gov.au/contentitem.asp?NavId=012&ContentID=378> as at 14 May 2002

[20] Ibid, p.38

[21] Porter, above n 17, p. 639

[22] I discussed this at greater length in my submission to the Senate's Community Affairs Committee inquiry into the Legislative responses to Recommendations of the Lockhart Review. My submission is available at <http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/2004-07/leg_response_lockhart_review/submissions/sub53.pdf>, pp. 1 – 5, as at 30 July 2010.

I suggest that the analogy with space exploration is that those disability advocates, who have pre-supposed that disabilities are indefinite (and therefore, insurance essential), are similar to those who thought a Moon landing was impossible. They appear to have settled for dependence and taxpayer funded 'charity' ahead of cures; and it is not as if science isn't showing us advances towards curing many debilitating disabilities almost daily.[23] In these circumstances, why are we settling for what is virtually the re-institutionalisation of disability as a focus for mandated public insurance, rather than aiming to insure that disability is eliminated from the human condition? Again, the space flight analogy should cause us to focus on the question: what are we aiming for and, are our sights high enough? My personal answer is: no. If the kind of money that an insurance scheme would truly require (or even part of it) was diverted to research and development we could have a realistic hope for many cures by 2020.

Tax holidays

At the hearing, I raised the question of taxation and the 'welfare and tax churn' that sees many taxpayers pay in tax what they have returned in benefits and subsidies. While acknowledging that this is technically outside the Commission's Term of Reference, we did have a discussion about providing people with 'tax holidays' in preference to an insurance scheme. Interestingly, on July 21 2010, Senator Barnaby Joyce floated a tax proposal which would have given zonal tax rebates, as a means of "finding ways to get people to work and live in regional Australia".[24]

It is unfortunate that such ideas are not set to become policy of either major party anytime soon, because it was not without a sense of irony that after reading the report about zonal tax rebates, I came across another report entitled *'Disabled worker's wage cut to $2 an hour'*.[25] This media report is a sad indictment of elements of the current disability supported employment system,[26] and while the Commonwealth Rehabilitation Service is apparently reviewing the case, it shows the inequities in current disability "support" systems.

Examples like this should demonstrate why questions about taxes and transfers ought to be immediately relevant to this inquiry. It is why I argue that one of the principles this

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[23] For example, see *Gene therapy and stem cells save limb,* Australian Life Scientist, 09 December, 2009 10:53 <http://www.lifescientist.com.au/article/329155/gene_therapy_stem_cells_save_limb_/> as at 30 July 2010; *Stem cells rescue nerve cells by direct contact,* Public release date: 1-Feb-2010 <http://www.eurekalert.org/pub_releases/2010-02/ki-scr020110.php> as at 19 July 2010; *Single Dose of Proprietary Adult Stem Cells Regenerates Damaged Pancreas and Reduces Blood Glucose Levels In Diabetes -Treatment For Diabetic Patients A Major New Objective,* <http://www.mesoblast.com/mediareleases/134.pdf> as at 30 July 2010.

[24] News - Top Stories / News.com.au , *'Give Aborigines a tax holiday',* Jul 21, 2010 7:02am <http://www.optuszoo.com.au/news/169747/give-aborigines-a-tax-holiday.html> as at 21 July 2010.

[25] News - Top Stories / News.com.au, *'Disabled worker's wage cut to $2 an hour,* Jul 20, 2010 2:02pm <http://www.optuszoo.com.au/news/169474//disabled-worker-s-wage-cut-to-2-an-hour.html>

[26] I also drew similar issues to the attention of the Henry Tax Review and The Fair Pay Commission. See Adam Johnston, *Henry Tax Review Submission* <http://taxreview.treasury.gov.au/content/submissions/pre_14_november_2008/Adam_Johnston.pdf>, pp. 4 – 8, as at 17 June 2010

inquiry should take up, if it truly wants to improve Australian productivity and ensure the welfare of people with disabilities, is to urge the Government to stop the tax and welfare churn. Alongside this, initiatives of social enterprise and disability savings accounts, as described by PLAN (Planned Lifetime Advocacy Networks) of Canada,[27] should be recommended to government. While conceding that this structure still includes a role for public welfare for an individual with disabilities, the PLAN organization itself is very clear that it will take no direct public funding. One of PLAN's core values is:

- Self-sufficiency makes us more effective. ***Independence from government funding*** enables PLAN to advocate on behalf of individuals and families without fear of consequences.
  "If government gives you money, they have a certain amount of control, and there may be a fear of advocating there. If we earned our own money, we could advocate and hold government accountable." – Arthur Mudry, PLAN founder[28]

The question of accountability is also important to PLAN but, significantly, it does not invoke grandiose notions of the social contract or representative democracy. Rather, PLAN focuses on:

- ***Commitment to family direction***. PLAN is structured to ensure it will always be directed by and accountable to families.
  "We got involved because we wanted certain things for our sons and daughters after we were gone. What we didn't realize were the benefits while we were still alive"—Joan Lawrence[29]

This is far more important to me, and probably many other people, rather than any notion of accountability via the Parliament or innumerable and largely unintelligible government regulations. Yet, official advocacy bodies, like the Disability Council, seem intent on formal bureaucratic structures. This is not for any lack of real alternatives.

In a paper published in 1981 by the Hastings Center, Stephen Toulman questioned the true value of a strictly rule-based, formal and conformist approach to the provision of public services. He highlights how an increasing demand for universal equity of both treatment and outcome has led to a reduction in (or elimination of) the discretion public officials could have otherwise exercised in individual cases.[30] He also demonstrates how we have been rule-obsessed; in relating the story of a young disabled woman in US who ultimately took her own life when the Social Security Department accused her of welfare fraud, he makes a compelling point. Toulman observes that:

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[27] See *Registered Disability Savings Plan - Securing the future for Canadians with disabilities* <http://rdsp.com/upload/RDSP/RDSP_Factsheet.pdf> as at 1 August 2010.
[28] *About PLAN: Mission and Values,* <http://www.plan.ca/sections/mission.html> as a 1 August 2010
[29] Ibid
[30] See Stephen Toulmin, *The Tyranny of Principles,* The Hastings Center Report, Vol. 11, No. 6 (Dec., 1981), p.36, Stable URL: http://www.jstor.org/stable/3560542 Accessed: 24/07/2010 05:05

> The television reporter (who covered the unfortunate story) added two final statements. Since the report had been filmed, he told us, the young woman, in despair, had taken her own life. To this he added his personal comment that "there should be a rule to prevent this kind of thing from happening."
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> Notice that the reporter did not say, "The local office should be given discretion to waive, or at least bend, the existing rules in hard cases." What he said was, "There should be an additional rule to prevent such inequities in the future." Justice, he evidently believed, can be ensured only by establishing an adequate system of rules, and injustice can be prevented only by adding more rules.[31]

Like Toulmin, I doubt this rule-based rationale. However, as was observed by Schwartz "nothing is too small to be left to (unlegislated) chance."[32] This is the kind of bureaucratic culture in which I fear a disability insurance scheme would operate. This is why, both my evidence and my submissions have emphasised limiting the role of government. We have seen the inequities (some arguably verging on the Dickensian) that can be generated from the current disability support system[33] and, to repeat, I did not hear anything from advocates who proceeded or followed my evidence to you that morning, to make me think disability insurance was a truly innovative idea.

Toulman's paper is also useful for its discussion of alternative support and funding structures, such as friendly societies.[34] There has been extensive work done on private models of support, which include both affordable housing and other services tailored to an individual's needs.[35] Including PLAN, there are likely many other variations. In short, I do not want the Commission to recommend the creation a government monopoly provider and, if you do create a new agency, I would insist (as stated before) that client engagement with it be voluntary.

My relationship to Mr Dickens

Finally, I refute any imputation that my evidence amounted to a return to a Dickensian-era where the disabled were left to the care of their families and/or charitable institutions. Rather, my perspective comes from people like Menzies and Hayek, who warned against socialism's central planning, leading to 'the smallest bureaucrats coercing individuals and their families' (to paraphrase Hayek). This should never happen, but this danger clearly

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[31] Ibid., p.32

[32] Schwartz, above n 15

[33] See *'Disabled worker's wage cut to $2 an hour,* above n 25

[34] See Toulmin, above n 30, pp. 36 - 37

[35] See for example Housing Choice Australia <http://www.hcau.org.au/TPL_S1.php?PageName=AboutUsPage&FolderName=No&PageType=Html&PageOrientation=No&PageTitle=About HCA>at 3 August 2010. There have also been numerous conferences on housing needs for those with disabilities; for example see *Housing and Support for People with Disability conference – Sydney, 31 May 2007: conference report* By Joy Connor (Senior Policy Officer, Shelter NSW), 30 June 2007 <http://www.shelternsw.org.au/docs/sem0705disabilityhousing-seminarreport.pdf> as at 3 August 2010.

exists in a centralised disability insurance scheme, particularly when advocates are calling for government bureaucrats to be actively involved.

Rather, it is disingenuous for advocates and others to presume that people with disabilities and their families are not capable of determining for themselves what they want, without being told by central government what they shall have. Indeed, perhaps if some were to actually read *Dickens* they might pass a cautionary eye over *Bleak House* and Mr Dickens' foreboding tale of the Court of Chancellery. In particular, he said:

> The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.
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> Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth.
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> On such an afternoon, if ever, the Lord High Chancellor ought to be sitting her—as here he is—with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon some score of members of the High Court of Chancery bar ought to be—as here they are—mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee- deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might. On such an afternoon the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be—as are they not?—ranged in a line, in a long matted well (but you might look in vain for truth at the bottom of it) between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them. Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained-glass windows lose their colour and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect and by the drawl, languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it and where the attendant wigs are all stuck in a fogbank!

> This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you rather than come here!"[36]

It is worth considering whether a similar fog of procedural formality is not descending on many quasi-judicial tribunals, which at inception were claimed to be simple, cheap and 'user friendly' dispensaries of justice. Why would a disability insurer not follow the same trajectory; all ending in what Dickens describes as a 'mountain of costly nonsense (which) overthrows the brain and breaks the heart'. And, indeed, if you will permit me to draw a parallel between disability insurance and, the Job Seeker Compliance Regime, the latter arguably succeeded in overwhelming and breaking many people, as it actively descended to (and remains in) a state of 'costly nonsense'.[37] In short, we may not call these institutions Courts of Chancellery, but they often bear a striking resemblance to Dickens' characterisation.

Beyond this, I remain concerned about the level of control a government-run disability insurer may give the bureaucracy over the lives of individuals and their families. Again, my reference points are confirmed opponents of socialism, in Menzies and Hayek. And, to draw one last historic analogy; Robert Menzies won the 1949 election, in part by campaigning against the Chifley Government's plans to nationalise the banks. My final plea to the Commission is: please do not 'nationalise my life' by imposing a compulsory disability insurance scheme.

Yours faithfully,

Adam Johnston

August 3, 2010

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[36] Jim Manis, Faculty Editor, Hazleton, PA 18201-1291, *Bleak House by Charles Dickens,* Volume One, Chapters 1 – 34, A Penn State Electronic Classics Series Publication, Copyright © 1999 The Pennsylvania State University, <http://www2.hn.psu.edu/faculty/jmanis/dickens/bleak_1.pdf> as at 1 August 2010

[37] See Independent Review of the Job Seeker Compliance Review, above n 13, pp. 35 – 40. In this second submission, I set out the 'mountains of costly compliance nonsense' involved with the compliance system.

Appendix 1

Submission to the Department of Family and Community Services Advisory Group on Planning for Sons and Daughters with Severe Disabilities

Dear Group Members

1) The definition of 'disability'

In seeking a definition of disability (and by extension severe disability) I went to Commonwealth's *Disability Discrimination Act 1992* (the Act). Quite frankly, in trying to "cover the field" the definition of a disabled individual in s.4 is so wide that it could cover the entire Australian population now, and in the future. As if to underline this absurdity the definition includes disabilities people do not currently have by saying:

> "…disability, in relation to a person…includes a disability that:
> (h) presently exists; or
> (i) previously existed but no longer exists; or
> (j) may exist in the future; or
> (k) is imputed to a person…"[1]

Theoretically, if influenza puts you in bed unable to attend work, you could argue that you are disabled. Paragraph (c) of the definition of disability contemplates disease causing organisms in the human body. Influenza is a virus with which you may be suffering presently, almost certainly will have had in the past, will have in the future and, may be imputed to have if you begin showing symptoms such as coughing and sneezing.

Almost certainly, this is not what legislators or draftsmen intended, but it seems to be an arguable interpretation. As such, in my view, anti-discrimination law is not necessarily the best template to go to in order to find reliable working definitions of concepts. Often, particularly when it comes to legislation trying to embody international covenants and other social policy charters, a great deal of ideology will come either explicitly or implicitly into the understanding of key terms.

This is clearly the case when it comes to discussing disability. In its recent review of the Act, the Productivity Commission undertook a survey of academic literature regarding disability. The Commission observed:

> "…The two main approaches to thinking about disability issues are the 'medical model', which views disability largely as a medical issue to be 'cured' and the 'social model', which views disability as resulting from social barriers to participation. The development of anti-discrimination legislation was largely due to the widespread acceptance of a social approach to disability…"[2]

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[1] *Disability Discrimination Act 1992 (Cth),* s.4, available at http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/s4.html

[2] Productivity Commission 2004, *Review of the* Disability Discrimination Act 1992*,* Report no. 30, Melbourne, 2004, p.11, available at http://www.pc.gov.au/inquiry/dda/finalreport/dda.zip

The Commission notes a commentary from the World Health Organisation[3] which, in its discussion of disability, at least tries to harmonise the medical and social views. However, in my view, a worthwhile and useful definition of disability must be primarily medical; an individual and their family would not have to worry about 'social consequences' if the individual did not have the medical condition in the first place. Therefore, I suggest a working definition of disability, including severe disability:

(1) A disability is a physical trauma, genetic condition or biological infestation, however and whenever acquired, which is:
(a) permanent in nature and;
(b) currently being expressed by one or more symptoms exhibited by an individual and;
(c) is not capable of cure given the current level of medical understanding and, an individual's treating physician, or an appropriately qualified specialist, recognised by the applicable College of Specialists, having examined and diagnosed an individual, is prepared to certify that this is the case and;
(d) renders the individual partially or fully incapacitated, by the nature of its severity, expression or both

(2) A psychiatric condition shall be included in this definition if clauses (1)(b), (1)(c) and (1)(d) are reasonably satisfied.

(3) A disability is a severe disability under clauses (1) and (2) if:
(a) the physical or psychiatric trauma leaves an individual dependent on other persons for the needs of daily living and;
(b) has left the individual with a reduced capacity for autonomous decision making or;
(c) where the degree of physical or psychiatric dependence means no act or decision is autonomous, or where the degree of autonomy is negligible in the circumstances.

(4) An individual who does not satisfy clause (3) may nonetheless satisfy the clause, if on the production of medical evidence by that individual (or their parent, guardian, sibling or associate[4]) it is reasonable to conclude that their disability shall in the future satisfy the definition.

Again, I think the 'medical model' honestly addresses what disability (and particularly severe disability) actually is, rather than trying to reorganise society as the pure social/human rights model might do.

2) Who is to be covered by the measure?

In this respect, the Act provides a useful guide in its definition of Associate, which you should consider using in answering this question. An associate of a person with a disability is:

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[3] *See* ibid, p.15

[4] 'Associate' will be discussed later in this submission.

> "…(a) a spouse of the person; and
> (b) another person who is living with the person on a genuine domestic basis; and
> (c) a relative of the person; and
> (d) a carer of the person; and
> (e) another person who is in a business, sporting or recreational relationship with the person…"[5]

With the increasingly socially elastic definition of 'family' these days[6] a whole variety of different people may provide care and support to the severely disabled person at various times. This is particularly if, as Mr Mackay suggests, key social institutions such as marriage are in a state of flux.[7] Therefore, the measure needs to be flexible enough to cover all these eventualities.

Given this, I would call on the Advisory Group to recommend that an independent body be established to further develop the measure, to be headed by a Judge or recently retired member of the judiciary. Judges are to be preferred over departmental bureaucrats as the former are practised in looking at the facts of a case and deciding questions on their merits; the later seem often to have an overriding concern *not* to spend revenue, be bound to administrative "guidelines" and other internal 'memos', thus giving the strong impression they operate by fiat rather than fact. Some senior politicians and academics have gone on record with their concerns about these trends. For example, the Victorian Attorney General Rob Hulls told the High Court's Ceremonial Sitting in Melbourne during 2003 that:

> "…In our defence of the rule of the law, we must also be alert to, and alarmed by, attempts to bypass judicial scrutiny, whether it be via privative clauses or the more insidious trend towards unenforceable guidelines. In my view, any suggestion that an Executive's "non-binding guidelines" be accepted as authoritative is dangerous terrain. Yet it is increasingly the case that we are asked the accept the legitimacy of such guidelines, whether it be in Industrial Relations, decisions concerning grants of Legal Aid, or more poignantly in the immigration area…"[8]

Equally, Suri Ratnapala has argued elsewhere that the bureaucrats have already succeeded and, "parliament has, with High Court approval, successfully unified legislative, executive and judicial powers".[9]

Therefore, I recommend that the FaCS bureaucrats have as little as possible to do with the measure's establishment. The Judge heading the independent implementation body would arrange for the tendering and coordination of services by appropriately qualified private sector providers to help eligible persons and/or their families make

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[5] *Disability Discrimination Act 1992 (Cth),* s.4

[6] *See for example* Hugh Mackay, *Turning Point: Australians Choosing Their Future,* Pan Macmillan, 1999, pp.145-152

[7] *See* ibid

[8] Hulls, the Hon. Rob, Ceremonial - Special Sitting at Melbourne - Centenary of High Court of Australia [2003] HCATrans 406 (6 October 2003), available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/HCATrans/2003/406.html

[9] Ratnapala, Suri, *Welfare State or Constitutional State?,* CIS Policy Monograph No. 15, Centre for Independent Studies, 1990, p.53

the necessary arrangements.[10] The role of the Government (at the implementation body's request) would be to establish a dispute resolution body, which had a clearly defined legislative framework.[11] The legislative framework should provide that the dispute resolution body be independent of both trustees and beneficiaries. It should also be required to report to Parliament, much like an Ombudsman.

3) Accommodation and care needs

I must begin by observing that the exclusion of day-to-day needs from the measure is entirely unrealistic and, may indeed cause hardship. Significant accommodation or care decisions will be made on the proviso of being able to obtain day-to-day care and support services in the same locality. Equally, the costs of each will be inter-related and affected by the other; indeed, the Government may find that trying to draw a clear dividing line between the two types of costs will become the most contentious and controversial elements of the measure.

For example, in my own case, personal care services provided by the *Homecare Service of NSW*[12] represent both a day-to-day care requirement and a long-term care need. I have been a client of *Homecare* for nearly 20 years; their support allows me to remain at home with my family, because my parents are relieved of some of my more 'complex' care needs. Theoretically, considering the measure we are discussing, the definition of a service as a long-term care need or a matter of daily living, could have catastrophic consequences on an individual's quality of life, ability to live in a particular place of residence and, their ability to reside with or near significant others in their lives.[13]

I would dismiss any attempt to draw distinctions between long-term or daily care needs, not to mention any other "definitions" departmental officials may be inclined to write. Rather, the extensive body of personal injury case law can and should be adapted to the questions of whom and what services shall be covered under the measure. This is another reason why the services of an experienced judicial officer should be called upon in developing the measure.

Thus, in determining what support services might be covered by the measure, you could have regard to the judgment of Gibbs CJ in *Griffiths v. Kerkemeyer*[14] or, the findings of Kirby J in *Hodges v. Frost.*[15] Kirby J usefully itemised some principles in

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[10] Any fees or charges incurred should be tax deductible, with associated hardship provisions for those unable to pay. Any disputes over payment (or capacity to pay) should be subject to independent assessment, much like courts (and the Legal Services Commissioner) can order independent costs assessments of legal fees.

[11] I have had unfortunate experiences with government services being delivered under so-called "non-statutory schemes", meaning that it is very difficult to hold tardy suppliers or service providers formally accountable. *See generally* http://www.pc.gov.au/inquiry/costrecovery/subs/subdr112.pdf

[12] An arm of the NSW Department of Ageing, Disability and Homecare (DADHC)

[13] I note in passing that the application of such a definition and its consequences could trigger complaints to HREOC (Human Rights and Equal Opportunity Commission), tying the measure up in protracted litigation.

[14] High Court of Australia (1977) 139 CLR 161 – *See extracts cited in* Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies: Commentary and Materials,* 2nd ed., LBC Casebooks, pp. 124-127

[15] Federal Court of Australia, Full Court (1984) 53 ALR 373 – *See* ibid, pp. 127-128

the award of damages; a similar approach could and should guide the identification of those services which reasonably come within the scope of this measure.

In dealing specifically with the matter of accommodation, there are a number of worthwhile initiatives already in existence. Furthermore, over the years, there have been many conferences, initiatives, schemes, workshops, inquiries and the like, dealing with the question of affordable housing for people with disabilities. Submissions are called for, conference organisers promise much, but it is often another matter whether anything is delivered. I draw your attention to my submission to the Productivity Commission's inquiry into First Home Ownership.[16] In this submission, I highlighted the work of the Singleton Foundation,[17] while the appendices to that submission included an "expression of interest" to attend a NSW Government Housing Forum for people with disabilities.

In the expression of interest, I outlined various mechanisms, including trusts, mutual non-profit companies and entailment, which could be used to fund both accommodation and other services a disabled person is likely to need.[18]

Means testing

Finally, I would like to take up the matter of means-testing. Paragraph (a) of the document "Planning for Sons or Daughters with Severe Disability" would appear to suggest that the concessions program will only be available to those parents who already receive some sort of age pension or concession. Self-funded retirees and their families seem to have been carefully, but unjustifiably, excluded from the measure.

There are a number of aspects the Government should consider before persisting in this approach. Firstly, superannuation is, as I understand it, meant to support the superannuants when they retire, rather than their children. Secondly, as the parents and their children age (and the medical and support needs of all parties become more complex), the retirees could well be forced to draw on the superannuation "principal" amount to fund either their, or their children's needs, or both. This may precipitate a decline into poverty and dependence on public welfare for all parties. Thus, the Government's apparent objective to exclude the disabled children of self funded retirees from the measure may well end up being a very false economy.

As the child of self funded retirees, I can confirm that the above is very much a concern of my family and, we wonder about the wisdom of self-initiated saving, when measures such as the current proposal, by its very design, operate as a distinct disincentive. Superannuation by its nature is already a form of taxation, which the Government then taxes again on both entry and departure from a superannuation fund; but at least most of the money is available when you retire from the workforce. However, it is arguable that self-funded retirees, who happen to have a disabled child or children, are being asked to pay an implicit or hidden DST (Disability Services Tax).

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[16] *See generally* http://www.pc.gov.au/inquiry/housing/subs/sub018.pdf

[17] *See* ibid., p.3 of 17

[18] *See* ibid., pp. 6-9 of 17. Also note the submission to a State Parliamentary inquiry on the same matter and related ministerial correspondence.

It would be preferable (and equitable) if access to the measure's benefits was determined on the child's ability (or prospective ability) to earn income or otherwise support themselves. No doubt, this would be based on assessment of the disability and any work history the child may have. Prospects of 'survival' in an increasingly competitive job market may also need to be considered, given media comment that prospering in the modern workplace means:

> "…(Employees) exaggerate their achievements and market themselves. They design a narrative about themselves crafted to appeal to their audience - the boss…A survey of 309 Australian workplaces last year by the Mercer consultancy…predicted an overall wage increase of 4.2 per cent for 2005, well ahead of the 2.6 per cent inflation rate - but only the cream of workers stood to gain, with huge pay rises, while the bulk of employees ate leftovers.
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> Ken Gilbert of Mercer says the trend reversed the way pay rises were traditionally awarded. "Previously companies [would] say we have a 4 per cent pay increase budget and we will pay that across the board, with a little bit left over for high performers, whereas now that budget will be given to high performers and what's left over will be paid across the board…"[19]

It is highly questionable whether many disabled people have prospects of 'marketing themselves' in this environment, given the omnipresent spectre of their disability. Having been an employee whose contract came to an end, I am currently only too well aware of the difficulties of re-entering the workforce. Equally, while it would be difficult to find evidence, I am sure that many employers, even though they collect 'diversity' information and claim they ascribe to certain policies, look at the prospect of actually hiring a disabled worker as something they could well do without.

The Act places duties on them to make 'reasonable accommodations', while if everything goes wrong, an employer could fear ending up before HREOC. This is not to mention health and safety issues, all of which may mean that in the end an employer says 'this is all very nice in theory, but I already deal with enough red tape, and there are plenty of other applicants'. And quite frankly, even though I am disabled, if I was hiring, the same rationale would be very persuasive. As such, even as a solicitor holding a law degree and an arts degree, I am aware that my employment prospects (even as I churn out the applications and regularly 'annoy' my employment agent) remain, at a very human level and beyond the persuasion of any statute, a question of whether someone is prepared to take a risk.

Therefore, given all of the above, I recommend that the Government urgently reconsider the means testing provision of the measure, with a view to its removal.

4) Providing information

Peak bodies and advocacy groups, such as Paraquad, The Spastic Centre, The Northcott Society and many others,[20] would be appropriate conduits of information to

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[19] Delaney, Brigid, *The golden children in the age of individualism*, January 9, 2006, Sydney Morning Herald, available at http://smh.com.au/news/opinion/the-golden-children-in-the-age-of-individualism/2006/01/08/1136655084981.html

[20] Many of which members of the Advisory Group will be, or have been, associated with.

the public. Furthermore, as we are dealing with the creation of trusts, the various State Law Societies, Bar Councils and representatives of the accountancy profession will need to be brought on board. Equally, estate planners, financial planners and conveyances will need to be trained in the details of the measure. These are the advisors many people will go to for assistance, and they need to be properly informed.

This is another good reason for an independent judicial officer to oversee implementation. Modules for continuing professional education will need to be written for the legal, accounting and associated fraternities. Information provided by someone who has worked in one of the fraternities, has probably had professional dealings with all of them and, holds an office to which all are ultimately accountable will carry much greater authority (and practical application) than guidelines emanating from the bureaucracy. This would be particularly so, in light of the earlier cited comments of the Victorian Attorney General.

Finally, I recommend that *Centrelink* has as little to do with this measure as possible. Part of my rationale for seeking to involve private sector providers is to give people freedom of choice to seek advice from someone other than the government, as well as an appreciation from personal experience that *Centrelink* "is big enough already". Indicating that you had to go to *Centrelink* to access the measure would almost certainly dissuade many eligible people from taking advantage of it.

I trust these comments will be of assistance.

Yours faithfully.

Adam Johnston

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