DISABILITY SUPPORT PENSION: TOWARDS WORKFORCE OPPORTUNITIES OR SOCIAL CONTROL?

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I. INTRODUCTION

Until recently, people unable to work due to sickness or invalidity were eligible to apply under the *Social Security Act* 1947 (Cth) for payment of a Sickness Benefit (payable for temporary incapacity) or Invalid Pension (payable to people with a permanent incapacity for work, at least half of which had medical origins and which constituted at least an '85 per cent incapacity'). These cash payments (funded from general revenue not contributions), continue to be made as flat payments (not earnings-related) not exceeding a defined maximum rate. Payments are reduced according to a formula where the person has income or assets above prescribed limits.

In the case of Sickness Benefit, qualification essentially turned on obtaining a certificate of incapacity from a medical practitioner. The duration of the incapacity was of little or no importance and the numbers of long-term sickness beneficiaries became of growing concern. Invalid Pension numbers also rose over the last decade or so, leading to government initiatives (both administrative and legislative) to try to stem the growth. The later discussion of

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'impairment tables' to rate medical disability and the requirement that 50 per cent of the inability to work be attributable to medical factors, are two illustrations of such measures.

External commentators and enquiries, such as the Federal Government's 'Social Security Review' (the 'Cass Report')[1], raised two more pressing concerns: first it was argued that the structure of the payments, in insisting on 'permanent incapacity for work' as the basis of qualification, may serve to explain the negligible numbers of invalid pensioners managing to re-enter employment (or other community activities); secondly, adverse comment was made about the 'passive' nature of the cash payment system and its lack of relationship with rehabilitation or labour market services which would assist disabled people to more fully realise their potentials.

The 1990 Budget announced the introduction of a new scheme of income maintenance for people with disabilities, originally with effect from October 1991. The announcement foreshadowed that Invalid Pension and Sickness Benefit would be replaced by two new income support measures: a Sickness Allowance payable for 12 months (or 24 months for special medical reason); and a Disability Support Pension (payable under new criteria, but divided into an active and a passive stream). Legislation to give effect to the reforms was introduced in May 1991.[2] The Bill passed by the House of Representatives was adopted by the Senate on 9 September, but in amended form, in response to concerns raised by peak welfare bodies. Government amendments removed some of the more controversial provisions - such as those providing for forced participation in rehabilitation, training or work, together with the accompanying penalty structure which was to have operated from October 1993. Consideration in the Senate delayed the timetable for implementation, and the final form of the legislation came into effect on 12 November.

The reforms aim to facilitate participation by disabled people in either work or community activities, while guaranteeing security of financial support for severely disabled people who have little prospects of making that transition.[3] Those objectives might not be easily realised; and, despite the Senate amendments, there is still a risk that the scheme may prove repressive of rights

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1 B Cass, F Gibson, F Tito, "Towards Enabling Policies: Income Support for People with Disabilities" 1988 *DSS Social Security Review* 24.

2 *Social Secruity (Disability and Sickness Support) Amendment Act* 1991 (Cth) [subsequently the *Disability Act*]. The legislation substituted a new Part in the *Plain English Act* (the *Social Security Act* 1991 (Cth) which had been passed in April and which came into force in July 1991. Prior to its amendment, the *Social Security Act* 1991 re-enacted the substantive policies contained in the *Social Security Act* 1974 (Cth) (as amended) [subsequently the *1947 Act*. Accordingly, references will only be made to the old and the new provisions (the *1947 Act* and the *Disability Act*) and not the since replaced Part of the 1991 Act (the April 1991 're-enacting Part').

3 *New Opportunities for People with Disabilities.* DCSH, DSS, DEET, August 1990.

to income security, or be productive of (well-meaning) social regimentation of the disabled. This paper will explore some of those possibilities.

II. INVALID PENSION

Under the pre-existing law, there were three main issues to be decided when assessing eligibility for Invalid Pension.[4] Qualification for pension required that the person be an Australian resident over the age of 16 and be 'permanently incapacitated for work'.[5] Incapacity was elaborated in section 27, which read:

> A person is permanently incapacitated for work ... if:
> (a) the degree of the person's *permanent* incapacity is *not less than 85 per cent* and
> (b) that permanent incapacity, or at least 50 per cent of that permanent incapacity, is *directly caused* by a permanent physical or mental *impairment* of the person (emphasis added)

The first element of this definition called for an assessment to be made as to whether or not the person was able to compete for classes of work which were appropriate, bearing in mind their education, prior work record and training. This stemmed from the interpretation placed on the words in paragraph (a) of s 27, which were read as requiring much more than an abstract consideration of the way in which given medical conditions might reduce employability in the Australian labour market as a whole; rather, in assessing qualification, weight was also to be given to *non-medical* characteristics of the *particular* applicant (or what were termed the 'social factors').[6]

The assessment of the impact of the disability on employability involved a "consideration of the whole person and the cumulative impact ... of such matters as (a) the nature and extent of [the] disabilities; (b) ... capacity to sustain ... work effort throughout a normal working day or week; (c) ... age; (d) ... previous work experience; and (e) the types of paid work available in the community which a person with those characteristics may reasonably be expected to be able to perform".[7] Applicants were assessed as 'whole persons' (not medical abstractions), where the disability was related to the age, background, skills and experience of the particular applicant. Eligibility turned on their capacity to attract an employer from the pool of otherwise suitable employers available within the region, to then sustain working effort over a normal period, and to meaningfully expect to retain that work.

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4 *Social Security Act* 1947 (Cth) ss 27 and 28.

5 *Ibid* s 28.

6 *Re Panke* (1981) 4 ALD 179; *Re Fliedner* (1983) 5 ALN N288. This interpretation was endorsed by the Federal Court in *Annas v Director-General of Social Security* (1986) 8 ALD 520.

7 *Re Fliedner* (1983) 5 ALN N288, para 26.

In this regard, the much discussed '85 per cent figure' was read simply as an *ameliorating* provision. In making the assessment it was not necessary to conclude that the person was unsuitable for all conceivable jobs, but rather that there was no job given the normal operation of the local labour market. The 85 per cent figure was *not* a reference to an arithmetic assessment of levels of medical impairment or disability.

The second element of the original invalid pension provision covered the 'permanence' of the loss of job competitiveness. An assessment was required to be made as to whether it was 'more likely than not' that the incapacity for work was one which was likely to subsist over the 'foreseeable future'.[8]

The third element (a medical foundation) always played some part in the calculation.[9] Paragraph (b) of section 27 was inserted in July 1987 to codify this by formally requiring that any total inability to compete for *work* as may be found, must then be one for which there was a significant medical *origin*. At least half of the causation was to be 'directly' attributable to 'impairments' with a medical origin. An 'impairment' in this sense was taken to be a 'reduction' or diminution in the medical status of a person.[10] The reference point in judging that diminution was that of a healthy person of similar age and background. What was called for was an assessment of whether at least *half* of the person's inability to work in sectors of the labour market which would otherwise be open to them, could be said to be directly *caused* by, or to flow from, their health problems.[11] Both an entrenched perception of invalidity[12] as well as a psychologically grounded 'lack of motivation to seek work'[13] qualified as a *medical* foundation for this purpose.

Rating values calculated under Tables of Impairment had absolutely no bearing on the satisfaction or otherwise of this requirement. This was because the tables (adopted as an administrative measure by the Department in 1987 to assist in the orderly administration of the Act),[14] measured only the degree of anatomical or other restriction on daily living activities consequent on suffering the particular medical problem. They did not provide a measure of the degree of restriction from engaging in the labour market from which the person suffered. The calculation of the proportionate impact of the medical conditions

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8 *McDonald v Director-General of Social Security* (1984) 6 ALD 6 at 13 (Federal Court per Woodward J; Northrop J concurring).

9 *Re Sheely* (1982) 4 ALN N 206.

10 *Re Kadir* (1989) 17 ALD 220; 10 AAR 149, paras 25-26.

11 *Re Zanos* (1989) 17 ALD 354, para 49.

12 *Re Vranesic* (1982) 4 ALN N 282 at 283.

13 *Re Fliedner* (1983) 5 ALN N 402 at para 29.

14 The tables had no official status under the legislation: compare *Donnelly v Repatriation Commission* (1987) 73 ALR 350 at 356-359; affirmed on this point in *Apthorpe v Repatriation Commission* (1987) 77 ALR 42.

in causing the required level of non-competitiveness of the person in the labour market therefore remained a matter of judgement.[15]

III THE BACKGROUND TO THE NEW DISABILITY PENSION

The fundamental premise of the new pension arrangements was stated to be that "under current income support arrangements, people with disabilities have few incentives to work"; therefore "changes to income support and related programs are necessary to encourage greater participation in the labour market and to reduce dependency on long-term income support".[16] Part of the real motive for the reforms, though, may lie in the history of Departmental responses to structural change in the labour market.

A. RISING NUMBERS OF INVALID PENSIONERS: THE DSS RESPONSE

Since the mid 1970s, concern has been held at the Commonwealth level about the burgeoning proportion of the workforce in receipt of invalid pension: at the beginning of the 1970s there were approximately 20 male invalid pensioners for every 1000 males of workforce age, a figure that had risen to approximately 30 by the end of that decade and was approaching 40 by the late 1980s.[17] This was a growth rate of around 7 per cent at a time when the population of people potentially eligible was rising at only 2 per cent per annum. Several factors contributed to this, but the most powerful was the effect of changes in the labour market: one study estimated that by 1980 there were 37,000 people (mainly males) drawing an invalid pension which would not have otherwise been sought apart from the deterioration in the labour market as it affected older (often unskilled) workers.[18]

The Department initially responded by tightening review processes: terminations rose by 850 in the year to June 1979 and by another 1,113 in the following financial year (approximately a 55 per cent increase over the period).[19] But concern remained. In May 1979, bolstered by a legal opinion from two Queen's Counsel to the effect that the current law did not embrace 'non-medical factors', administrative instructions were issued to Commonwealth

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15 One method was to notionally list the factors contributing to un-competitiveness for work, and then allocate them between those which did originate in a medical condition, and those which did not: *Re Kadir* note 10 *supra* and *Re Zanos* note 11 *supra*.

16 *1990-1991 Budget Information*. DSS, 1990 at p 1.

17 B Cass et al, note 1 *supra*. There was a similar rise in male invalid pension numbers during the 1930s Depression: *id.*, p 25.

18 P Stricker, P Sheehan, *Hidden Unemployment: the Australian Experience* at pp 87-90.

19 Statistics calculated from figures in the Annual Reports of the Department.

Medical Officers that such factors were no longer to feature in the assessment.[20] This was reinforced by the May 1980 establishment in the then Department of Health, of a new State Office position of Senior Medical Officer (SMO) to vet all recommendations.[21] The statistical result was dramatic: grants fell from a peak of 43,800 in the financial year to June 1979, down to 23,200 in the year to June 1982. Rejections climbed from 23 per cent in the initial year of this period to 41 per cent in the final year.[22] In the first quarter following their introduction, SMO's were responsible for rejecting 10 per cent of new applicants for pension and 6 per cent of those pensioners reviewed (and this *despite* favourable CMO recommendations under the new guidelines).[23]

Following threats of a High Court challenge, and facing the odium of widespread protest in the forthcoming 'International Year of the Disabled', the Government retreated, issuing revised guidelines in May 1981. Initially the new Government, which took office in 1983, sought to reinforce that more liberal stance, ordering that the ultimate decision in invalid pension matters be exclusively a DSS responsibility, and that social work assessments be made of socio-economic and other factors before rejection of a claim.[24]

B. THE 'SECOND WAVE OF REFORM': THE TABLES TURNED?

In the May 1987 *Economic Statement*, however, it was announced that half of any disability would in future be required to be attributable to a medical impairment (extending the 1982 ruling by the AAT[25] that there be a substantial medical foundation). Associated with this, the Department introduced Impairment Tables, modelled on those applied in Veterans Affairs, and derived from American Medical Association (and World Health Organisation - 'WHO') classifications.[26] Initial instructions issued on 12 June took a hard line, arguing that at least a 40 per cent impairment rating was called for in order to satisfy the new test that 50 per cent of the *incapacity for work* be attributable to an

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20 For an analysis: P Hanks "Invalid Pensions: Rights at Risk" (1980) 5 *Legal Service Bulletin* 172.

21 Kirkwood points out that at the beginning of 1983 there were 902 part-time CMOs (fee-for service general practitioners in the main), and only 58 'full-time' appointees. Consequent disparity of decisionmaking was one of the reasons for introduction of the SMO: J Kirkwood, "Medical Assessments for the Invalid Pension" (1984) 9 *Legal Service Bulletin* 32 at p 35. (Joint issue with *New Doctor*).

22 B Cass et al, note 1 *supra* at p 74.

23 Hansard, Senate, 1981, 2220-2221.

24 B Cass et al, note 1 *supra* at p 75. Kirkwood also cites the memorandum of February 1983 in which the then Director-General (now Secretary) of DSS reminded determining officers that the decision on qualification was vested in them, even where their opinion differed from that of the SMO: Note 21 *supra* at p 35.

25 *Re Sheely* (1982) 4 ALN N 206.

26 *Ibid* at 77-78.

impairment. Thus DSS instructions advised Regional Managers that a 40 per cent rating was a *mandatory* requirement for qualification;[27] cases with a rating of less than 40 per cent were deemed ineligible, and delegates were instructed that they were 'not required to be considered further'.[28] Lest there be any misunderstanding, a second set of instructions (of 18 June), directed that socio-economic factors were *irrelevant* for any person with a rating less than 40 per cent.[29] On the 26 June this was amplified and reiterated.

However, on 2 July, Regional Managers were contacted to advise that statistics were being urgently collected to analyse whether these instructions "are the most appropriate means of implementing the new policy". Cases with a rating above 40 per cent were to be granted, but those below that figure were to be held in limbo, "until it is confirmed that procedures outlined for such cases are fully appropriate". That monitoring disclosed that roughly 70 per cent of cases received a rating of at least a 30 per cent impairment. Accordingly, late in July, it was resolved to lower the 'presumptive automatic grant' level to a 30 per cent impairment. The group with ratings in the 20-30 per cent band were isolated for more extensive investigation; with those in the upper reaches more readily to be found to qualify. Those in the lower reaches would presumptively not qualify; while the 20 per cent or so of invalid pension applicants graded as having impairments at or below the 20 per cent impairments, would qualify only in rare (extreme) circumstances.

A six month period of monitoring and 'bedding down' was also agreed on and, by the end of the month, the ratings were being described as 'indicators' which generated strong or weaker presumptions of incapacity depending on their level. By mid August fresh instructions had been issued. These reinstated the assessment of incapacity for work as the primary question, with the presumptions generated by impairment ratings relegated to a (prominent) supporting role.[30]

C. CASS AND THE LABOUR MARKET

It is clear from the above that the labour market has undergone some profound structural changes. As the Cass Report put it, despite strong growth in the labour market in the 1980s, "the fundamental labour market problems remain insufficient aggregate demand for labour, and the entrenchment of long-term unemployment".[31] It was recognised by Cass that the disabled were vulnerable to downturns in the labour market, and that the shift in the

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27 The mandatory social work referral introduced in 1983 for all cases considered for rejection, was abolished for all cases except those with at least a 40 per cent rating (the newly identified 'borderline' cases), in an instruction issued on 18 June 1987.

28 Manual Instruction 4.013.

29 Instruction 4.040.

30 Instructions issued 17 August 1987.

31 B Cass et al, note 1 *supra* at pp 8-10.

proportions of the aggregate labour market (full and part-time employees) who are engaged in manufacturing (declining) and service sectors (rising) would further reduce labour force participation of the disabled unless their access to skills and training programs were to be boosted.[32]

The remedy suggested in the Cass Report differed from the 'growth capping' strategies adopted by the Department, however. It had two (related) parts: first, the injection of a more active focus to the income support program, to reverse the assumption that disability permanently excludes recipients from future participation in the labour market and community; and, second, to facilitate re-entry, a proposal that income support payments be integrated more closely with related service programs (labour market, rehabilitation and community support). The Government announcements remained faithful to the pursuit of those twin goals, but the administrative measures adopted to give effect to them risked derailing (or unintentionally reversing) the policy directions so mapped out.

IV. OPERATIONAL CONCERNS GENERALLY

A. ELIGIBILITY: THE REACTIVE MINEFIELD?

The functions of the Department at the initial point of application (the 'intake gate') can take two forms: They might be dynamic and flexible or they might be static and reactive. If the rationale for the new system is to provide opportunities for the negotiation of tailor-made solutions to individual needs as a way of boosting prospects of re-entry to the workforce and community life, the former would be preferred. But if the prime purpose remains that of auditing the application of rigid eligibility criteria for disability payments then, as at present, the reactive role could be expected to be maintained.

(i) The new arrangements

The opportunity for the client to initiate an active and equal dialogue about the particular needs of the person and how they might best be satisfied (and for the Department to reciprocate) mainly centres on the point of application. It is at this point that the opportunity arises for the client and the Department to sit down - preferably on more than one occasion - to discuss the interests and priorities of the person, and map out possible services and strategies for realising those objectives or for removing barriers to their realisation. Such 'active employment' schemes embody several features: equality of the parties, flexibility and reciprocity of discussions, and would normally conclude with the adoption of a mutually agreed 'custom-made' plan of action.[33]

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32 *Ibid* at p 10.

33 A number (though not enough) of these features are built into the 'active employment agreements' required to be negotiated under the reform measures which replaced unemployment benefit by a Job Search Allowance and a Newstart Allowance: See *Social*

Yet neither the administration nor the legislative framework encourages this. Instead, at this first 'gate', the functions of the Department under the new legislation remains the more 'reactive' (or passive) one of determining whether or not the applicant qualifies for the new payment. A passive rather than an actively dynamic role appears to have been selected.

In place of the concept of 85 per cent permanent incapacity for work which was at the heart of previous arrangements, the new legislation was supposed to substitute what was summed up as:

> the concept of inability to work full-time at full award wages in the foreseeable future, due wholly or substantially to a physical, intellectual or psychiatric impairment.[34]

As elaborated (and modified) in the new Act, there are four elements to the new eligibility conditions. These are threshold issues, which govern *entry* to the new payment (leaving the 'streaming' into the active and inactive groups for later determination, when the 'case-planning' elements are considered for application).

First, the person must have a minimum impairment rating of 20 per cent.[35] This is calculated under 'Impairment Tables' incorporated into the legislation. Once enacted, the mode of calculation provided in the rating schedules are binding on the Department and review bodies (though review bodies can correct errors in the application of the tables).[36]

The second gateway requirement is that applicants must have a 'continuing inability to work'. There are two ingredients here. First, and 'of itself' (of which more below), the impairment must be sufficient to prevent the person from performing their 'usual work' *and* any other work for which they are skilled.[37] This means that a skilled worker must show that they cannot undertake unskilled work. Second, it must also be shown in all cases that the inability to

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Security Act 1991 s 606 (Inserted by *Social Security (Job Search and Newstart) Act* 1991 (Cth) s 7).

34 *What's New, What's Different 1990-1991 Budget*, DSS 1990, at p 3.

35 *Social Security Act* 1991 (Cth) (as amended by *Social Security (Disability and Sickness Support) Amendment Act* 1991), s 94(1)(b) (impairment(s) greater than 20 per cent under the Impairment Tables).

36 Section 23(1) (definition of 'impairment tables'), Schedule 1B. In apparent recognition of the prospect that meritorious cases may receive less than a 20 per cent rating and that it is inefficient to take cases through appeal in order to correct this, Departmental practice will allow for a 'second opinion' to be sought if the rating is in the 10-20 per cent band: DSS, *Disability Reform Outline* September 1991 at p 2 para 16.

37 Section 94(2)(a)(i), (ii). Prior to the Senate consideration sub-paragraphs (i) and (ii) were expressed as alternatives rather than as a cumulative requirement. This is a significant change: inability to perform 'usual work will not suffice'; any capacity of say a skilled tradesman to undertake a light duties cleaning job would rule out satisfaction of the requirement. (The state of affairs must also extend over at least the next 2 years).

work flowing from the impairment is unresponsive to, or would not benefit from, mainstream educational or vocational training programs: the impairment must be 'sufficient of itself' to rule out such education or training, or it must be shown that training is not likely to equip the person, within the next two years, to do work for which the person is currently unskilled'.[38]

For its part, 'work' is defined as employment for at least 30 hours a week at award wages (the original Bill allowed for lesser figures: "wages that are reasonable, in the Secretary's opinion, for the work", but this was deleted from the final version).[39] Moreover it is sufficient if such work "exists within Australia, even if not within the person's locally accessible labour market".[40] To further reinforce these exclusions, the Secretary is directed not to pay regard to either the availability of work within the local labour market, or the availability of general education and training programs (those not specifically designed for disabled people).[41] The only exception is for older workers: in the case of a person who has reached 55 years of age regard may be paid to whether or not any training "is likely to equip the person to do work, hav[ing] regard to [the local labour market]".[42] Effectively, then, social factors apart from age are essentially to be excluded.

The third requirement is that the inability to work be a 'continuing' one. This is defined as one which is likely to continue for two years.[43] Broadly this mimics the previous interpretation of 'permanent' as being a state of affairs 'likely to persist into the foreseeable future'.

Finally, a connection is required to be shown between the impairment and the consequent inability to work (or benefit from training). This is expressed in the new legislation as an impairment which 'is *of itself sufficient*' to preclude employment or participation in training.[44] This was substituted, without any fanfare, for the original Government announcement that the inability to work would be required to be caused 'wholly or substantially' by the person's impairment.[45]

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38 s 94(2)(b)(i),(ii).

39 ss 94(5) (sub-para (a) of the definition of work), 94(1)(c) and 94(2) respectively. (The original Bill provided for the dispensation from award conditions in cl 94(5)(a)(ii)).

40 s 94(5) (sub-paragraph (b)).

41 ss 94(3) and 94(5) (definition of 'educational or vocational training').

42 s 94(4).

43 ss 94(2)(a) and 94(2)(b).

44 s 94(2).

45 Note 3 *supra* at p 1.

The first of these conditions narrows the entry gateway by comparison with the present arrangements. Based on Departmental figures and the monitoring conducted in the wake of the 1987 changes discussed above, it must be expected to exclude between 5 per cent and 9 per cent of existing invalid pensioners from qualifying.[46] The second criterion will also narrow the conditions: based on the 1979-1980 experience discussed above, it seems likely to account for another 7-10 per cent.[47] The third condition will, on the face of it, be intake neutral.

The final condition is intriguing. It is not a separate requirement, but stands part of the definition of a continuing inability to work whether at the person's usual or other occupation for which they are qualified. On a plain reading it requires that the impairment *itself* be sufficient to preclude participation in work or training. This effectively means that it is totally responsible for the inability to work: a significantly higher standard than the Government announcement (allowing for substantial causation), which itself lifted the standard (originally that at least 50 per cent be so attributable). Certainly its location in a definition may dilute its significance as a barrier in practice. However on any reading it appears to be much more restrictive than current criteria and it might reasonably be predicted that up to another 7 per cent of the 'current stock' of existing or prospective invalid pensioners might in future be 'excluded' by virtue of the impact of this tightened requirement.[48]

A conservative estimate of the cumulative effect of these tightened conditions, then, is that approximately one in five of people meeting the current conditions for Invalid Pension may not qualify for the new Disability Support Pension. In aggregate, these exclusions may be productive of very harsh policy outcomes.

Not all of the excluded group will be ready candidates for the exclusively 'active' stream of Sickness Allowance for instance. Qualification for Sickness Allowance turns on establishing (i) an incapacity for work, (ii) which is "caused wholly or *virtually wholly* by a medical condition arising from ... sickness or accident", and (iii) which "is, or is likely to be, of a temporary nature".[49] Some of those excluded under the fourth criterion for Disability Support Pension may qualify under the second of these conditions; it is less restrictive than the 'impairment of itself' criterion for Disability Support Pension, but it is more restrictive than the former '50 per cent causation' rule for Invalid Pension. But

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46 In 1988-1990, of people granted pension, 9.2 per cent received an impairment rating of 0-20 per cent: *Senate Estimates Committee:* "Additional Information Received", Senate, Oct 1990, vol 5 at p 845. (Answer to an Estimates Committee question by Senator Alston).

47 The Department, drawing on a 1989/90 pilot study, estimates that the first two factors will exclude 13 per cent from eligibility: *ibid* at pp 849 and 851.

48 The Department however has stated that the new language 'is meant to reflect' the current 50 per cent contribution requirement: *id.*

49 *Social Security Act* 1991 (Cth) s 666(1)(a)-(c).

it is supposedly only a temporary expedient, because of the time limitation on receipt of this payment (subject to certain exceptions which may in practice prove rather liberal).

By virtue of important amendments moved for the first time in the Senate, people who happen to have an episodic or fluctuating condition (such as certain psychological conditions or drug-dependent individuals) may regain Sickness Allowance as an exception to the standard rule barring access for 12 or 24 months once the allowable period (12 or 24 months) has elapsed for this payment. Originally this was permissible only where the re-application was based on a medical condition which was 'different' from or 'significantly more serious' than the original condition (which would not usually be the case with such conditions). However this has been broadened to include both "an incapacity caused by" the relapse of a "chronically relapsing [original] condition" (s 666(4A)(b)), and - to accommodate programs of treatment for alcohol or drug abuse - it also covers people who are participating in *approved* programs of "counselling, treatment or therapy for drug or alcohol abuse" where that participation is "not likely to extend beyond 78 weeks".[50]

Other excluded groups are in a much more tenuous position. Certainly, people who are relegated to labour-market programs may still gain some access to payments linked to rehabilitation: there is continued availability of a 'rehabilitation type payment'. Recipients of either the new short-term payment (Jobsearch) or the longer-term payments (Newstart) for the unemployed can build on that other entitlement (transforming it into Sickness Allowance) where three other things can be shown: (i) that the person "has a disability that reduces the person's ability to work"; (ii) the person is undertaking an "approved rehabilitation program"; and (iii) "the program is intended to enhance the person's ability to work".[51] Yet the indications are that this will not cater to significant numbers of those affected by these changes: more promising candidates are likely to win the restricted number of places available.

Those excluded from Disability Support Pension on other grounds (such as lack of a 20 per cent rating) may yet qualify for Sickness Allowance either under the basic criteria of section 666 or the 'relaxed/rehabilitation' grounds of section 667. Even so, numbers of 'unemployable' people also seem destined to drop back to Jobsearch or Newstart (with their associated 'active employment' ingredients). This is a particularly pointless enterprise, which must reflect badly on the morale and self-esteem of this group.

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50 ss 666(4) (basic barrier to re-claiming within 12 months), 666(4A)(b), (c) respectively. (Compare cl 666(4)(a)(b) of the original Bill).

51 s 667(1). The program must last, or be likely to last, at least 6 weeks: s 667(1)(d).

(ii) The Cass proposals for an 'active' ingredient

For its part, the Cass Report proposed to capture the new active philosophy at the point of *intake* (rather than at a subsequent stage), and to do so without departing so markedly from the previous concepts.

The Report also proposed that eligibility be based on a new concept of:

> significantly reduced potential for substantial gainful employment attributable predominantly to a medically-recognised impairment in interaction with other factors affecting employment capacity and employment opportunities.[52]

The first element of this was to be an assessment of the level and functional impact of the impairment, 'using an impairment guide especially developed for the purpose'.[53]

The Cass criteria differed from the recent Government legislative package in three important respects. First, the impairment tables were to operate in 'bands' (they were not 'sudden death' criteria). Secondly they were to be 'indicative rather than ... rigidly determinative' in their effect.[54] Thirdly, the scheme expressly included both 'socio-economic resources affecting employability' (such as age, sex, skills, literacy and work history) and also 'the availability and accessibility of jobs appropriate to the individual's skills and capacity'.[55] In the interests of certainty (and cost-cutting), the Government opted for precise, determinative impairment tables and the exclusion of non-medical factors, however.

Moreover, under Cass, a 'dynamic/flexible' entry mechanism was preferred in place of the reactive approach. Assessment was to be the responsibility of inter-departmental Panels.[56] This capacity to focus on shaping 'tailor made' solutions to the individual needs of the applicant for employment training or rehabilitation, was reinforced in other ways. Thus Cass preferred the more open (subjective) notions of 'significantly reduced' labour force potential, and called for this to be 'predominantly' a product of an impairment *interacting* with the socio-economic factors. Government legislation on these points has elected to pursue the goals of: objective precision (full-time award work), simplicity and parsimony (exclusion of non-medical factors), and a traditional - and reactive - entry gate (the Disability Officer acting on information from sources such as the treating doctor).

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52 Note 1 *supra* at p 213.

53 *Id.*

54 *Ibid* at p 144.

55 *Id.*

56 This suggestion was first advanced by Kirkwood, note 21 *supra* at p 35.

B. ADMINISTRATION: MATCHING PROMISE TO PERFORMANCE

(i) Fine-tuning the Tables?

Tables of 'impairment' levels for the purposes of assessing eligibility for disability support are something of a misnomer: in this context they seek to measure not only strict anatomical impairment (which can often be measured reasonably objectively) but also the broad functional consequences of the impairment. Those functional consequences divide conceptually into two, which may be illustrated through the example of the impairment of loss of one arm. First there is the consequence that the person will not be able to undertake exclusively two-armed tasks (termed the 'disability' by the WHO).[57] Second, there is the issue of the *social* consequence of that disability - for example the impact on the ability of the person to manage their social and personal life, or their ability to obtain work. This latter is termed the 'handicap' by the WHO. Self-evidently there may be great variance in the level of say work-related handicap which flows from a given impairment. A one-armed former labourer lacking potential to be trained for a desk job is virtually totally handicapped, while the handicap for the one-armed academic is nil.

It is the inability of impairment tables to load in these 'social background' factors which is one of the serious sources of error (or injustice) where they are given determinative status in the calculus of eligibility. Another serious weakness lies in the area of assessing psychological conditions: the conditions sought to be rated are not objectively manifested, they may fluctuate over time and in accordance with the nature of the stressors on the individual, and the work-related consequences are especially hard to predict. Third, but by no means least important, the tables were originally developed for other (quite unrelated) purposes: they were developed to provide crude measures of the ability which people may retain for independent living, or to ascertain their needs/suitability for rehabilitation.[58]

(ii) The supply and demands on Disability Officers

Under the new scheme eligibility decisions will be made by special intake officers (Disability Officers). This group of administrators will have a pivotal role to play in the success or otherwise of the reforms. Disability Officers are charged both with determining eligibility for the new income payments and

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57 WHO, *International Classificaton of Impairment, Disabilities and Handicaps*, Geneva, WHO, 1980.

58 These weaknesses, and the crude (and inaccurate) ratings, were detailed in the as yet unpublished report of the Woolcock Committee (established by the Minister in 1987 to review the applicability of Impairment Tables to Australian conditions). The Government amendments moved in the Senate sought to accommodate this criticism to a degree by expressing a preference for assessing clients under 'functional' rather than 'diagnostic' tables where a choice exists: Schedule 1B, note 4 *supra*, as amended.

with making decisions about whether or not to refer a person for detailed assessment by a Panel, on the ground that they are likely to have a potential for enhanced labour force (or social) participation. Their seniority, training and workload play a big part in shaping the kind of role which they will discharge.

Experience with an equivalent position in the analogous scheme for sole parents (the 'Jobs Employment and Training' or JET scheme)[59] demonstrates two things. First that it is critical that there be a sufficient number of well trained officers to cater to the client load. Second that there must be adequate linkages into the service networks (rehabilitation, training, and child care) required to deliver meaningful packages to those people catered for. The former rests on planning projections. Government advisers, keen to obtain approval for new initiatives in the face of objections levelled by the Department of Finance that initial outlays to establish the reform may render the program too costly, tend to unduly depress the levels of additional staffing realistically required to do justice to the implementation program. The second is even more fraught, for it relies on the cementing of good cross-portfolio relations. Either can (and often does) bring a reform undone.

It is not possible to make a definitive assessment of the strength or otherwise of this aspect of the recent legislative initiatives, because of the paucity of information contained in Budget and related papers. However there is reason for caution: only $5.1 m has been allocated to fund the new positions in 1991-92 (or $12.90 per disability support pensioner).[60] This is palpably too modest an expenditure if the aims behind an 'active' scheme for the disabled are to be realised. Moreover, it would be unusual were the reforms not to face major impediments due to a lack of commitment to the provision and training of Disability Officers, or due to inter-Departmental jealousies (and lack of co-operation).

C. BARRIERS TO REALISING THE PROACTIVE POTENTIAL

As we have already seen, the new Government scheme rests on its ability to usher in a more dynamic, personalised approach to integrating income support, training and rehabilitation measures in creative ways which will realise the potentials of disabled individuals to participate more fully in work or other social activities. Access to this element of the scheme as devised by Cass was to have been coincident with the decision about grant of income support, but under successive versions of what became the current legislation, Government

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59 This scheme, which was introduced in the 1988-89 Budget, provides for specialist departmental officers (JET advisers) to interview Sole Parent pensioners (particularly those with older children) to discuss the extent to which education, training, child care, or labour market transition programs might facilitate their entry into the workforce: DSS, DEET, DCSH, (*Jobs Education and Training: Interim Evaluation Report*), July 1990.

60 Parliamentary Debates, Senate, 12 December, 1990 at p 5577. (Answer to question on notice from Senator Alston).

postponed this to a 'second stage' decision. Streaming into the active pathway, though, continues to be liable to be influenced by legislative criteria and administrative arrangements which might colour perceptions of what is entailed at this point.

The lynchpin of the original legislation which went through the House of Representatives, was the power contained in cl 104 permitting the Department to *require* an existing disability support pensioner to agree to receive or participate in treatment, training or work activities: cl 104(1)(c)(iii), (v), and (vi) respectively. This scheme of 'directed participation' in the active stream was open to two serious objections: that it corrupted the intent of the active society philosophy to force rather than to encourage participation, and that it was inappropriate to enforce the requirements by way of penalties for non-compliance. The latter objection to the scheme of mandatory penalties originally foreshadowed[61] was partially accepted in the House Bill. It placed a two year moratorium on the operation of penalties, provided for penalties only after the first breach, and allowed discretion in selecting a duration of penalty up to specified maximums: cl 104(1)(f), (3) and (4) respectively. Provision was also made in clause 104(1)(c) for the Department to take account of the plans and preferences of the person, and their capacity to comply.

All of this was removed in the Senate, to be replaced by a section which now only authorises the imposition of requirements to *supply* information, or *attend* for interviews, medical examinations and so forth;[62] conditions requiring *participation* are no longer authorised. The Department must establish that it is reasonable for the section to apply and applicants must receive written notice of their obligations and the consequence of non-compliance. That consequence is that the pension is 'not payable' if the person has not taken reasonable steps to comply.[63]

The shift from the penalty driven focus of the House Bill to the opportunity model created by the Government amendments moved in the Senate improved the prospects for the reforms. It diminished the risk that the new legislative scheme would acquire a negative image among disability groups resentful at the use of threats rather than inducements to take encourage people to advantage of special training or rehabilitation programs. But the promise of the 'active

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61 Foreshadowed in answer to a question about whether it would be mandatory for a pensioner to participate in training, rehabilitation, or 'job search' schemes. It was replied that "a disability support pensioner who is assessed as having a potential for employment ... would receive pension conditional on acceptance [of training rehabilitation or work]": note 46 *supra* at pp 849 and 853.

62 *Social Security Act* 1991 (Cth) s 105(1)(c) (conditions), (d) (reasonable to apply section), (2) (notice). Similar powers are available in respect of Sickness Allowance: s 667A.

63 *Ibid* section 105(1)(e). Departmental guidelines suggest that a period of 4 weeks 'suspension' will first be imposed, after which the payment will be cancelled should the conditions not be satisfied: DSS, *Disability Reform Outline*, September 1991, Attachement B.

model' may still be contradicted in several ways: by a lack of structure or policy guidance about the character of the decision to be admitted into or placed on the active stream; by the application to this later stage of the 'eligibility monitoring' ethos which characterises the administration of the initial entry stage; by allowing too little room for people to volunteer for the 'active plan' stream; by choice of less than optimal mechanisms for making decisions about the content of plans; and, finally, by a lack of genuine reciprocity (and flexibility) in the devising the plans (and specifying expectations and obligations) to give effect to the aspirations held for participants in the active stream.

(i) The lack of structure and guidance

The Senate amendments generally improved the legislation, with one crucial exception. By deleting the provisions which required the Department to consider the capacities of candidates for the active stream, and to take their plans into account, this key process has been left bereft of direct legislative regulation. It is true that all that remains are provisions which enable a person to be directed to set the process in motion (by attending interviews etc), and section 104 which reads that: "[t]he Secretary may *request* a [disability pensioner] to undertake a program of assistance or a rehabilitation program" (section 695 provides the same authority for sickness Allowance).

These powers certainly give the appearance of being entirely consistent with according a voluntary character to the process: after all what possible role could there be for such provisions when there is no basis for compelling people to take advantage of opportunities for participation in training? But the reality may prove to be very different. Such provisions may be more than sufficient to propel people into programs even though they do not regard them to be suitable to their needs. While in strict law there will be no penalties for withdrawal from unsuitable programs, it is likely that few people will be aware of this, and that few will avail themselves of the opportunity to do so.

While unintended, it is likely that the omission of provisions to regulate the formation of 'agreements' will lead to Departmental discussions about prospects being less reciprocal than they otherwise would be, and that the programs offered will be less tailor-made to the needs of participants than they otherwise might have been.

(ii) The legacy of 'eligibility monitoring'

As foreshadowed previously, another source of dilution of the impact of the new scheme may be the influence of the eligibility conditions set down as the basis for qualification for disability support pension. It must be queried whether the administration by Disability Officers of such concrete (and restrictive) criteria, is compatible with devoting sufficient time to determining individual suitability for consideration by the Panels. This is because the criteria would seem to encourage a high volume, mechanical approach to the initial screening

role: a slow, careful and individualised 'culture' of decisionmaking will be harder to foster in this environment than it would have been had say the Cass criteria been adopted. This danger is heightened by the retention of the quite wide-ranging 'non-payability' power which denies pension where people are judged to have unreasonably failed to respond to notices 'to contact' officers of the Department, or to attend interviews, complete questionnaires, etc.[64]

While it remains true, as discussed earlier (s 667 in Section IV (a)(i) above), that a substantial number of clients could (and perhaps will) be referred for assessment of their needs while still on the new Sickness Allowance (as a product of Panel consideration of their rehabilitation needs),[65] it is likely that most will only be picked up when eligibility for Sickness Allowance expires. Under the new arrangements this occurs after 12 months continuous receipt,[66] unless the Secretary determines in writing that this should be stayed for up to another 12 months on the basis of being satisfied "that the ... incapacity will end during the next 52 weeks", or that the medical condition "is different from, or significantly more serious than" that previously prevailing (episodic conditions and rehabilitation cases aside).[67]

In the House Bill, provision was also made at the 24 month mark, for the Secretary to consider a further extension of payment provided *both* conditions were satisfied (ie that it was a short-term disability stemming from fresh or intensified medical conditions).[68] Government amendments in the Senate removed this capacity, leaving 24 months as the upper ceiling - in theory at least. It may not be so in practice, however.

This reservation about the effectiveness of the time limits rest on the provision which has been made to allow some categories of recipients to *reclaim* (thus re-starting the clock). This is achieved by exempting them from the 1-2 year 'non-payment' period if their condition is different from the original, more serious than the original, a relapse of an episodic condition, or where the person is participating in (drug or alcohol) treatment programs.[69] Moreover, the time clock is also re-started where the person goes off the allowance for more than 6 weeks.[70] (As a separate issue, and in place of the

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64 *Ibid* s 105. (Also s 696 in the case of Sickness Allowance).

65 Departmental material rather intriguingly states that "recipients of sickness allowance will be assessed by joint panels for their suitability for rehabilitation ...": DSS, *Disability Reform Outline* September 1991 at p 4 para 23.

66 s 699(1) (breaks in payment of less than 6 weeks are disregarded for this purpose: s 699(4)).

67 s 669(2)(a),(b) respectively. A fresh claim is also required at this point: s 669(3). In any event the benefit generally then ceases after 2 years: s 670(1).

68 Cl 670(2). This had the effect of producing an 'outer limit' of a 3 year maximum payment of this allowance.

69 ss 666(4) and 666(4A).

70 s 670(2).

previously payable 'rehabilitation allowance', provision is made for payment to be made to a person 'undertaking an approved rehabilitation program').[71]

Certainly then, it is possible that the former group of long-term invalid pensioners who do not qualify for Disability Support Pension will in fact effectively become long-term Sickness Allowees. But, unless the spirit of the reforms of sickness benefit are to be undermined in this way, the 12 and 24 month milepegs should be the occasions when most applicants are seriously considered for assessment. Once again, routine screening - where the satisfaction or otherwise of the Sickness Allowance criteria is uppermost - seems likely to become the dominant influence on the culture of decisionmaking at this point.

To put it another way, the nature of the criteria for qualification for the two payments may largely deflect Disability Officers from discharging their key gatekeeping (or 'spotter') role of identifying the people most likely to benefit from the more detailed consideration by the Panels of their needs and potential, in the course of the personal interviews which are part of the new scheme. That role of selecting cases for Panel consideration may shift from reliance on the professional skills of Disability Officers towards reliance on computer-generated listings of clients whose files record factors (such as age or prior work history) which render them 'good risks' for a Panel assessment. Indicative factors may replace human judgment, at no small cost to realising the objectives of the new scheme.

(iii)The mix and composition of the pool of eligible participants

Experience with the JET scheme also demonstrates that the pro-active targeting of the most eligible members of the population of social security clients may mis-read the market to some degree.[72]

Certainly, the limited availability of resources for assessment and support of eligible disabled people clearly calls for priorities to be set. Particularly in the early years, resources should be focussed on the groups most able to benefit and at least cost in time or level of resourcing: the scheme should subscribe to the principle of resource efficiency. But it would appear to be short-sighted to place total faith in the capacity of the scheme to locate its population through targeting (as with invalid pension cases already marked down for review) and 'screening in' (through the spotting role of the Disability Officer).

Currently, the selection of clients by the Department itself forms by far the most prominent part of the operational design for the scheme (though volunteers

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71 ss 667 and 671.

72 One mistake with JET was to assume that sole parents whose youngest child was approaching 16 (with consequent loss of the mother's sole parent pension) would be one of the most receptive groups: in fact very strong demand was forthcoming from the group of sole parents with very young children (a group excluded from the target, and assumed to be a group who would be highly resistant to workforce participation at that stage).

will be 'considered' for reference to a Panel and the development of a plan). What is required is an explicit recognition of an *entitlement* for all disability support pensioners to request a meeting with a Panel, and clear rights of appeal against denial of access (or the content of any agreement which ensues). In short, the scheme should plan for a significant stream of people who 'elect' to join the scheme following an active approach from the client.

(iv) The decision making structures

As the discussion above would imply, the new scheme may be seriously flawed by the rejection of the original Cass proposal that *all* clients applying for disability pension be referred for assessment by a Panel. Certainly, the Report contained a flaw, in overlooking the fact that many clients pass through a period of time in receipt of State 'Work-care type' payments prior to applying for Sickness Benefits or Invalid Pension. Unquestionably, therefore, the largest pool of the most receptive group of candidates for rehabilitation or training is to be found among those in the *initial* months of Sickness Allowance (Benefit) payments: as the experience of active engagement in the workforce becomes more remote, it becomes increasingly difficult to rekindle.

Be that as it may, it may be speculated that the Cass proposal for Panel assessment was rejected because it was thought that the only purpose of such a Panel would be to administer the more subjective eligibility criteria proposed in the Cass package. If so, it is suggested that this overlooked a major (perhaps critical) role of the Panel in *case selection* of the people most suited to participate in, and benefit from, the 'active' stream.

This possibility cannot be tested one way or the other at this time. But equally, the premise on which the Government scheme is predicated also remains speculative. Perversely, the pilot studies of assessment modes which the Government commissioned in the year prior to announcing the new scheme, *excluded* the piloting of the universal Panel which was one of the lynchpins of the model advocated in the Cass Report. It is difficult to avoid the conclusion therefore that policymakers may already have had a closed mind on the subject (or that undue weight was given to effecting cost-savings through a narrowing of eligibility for long-term income support). If so, Government may come to regret the lost opportunity to pursue the longer-term goals of maximising the rehabilitation potential of the reformed scheme.

(v) 'Reciprocal' bargains?

As we have seen, the essence of the Cass proposals was the creation of a flexible forum (the inter-disciplinary Panel) in which to discuss options and forge a personalised package of income support and related services which would enable the person to begin the transition from dependency back to active engagement in the laborforce or society (Section IV (a)(ii) above). This had

also been a significant component of the rhetoric of the Government announcements of the new scheme.[73]

Under the House version of the new legislation scheme, however, the 'active' element of Disability Support Pension was unquestionably more imposed than agreed. This element was to have been injected only when the Secretary determined that it would be 'reasonable' for the relevant section to apply.[74] The views of the person would have been considered before this was done,[75] but it remained a one-sided process. Secondly, the active component would have taken the form of issuing a 'notice' which *required* the person to 'undertake a course of vocational training or of rehabilitation'.[76] Imposition of a non-payment ('deferment') period for failure to 'take reasonable steps' to comply with the requirement,[77] reinforced this attitude (though it was slightly softened by a 'warning' letter for the initial breach, and by setting subsequent penalties as 'ceilings' with the discretion to pick lower periods).[78]

The House Bill version, then, explicitly perpetuated the ethos of the previous system where (at worst) the initiative lay entirely with the Department: where 'proposals' were devised by the Department and then imposed on the client. By contrast with such a legislative emphasis on regimentation, the active employment strategy built into the new unemployment arrangements contains examples of genuine elements of reciprocity and personalised bargains.[79] The legislation passed by the Senate leaves the achievement of such balance to administrative chance. Unfortunately there is no guarantee that the administration of the new 'voluntary' scheme will not turn out to be equally unsympathetic to the rights of clients and their individual needs as was likely under the much more directive framework of the original Bill.

This risk would be much reduced if provisions along these lines were restored for the *sole* purpose of providing a framework within which discussions with clients might be conducted. As will be argued below, such provisions are required as a guarantee of 'equality of brokerage' in dealings by citizens with the bureaucracy.

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73 *New Opportunities for People with Disabilities*, DCSH, DSS, DEET, August 1990.

74 Cl 101(1)(d).

75 Cl 101(1)(c).

76 Cl 101(1)(c)(iii)-(vi).

77 Cl 101(1)(e).

78 Clause 101(3) and 101(1)(2) respectively. After the first occurrence, the maximum deferment period would have been 2 or 6 weeks non-payment, with power to lift the suspension once a person was in compliance: s 101(6).

79 *Social Security Act* 1991 s 606 (inserted by *Social Security (Job Search and Newstart) Act* 1991 (Cth), s 605(3) ('negotiation' of Newstart agreement); s 606(2) (approval of agreement); s 606(3) (requirement to have regard to needs and capacity of individual in negotiating agreement).

V. DISTRIBUTIONAL CONSEQUENCES FOR YOUNG PEOPLE

A. POLICY ISSUES

Construction of sound income support policies for disabled young people requires that a careful balance be struck between several divergent policy goals. First, there is the goal we have already discussed, of facilitating entry to the 'active' society, through the provision of access to training and rehabilitation services, the extension of monetary incentives, and other measures. Second, there is the goal of supporting young disabled people in taking their first steps to independent living (this is both consistent with the principle of normalisation[80] and, for some, will be a necessary pre-condition to obtaining or sustaining employment). Third, there is the issue of *adequacy* of payment (an anti-poverty objective); and, for a smaller proportion, a related goal of adequately reimbursing parents for the provision of in-home support and care of a disabled adolescent.

In all cases, one proper concern of policy is to avoid the fracture of the family unit, and consequent increases in the proportion of disabled young people admitted to state wardship or joining the young homeless populations. Finally, there is the issue of parity of disability support payments with the 'common youth payment structure'. This was proposed in a 1984 discussion paper issued by the Office of Youth Affairs as a way of eliminating perverse incentives which rewarded (with higher payments) young people who discontinued schooling and became dependant on welfare while seeking work (thus passing up opportunities for acquiring necessary skills and training). It was adopted in the 1985-86 Budget, with a three year phasing-in period, during which time education allowances were raised to prevailing age-related levels of unemployment benefit (which were frozen for younger age groups however). Consequently the common rate scale varies with age and is quite austere.[81]

B. FINANCIAL IMPACTS OF THE 'COMMON YOUTH SCALE'

The reforms apply the common youth scale with two variations: the parental income test is not applied to younger disabled people, and the payment is boosted by adding on the equivalent of Child Disability Allowance (currently $29.95 pw). The monetary implications of the application to the young disabled of the modified 'common' rates scale are substantial. Based on Departmental projections,[82] the most dramatic drop in weekly income has been mitigated by

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80 See for example Clauses 1 and 4 of the *Declaration of the Rights of Mentally Retarded Persons*, 1971.

81 See for example J Rome, *Reform Options: Youth Income Support* (1986) unpublished paper presented at the Council of Social Welfare Ministers 'Income Support Seminar', December 1986.

82 *Personal communication*, November 1990. The figures assume indexation and the comparisons have been updated to October 1991 dollar values.

not applying a 'parental income test' to part of the disability payment for single people aged 16 and 17 years, who are either living at home, or, if living away from home, who remain 'dependent'. The weekly rate for new clients will still decline by $62 (from $154 in October 1991 under the old invalid pension scale to approximately $92.00 in November 1991); as mentioned however, unlike the non-disabled, part of this payment (currently $30.70) will not be subject to the 'parental income (or assets) test'.

The 18 to 20 year old living at home is the next most severely affected: losing $49 (from $154 to $105.50), followed by a losses of $32 (16-18 yr olds) and $11 (18-20 yr olds) for a person living away from home.

This latter differential (and the absence of a parental income test) reflects the policy assumption underlying the common youth allowance, that leaving home should be recognised in the payment structure after age 18, while before that age, rates should be held down both to encourage the gaining of further training and on the basis of an assumption of dependence/responsibility by parents for contributing towards the maintenance of adolescent offspring. The young homeless (independent) allowance[83] is a narrow exception to this policy. A person qualifying for this payment receives a higher rate.

There is one other (less dramatic) implication of the new rates package. A couple under the age of 21 who do not have dependent children, will be assessed as *individuals* for the purpose of determining their basic rate (which does not suffer a decline under the new youth scale): they will each qualify for half the 'married' rate, but only if *both* qualify for the payment in their own right (there is no longer an assumption of spousal dependency for this purpose; any income continues to be pooled when applying the income test, however). Some couples where a disabled member relies on support from their non-disabled (and otherwise ineligible) partner, may be disadvantaged by this change.

VI. CONCLUSION

The realisation of the aims of a more 'active' social security system has appeal: it re-includes people who might otherwise be excluded from participating fully in society, and it may re-legitimise the role of the welfare state. As argued elsewhere, the more 'responsive' welfare state calls for a re-thinking of the machinery of law and government.[84] Detailed legislative 'blueprints', imposed uniformly on all applicants, are anything but an ideal

83 Provided under ss 5(1) [definition of homeless person], 1067 *Social Security Act* 1991 (Cth) (formerly s 118(8) *Social Security Act* 1947).

84 T Carney, *Law at the Margins: Towards Social Participation*, 1991.

vehicle for giving effect to the vision.[85] 'Active', individualised, programs cannot be forged on a traditional bureaucratic production line: standard bureaucratic decision-making (and administrative review) will not harmonise with the new aims.

Equity of outcomes (that is to say, whether or not participation is achieved) becomes the major measure of success, displacing the more usual test of 'equity of treatment' by the decision-maker (namely standardised processes or entitlements). Equality in 'brokerage' settings (where access to personalised packages of services is negotiated) becomes more important than are guarantees of equality transmitted through the uniform content and application of procedural or substantive rules of law.[86]

However, as this article has sought to demonstrate, there are substantial risks to be protected against under a 'responsive law' regime. New welfare can all too easily become a repressive (or more repressive) vehicle for promoting social conformity. Basic civil rights must therefore still be rigorously protected. Participants must be genuinely empowered, including through the adoption of advocacy and educative strategies: an area in which regrettably the reform legislation and associated package is silent. Rights for citizens to challenge or review the tailor-made packages of welfare entitlements which they negotiate with the state must also be provided. Here the balance sheet is quite uneven. The new active employment provisions for long term unemployment recipients were introduced in a form which allowed appeal against the process by which an agreement was reached, but excluded appeal against the content and terms of agreements.[87] Under the new disability legislation, eligibility decisions are fully appellable to the Social Security Appeals Tribunal, but the issue of eligibility is narrowly defined.

Under the very traditional form of drafting of the current disability legislation, the notion of reciprocal 'agreements' has now been excluded altogether from the face of the Act (even in the House Bill it was much weaker than it is in the unemployment counterpart). The new disability legislation provides (rather tacitly) for an 'active' element to be broached following a reference for an interview. In very rare circumstances the elements of any program which might be agreed may (indirectly) present for review should the Department respond by imposing (another) non-payability condition on a person withdrawing from programs perceived to be unsuitable. But the reality is that the programs will not be transparent to review at all: the appropriateness or otherwise of the decisions to admit or not admit people to the active stream,

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85 The active employment provisions of the new Jobsearch and Newstart legislation (replacing Unemployment Benefit) are vulnerable to this criticism: *Social Security (Job Search and Newstart) Act* 1991.

86 T Carney note 84 *supra*, at p 128.

87 *Social Security Act* 1991 (Cth) s 1250(1)(ca)(cb).

and the quality or otherwise of the programs offered, will all be effectively quarantined from external scrutiny.

Frankly it would have been much preferable to have all aspects of the package, including say choice of training or rehabilitation programs, explicitly open to review.

The centre-piece in the new style of legal intervention proposed here is that both the arrangements for the delivery of the program, and the legal context in which that occurs, should be more 'responsive' than in the past. The usual 'conditional/prescriptive' form of writing legislation distinctly does not lend itself to this new approach, however.[88] 'Framework laws', which set policy goals without excessively detailing the 'means' by which they are to be realised, may be some advance.[89] Ideally, however, the new disability legislation should be re-written in more 'responsive' form, where the aim would be to create balanced environments for negotiation and decision-making. The enactment of the reforms in traditional forms of legal drafting has unquestionably diluted the force of the new ethos of entitlement sought to be engendered.

What is advocated here is that there be matching strategies. The introduction of cross-departmental programs which mesh 'active/reciprocal' relationships between the disabled and the state, should be parallelled by forms of legislative expression, and by decisionmaking frameworks, which dovetail with, rather than undermine program objectives. One strand of the defence of this position is the proposition that the erosion of legitimacy of the welfare state is a product of the expansion of old style legal regulation.[90] Rather than improving the working of legislation in traditional form,[91] or withdrawing the welfare state (as privatisation critics would advocate), this approach involves a form of 'legal control of self-regulation', including a role for law in 'structuring inter-system-linkages'.[92] It accepts that citizenship rights should not be confined to legal and political life, but should extend more generally to social and economic life (where inequality and domination often negate the Marshall vision of re-uniting

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88 T Carney note 84 *supra*, at Chapter 2.

89 *Id.*

90 The argument is either that the expectations of citizens grows inexorably, or that the state searches for new ways of further disciplining citizens: D Nelken, "Law in Action or Living Law? Back to the Beginning in Sociology of Law" (1984) 4 *Legal Studies* 157 at p 171.

91 Teubner calls this an 'implementation' strategy, which he claims risks falling foul of one of the legs of a 'regulatory trilemma': (i) that the law fails to impact on society, politics or behaviour ('symbolism'); (ii) that law displaces natural institutions ('colonising'); or (iii) that law loses its integrity ('capture' or 'sell-out' to, for example, politics): G Teubner, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law" in G Teubner, (ed.) *Dilemmas of Law in the Welfare State* 1986, at pp 304, 309 and 311.

92 G Teubner, "The Transformation of Law in the Welfare State" (In Teubner, (ed) note 91 *supra*) at pp 7-8.

political and social spheres).[93] And it relies on law to 'supplement' social interaction, by injecting what Peters calls the:

> procedural dimension added to social interaction, in which questions of propriety, fairness and desirability can be brought up.[94]

The model seeks to secure reciprocal entitlements to participation ('distributive rights'),[95] in a guise at the margins of the domain of law.[96] However, while the central premise that mutuality and responsiveness can be institutionalised may not call for the abolition of 'social asymmetries of power and information',[97] it certainly does call for the elimination of the potential for abuses of power (not inequality of power per se).[98] It is argued here that it is the responsiveness of such (legally supplemented) systems to social needs, together with their ability to provide security of (reciprocal) citizen-state expectations,[99] which is critical to success.

Loose analogies with contractual notions may assist to secure this vision within the context of reform of disability payments and programs.[100] Other approaches may be equally viable, however. This paper does not seek to advocate one model. The thesis advanced here is a more modest one: it is argued that in the case of the disabled, the program goals of the 'active society' cannot simply be pursued by traditional legal and administrative structures. More radical (and innovative) thinking and planning is called for to achieve the integration of income support with training, rehabilitation, child care or other supports to enable disabled clients to participate more actively through labour

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93 A Peters, "Law as Critical Discussion" (In Teubner, (ed) note 91 *supra*) at pp 268 and 276.

94 *Ibid* at p 255.

95 U Preuss, "The Concept of Rights and the Welfare State" (In Teubner, (ed) note 91 *supra*) at p 163.

96 Luhmann contends that modifications to traditional law lie entirely either within or outside the law (one system cannot affect another) and that such 'communal' models of face to face interaction lie outside the law: N Luhmann, "The Self-Reproduction of Law and its Limits" (In Teubner, (ed) note 91 *supra*) at pp 120-21 and 123.

97 U Preuss note 95 *supra* at p 171 (emphasis added).

98 G Teubner, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law" (In Teubner, (ed) note 91 *supra*) at p 318. D Kettler, "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy" (1987) 21 *Law and Society Review* 9 at p 38.

99 Kettler *ibid*, at p 16. Private property concepts, do not lend themselves to this task: T Carney, "The Social Security Act: Just Another Act or a Blueprint for Social Justice?" (1990) 25 *Australian Journal of Social Issues* 103 at pp 105-8; also Kettler *ibid* at pp 17-25.

100 T Carney note 84 *supra*, Chapter 4. For a critical discussion of notions of 'contract' in social work see: D Nelken, "The Use of 'Contracts' as a Social Work Technique" (1987) 40 *Current Legal Problems* 207; T Carney, "Voluntary Care Arrangements: Responsive Welfare Entitlements? Or Coercive Intervention Revisited?" (1989) 3 *Australian Journal of Family Law* 114.

market or other forms of social participation.[101] It is suggested here that the legislation and administrative arrangements to implement the disability package display too little evidence of that thinking.

In the long run, by leaving the key 'active society' components beyond the ken of either legislative regulation by way of 'framework guidance provisions' (directing reciprocal discussion and tailor-made outcomes) or external accountability (through access to review of decisions about admission to, or the form of, participation), it is more rather than less likely that the administrative practice will lead to enhanced social control in place of the intended facilitation of the realisation of citizenship rights for the disabled.

It can only be hoped that the early experience of the program will reinforce the advantage of cooperative rather than such policing arrangements.

101 J Gass, "Towards the 'Active Society'" (1988) June/July, *The OECD Observer* at pp 4-8.