DISABILITY, DISCRIMINATION AND EQUAL OPPORTUNITIES:

A COMPARATIVE STUDY OF LEGAL MODELS ADDRESSING THE EMPLOYMENT RIGHTS OF DISABLED PERSONS, WITH PARTICULAR REFERENCE TO BRITAIN AND THE UNITED STATES

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CHAPTER X:
DEFINING DISABILITY DISCRIMINATION IN THE WORKPLACE

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified.[1]

INTRODUCTION

In the major common law countries, the legal concept of discrimination is largely derived from the disparate treatment and adverse impact analysis of the US Supreme Court in *Griggs v Duke Power Co.*[2] That analysis is so well understood in the North American jurisdictions that discrimination legislation merely enacts a general prohibition on employment discrimination on account of disability, with hitherto little further explication. Burgdorf remarks that: "On their faces, many federal civil rights statutes constitute little more than broad directives that 'Thou shalt not discriminate'".[3] Thus the (US) ADA 1990 lays down as a "general rule" that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual".[4] The statute then continues by indicating what this anti-discrimination edict requires of employers in practice.

The British sex and race discrimination legislation, in contrast, spells out the equivalent concepts of direct and indirect discrimination. For disability rights reform, it might be thought sufficient, therefore, to take the framework of the British discrimination statutes, add the terms "disability" and "disabled person" where appropriate, and supply a definition of the newly protected class. Where employers discriminate because of disability by treating disabled persons less favourably than others, the existing concept of direct discrimination

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[1] McIntyre J in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 174-5 (a case under s 15 of the Canadian Charter of Rights and Freedoms holding that a citizenship requirement for entry to the Bar of British Columbia violates the Charter).

[2] (1971) 401 US 424.

[3] Burgdorf, 1991: 413. He explains that broadly worded statements of this kind represented the best approach to what was controversial law reform of civil rights in the 1960s.

[4] 42 USC §12112(a).

would be sufficient. Where disabled persons are treated less favourably than others because they cannot comply with a requirement with which a substantially higher proportion of non-disabled persons can comply, and the requirement is not justifiable in the circumstances, indirect discrimination would arise. However, disability discrimination gives rise to additional questions and reservations, so that it will be necessary to provide a more expansive definition of discrimination if disability rights are to be enacted here.[5]

DIRECT DISABILITY DISCRIMINATION

Although the expression "direct discrimination" is not used in the British sex and race discrimination statutes, it labels a concept that is reasonably well understood in that context.[6] Direct discrimination occurs where a person treats a member of the protected class less favourably than he or she treats or would treat someone who is not a member of the protected class *and* where the less favourable treatment is on the ground of class membership. The idea of direct disability discrimination has been made explicit in the Australian anti-discrimination legislation. In New South Wales, for example:

> A person discriminates against a physically handicapped person on the ground of his physical impairment if, on the ground of... his physical impairment... he treats him less favourably than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person who is not a physically handicapped person.[7]

In South Australia, direct discrimination means *unfavourable* treatment because of a person's disability.[8] In the North American jurisdictions, the prohibition of direct disability discrimination is implicit in the general interdiction against disability-related discriminatory acts. The (US) ADA 1990 defines discrimination as including:

> limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.[9]

The Canadian Human Rights Act addresses both direct and indirect discriminatory practices,[10] while the Ontario legislation states that everyone "has a right to equal treatment

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[5] The CRDP Bill would import the US model of disability discrimination while retaining the comfortable definitions of discrimination with which we have been familiar since 1975.

[6] Sex Discrimination Act (SDA) 1975 s 1(1)(a); Race Relations Act (RRA) 1976 s 1(1)(a).

[7] (NSW) ADA 1977 s 49A(1)(a). See also: (Vic) EOA 1984 s 17(1); (WA) EOA 1984 s 66A(1); (Cth) DDA 1992 s 5(1).

[8] (SA) EOA 1984 s 66(a).

[9] 42 USC §12112(b)(1).

[10] (Can) HRA s 7.

with respect to employment without discrimination" because of disability.[11] In the Yukon Territory, discrimination by unfavourable treatment is prohibited,[12] while in Québec, everyone has the right to "full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on" disability",[13] and in Manitoba, discrimination manifested in differential treatment not based upon personal merit is unlawful.[14]

However direct disability discrimination is defined, there are a number of common problems in the interpretation of the concept. The first problem is to show that the less favourable or unfavourable or differential treatment is due to disability. Discrimination "because of" disability requires the making of a causal connection between the discriminatory act and the complainant's disability. So a refusal to employ a disabled person may be defensible if that person is not qualified for the position or another applicant was better placed on merit. For example, in *Garton v Hillcrest Hospital*,[15] a blind employee on switchboard duties had increasingly exercised supervisory duties. The employee applied to be reclassified on the basis of these duties but this was refused. Subsequently, an internal advertisement for a new post as switchboard coordinator appeared and a job specification was published. The employee ranked either equal to or ahead of the other applicant for this post in terms of job performance and seniority, but the selection panel was swayed by the other applicant's potential for advancement. It was held that the employee had been less favourably treated by reason of his blindness. The interviewing panel had assumed that he was incapable of performing a specific duty of the job, even though that duty did not appear as part of the job specification.[16]

A second problem concerns that of multiple causes? In the US, the RA 1973 applied only to prohibit discrimination "solely by reason of handicap". This form of wording gives rise to problems where disability discrimination is adulterated by other causes and motives that may

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[11] (Ont) HRC s 5(1).

[12] (YT) HRA s 6.

[13] (Queb) CHR&F s 10.

[14] (Man) HRC s 9.

[15] (1984) AILR ¶240 (SA HPDT): a complaint under s 49(5) (SA) HPEOA 1981.

[16] The employer also failed to make out the defence that special equipment or assistance would be required, and could not be reasonably provided, as this had not even been considered and no aspect of the job seemed to call for such assistance.

have played a lesser or greater role in determining the plaintiff's employment opportunities. In principle, it would seem sufficient for a cause of action that a person's disability has contributed to the detrimental employment decision being challenged and that the presence of a prohibited ground in the employer's reasoning should taint that decision with illegality. It is remarkable that the (US) ADA 1990 dispenses with the words "solely by reason of" disability, and other jurisdictions have consciously drafted the law so as to address the issue of multiple cause discrimination. In South Australia, for example, it is sufficient that disability was one of a number of grounds for the impugned action, provided that it was "a substantial reason for the act".[17] In Victoria, judicial interpretation has led to the view that disability need not be the dominant reason for the discrimination.[18] The model provision is that in the Australian Commonwealth statute, providing that it is sufficient that disability is one of the reasons, whether or not dominant or substantial, for the discriminatory act.[19]

The third problem with direct disability discrimination is whether the motive or purpose or intention of the discriminator is relevant. Some acts of disability discrimination are undoubtedly unintentional, others are not motivated by prejudice, and others still may have been informed by good intentions or benign purposes. In British sex and race discrimination cases, intention, motive and purpose are not ingredients of direct discrimination.[20] Discrimination is not a fault-based concept. The only question is whether the complainant would have received the same treatment as the comparator but for his or her status (*ie* but for disability)? In Canada, human rights legislation has been interpreted as extending to unintentional discrimination,[21] while the US Supreme Court interpreted section 504 of the Rehabilitation Act 1973 as not requiring proof of discriminatory intent and accepted that evidence of indirect discrimination or disparate impact would also establish *prima facie* discrimination.[22] In contrast, in *Department of Health v Arumugam*,[23] the (Vic) EOA 1984 was

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[17] (SA) EOA 1984 s 6(2).

[18] *Campbell v FH Productions* (1984) AILR ¶178 (Vic EOB); but see Law Reform Commission of Victoria, 1989; 1990a; and 1990b.

[19] (Cth) DDA 1992 s 10.

[20] See, for example: *Equal Opportunities Commission v Birmingham City Council* [1989] 1 All ER 796 (HL); *James v Eastleigh Borough Council* [1990] ICR 554 (HL).

[21] *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can SC).

[22] *Alexander v Choate* (1985) 469 US 287. Under Title VII, a complainant of disparate treatment is required to show that the employer had an unlawful motive or intended to discriminate: *Furnco Construction Co v Waters* (1978) 438 US 567 and *Texas Community Affairs v Burdine* (1981) 450 US 248. Unintentional discrimination will be caught, if at all, by disparate impact theory: *Griggs v Duke Power Co* (1971) 401 US 424. However, it is

not interpreted as prohibiting unconsciously motivated discrimination. The reversal of this ruling has been proposed.[24]

The Victorian illustration raises the question: should this be left to judicial interpretation? In British Columbia, for example, the intention of the discriminator is explicitly an irrelevant consideration when a question of disability discrimination arises.[25] In contrast, in the Australian case of *Jamal v Secretary, Department of Health*,[26] there was an egregious attempt to introduce the concept of *mens rea* into disability discrimination law, so that an employer could only be "guilty" of disability discrimination if he or she acted intentionally and was motivated by the complainant's disability. Although the final appellate court rejected the idea that the legislature had imported any notion of guilt or intention or deliberate action into the legislation, *Jamal* demonstrates that direct discrimination can be mistakenly interpreted as intentional discrimination.

A fourth problem concerns the degree and nature of less favourable treatment. Because direct discrimination calls for a comparative approach to the treatment of the complainant and a comparator, it will always be possible to find some differences in the treatment given. Clearly, trivial differences in treatment can be ignored, perhaps on the basis of *de minimis non curat lex*.[27] However, the difficulties of comparing like with like may be less easily dismissed. This is a fifth problem: the difficulty of making a comparison. Because of the legacy of segregation, a disabled complainant might find it difficult to select an "able-bodied" comparator. In *Clinch v Commissioner of Police*,[28] for example, the plaintiff had lost his right eye in a childhood accident. He had applied for a position with the police force. The police

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doubted whether the US Supreme Court is making a distinction other than requiring a disparate treatment complainant to show that his or her race or sex (or disability) was causally connected to the complained of action or omission. In other words, there is a similar "but for" test of direct discrimination.

[23] [1988] VR 319.

[24] Law Reform Commission of Victoria, 1989; 1990a; 1990b. The Commission recommends that motive should be expressly irrelevant, but that unconscious discrimination should not be included.

[25] (BC) HRA s 13(1.1). See also: (Man) HRC s 9(3).

[26] (1986) EOC 92-162 (NSW EOT); (1986) EOC 92-183 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

[27] See the British sex discrimination cases of *Automotive Products Ltd v Peake* [1977] ICR 968 (CA) and *Jeremiah v Ministry of Defence* [1980] ICR 13 (CA).

[28] (1988) AILR ¶169 (NSW EOT).

force had a standing instruction requiring prospective employees to have vision in both eyes. The police force refused to employ the plaintiff, although there was a doubt about whether there had been a formal application or merely an informal inquiry. A tribunal considered that it might be necessary to show that the police had employed another person instead of the applicant to determine whether there had been discrimination in a denial of employment. No mention of a comparison with a hypothetical person was made and this is in line with general discrimination jurisprudence.[29]

The comparability requirement raises a sixth problem. Must the circumstances in which the complainant and comparator are being compared be comparable? British discrimination law requires the relevant circumstances of the two cases to be the same or not materially different,[30] and this is also expressed to be the case in Australian disability discrimination law,[31] although South Australian law was deliberately amended so as to exclude such a requirement.[32] In fact, disability will almost certainly be a material difference in every case. Disability can create differences in the way in which a disabled person can do the work in question. Many cases of disability-related employment discrimination could fall at the first hurdle, therefore, because a disabled plaintiff's disability would destroy the basis of comparison with the able-bodied comparator. Thus, it becomes imperative that disability discrimination statutes should contain a reasonable accommodation mandate, and that such reasonable accommodation should not be a materially different circumstance for the purposes of comparison with a non-disabled comparator.[33] This point is examined further in Chapter XIII below.

INDIRECT DISABILITY DISCRIMINATION

Like "direct discrimination", the term "indirect discrimination" is not used in discrimination legislation itself. Indirect or "adverse impact" or "effects" discrimination derives from the

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[29] The problem of the hypothetical comparator has also featured in British equal pay law: *Meeks v National Union of Agricultural and Allied Workers* [1976] ICR 785 (CA); *McCarthys Ltd v Smith* [1979] ICR 785 (CA), [1980] ICR 672 (ECJ and CA).

[30] SDA 1975 s 5(3); RRA 1976 s 3(4).

[31] (NSW) ADA 1977 s 49A(1); (Vic) EOA 1984 s 17(2); (WA) EOA 1984 s 66A; (Cth) DDA 1992 s 5(1).

[32] (SA) EOA 1984 s 66.

[33] See to this effect, for example: (WA) EOA 1984 s 66A(2). In *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252 (NSW CA) the same result was eventually achieved via judicial interpretation of the provisions of the (NSW) ADA 1977.

reasoning of the US Supreme Court in *Griggs v Duke Power Co.*[34] As we understand this concept in Britain, indirect discrimination occurs where the defendant applies a requirement or condition, which is applied equally to all, but with which only a considerably smaller proportion of members of the protected class, as compared to the proportion of members of other classes, can comply and their inability to comply is to their detriment. The discriminator has a defence if he or she can demonstrate that the requirement or condition is justifiable apart from its discriminatory effects.[35] The Australian discrimination statutes generally adopt this formula.[36]

The concept of adverse impact or indirect discrimination pervades North American discrimination law. The (US) ADA 1990 makes this clear in several respects. For example, the use of qualification standards, employment tests or other selection criteria that tend to screen out disabled persons is discriminatory, unless job-related and consistent with business necessity.[37] In Canada, human rights law encompasses adverse effects discrimination, either by virtue of judicial interpretation,[38] or by virtue of statutory provision. For example, in Ontario, "constructive discrimination" (a concept broadly similar to indirect discrimination) arises where:

> a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.[39]

Yukon Territory terms "any conduct that results in discrimination" as "systematic discrimination", as does Manitoba,[40] while Québec explicitly outlaws effects discrimination.[41]

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[34] (1971) 401 US 424.

[35] SDA 1975 s 1(1)(b); RRA 1976 s 1(1)(b).

[36] (NSW) ADA 1977 s 49A(3); (SA) EOA 1984 s 66(b); (Vic) EOA 1984 s 17(5); (WA) EOA 1984 s 66A(3); (Cth) DDA 1992 s 6.

[37] 42 USC §12112(b)(6).

[38] *O'Malley v Simpson-Sears Ltd* [1985] 2 SCR 536 (Can SC); *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can SC) interpreting the (Can) HRA. See: McKenna, 1992.

[39] (Ont) HRC s 11(1).

[40] (YT) HRA s 11; (Man) HRC s 9(3).

[41] (Queb) CHR&F s 10.

The case law in the comparative jurisdictions does not reveal any particular problems in the operation of indirect discrimination in the disability context. However, the experience of the British sex and race discrimination statutes suggests that, if disability laws were to be enacted here, there would be some issues that would affect the efficacy of such new provisions. First, indirect discrimination depends upon showing that some requirement or condition has been applied. Generally unfavourable circumstances will not suffice. The (US) ADA 1990 illustrates the types of discriminatory hurdles that might constitute indirect discrimination.[42] American employers may not participate in contractual or other arrangements (for example, with an employment agency, trade union, training organization or fringe benefits provider) that have the effect of subjecting disabled persons to discrimination. The use of standards, criteria, or methods of administration having the effect of discrimination on the basis of disability or perpetuating the discrimination of others who are subject to common administrative control is prohibited. Furthermore, the use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out disabled individuals would be caught, unless shown to be job-related and consistent with business necessity. American employers must select and administer tests concerning employment in the most effective manner to ensure that, when such tests are administered to disabled job applicants or employees with impaired sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factors such test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant, except where such skills are the factors that the test purports to measure.

A second problem concerns how flexibly the courts will be prepared to apply the concept of indirect discrimination to disabled persons. For example, the application of a requirement that employees must work full-time can be expected to have a disproportionate impact upon some disabled persons. In one sense, such persons *could* comply with this requirement, but their disability might prevent them from doing so in practice. A narrow approach to the "ability to comply" ingredient of indirect discrimination could serve to exclude disabled persons from its protection.[43] Moreover, too narrow an approach to what constitutes a requirement or condition could result in many hurdles faced by disabled persons being discounted for the purposes of indirect discrimination. For example, many disabled job applicants will have had insufficient experience of employment because of previous discrimination. Would an

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[42] 42 USC §12112(b).

[43] See, for example, the narrow approach taken in the British sex discrimination case of *Turner v Labour Party* [1987] IRLR 101 (CA).

employer's preference for work experience be a "requirement" or might it be interpreted merely as a desirable factor that does not operate as an absolute bar to employment?[44]

A third issue arises in respect of the mathematics of indirect discrimination. What statistical pools of comparators must be chosen to show the disproportionate impact of a requirement or condition upon a disabled person, and what level of disproportionate impact is necessary? This has been problematic under race and sex discrimination law.[45] Although the survey evidence described in earlier chapters goes a long way towards improving our knowledge of disabled persons and the labour market, we still possess insufficient data about local labour markets and the numbers of qualified disabled workers within them. The need to demonstrate disproportionate impact upon disabled persons will prove to be the most difficult aspect of challenging employers' requirements or conditions via indirect discrimination theory.

OTHER FORMS OF DISABILITY DISCRIMINATION

Victimisation

Discrimination by way of victimisation is a common feature of all forms of employment discrimination and in all jurisdictions.[46] It involves treating the complainant less favourably than another person would be treated in the same circumstances because the complainant has relied upon, or brought proceedings under, or made allegations of contraventions of, discrimination legislation against the victimiser or another person, or has given evidence or information in connection with such proceedings.[47]

Harassment

In Britain and the US, harassment as a form of discrimination was developed out of the principles of direct and indirect discrimination, especially in the area of sexual harassment.[48]

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[44] As was the case in the race discrimination case of *Perera v Civil Service Commission* [1983] ICR 428 (CA).

[45] See, for example: *Jones v University of Manchester* [1993] ICR 474 (CA)

[46] See, for example: (Can) HRA s 59; (PEI) HRA s 15. Under Australian Commonwealth disability law it is a criminal offence to victimise an individual who exercises his or her rights under the legislation. The offence is punishable by imprisonment of up to 6 months: (Cth) DDA 1992 s 42.

[47] SDA 1975 s 4; RRA 1976 s 2. Victimisation also includes circumstances where the victimiser has acted because he or she knows or suspects that the victimised party has done or intends to do any of the protected acts.

[48] *Porcelli v Strathclyde Regional Council* [1986] ICR 564 (Court of Session); *De Souza v Automobile Association* [1986] ICR 514 (CA).

A number of disability statutes in the jurisdictions being studied expressly outlaw harassment of disabled persons,[49] but there seems no reason why harassment should not be otherwise judicially recognised. Disability harassment, with its likely emphasis upon offensive remarks and behaviour, would seem to have much in common with racial harassment, although like sexual harassment, it represents a form of power abuse or bullying.

Cases of disability harassment appear only rarely in the law reports. In one such example, *Gosh v Domglas Inc*,[50] an injured worker, who had been assigned to sedentary tasks after returning to work from injury, was harassed by his supervisor and a co-worker. They made jokes about his condition, mimicking and drawing attention to his resultant limp. The relevant manager knew of the harassment but failed to stop it. A complaint of disability discrimination was upheld. The supervisor was ordered to pay $3,000 general damages, the co-worker $1,500, and the manager $2,000 for the harassment claim. The employer was held jointly and severally liable and was ordered to pay $1,000 general damages. In another such case, *Boehm v National System of Baking Ltd*,[51] an employee with a learning disability was subjected to adverse remarks about his mental abilities by a production manager, causing the employee to leave work and not return. A complaint of constructive dismissal failed, as the employer had asked the employee to return to work and should have had an opportunity to redress the problem, but damages for harassment were awarded.

Characteristics discrimination

Discrimination against disabled persons often takes the form of applying disability stereotypes to individuals with disabilities and judging them accordingly. This is statistical discrimination; so-called because, relying upon imperfect knowledge, the employer applies mean statistics to individual cases. In order to deal with this form of discrimination, the law must prohibit less favourable treatment that is informed by a characteristic that appertains generally to, or is generally imputed to, disabled persons. This is a feature of Australian disability discrimination law and has no counterpart in Britain.[52] So a general rule that excluded a whole class of persons from employment, such as diabetics or epileptics, because some members of that

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[49] See, for example: (Can) HRA s 12; (Man) HRC s 19; (Ont) HRC s 5(2); (Queb) CHR&F s 10.1; (YT) HRA s 13; (Cth) DDA 1992 ss 35-36. Disability harassment is expressly dealt with under the (US) ADA 1990: 42 USC §12203(b).

[50] (1992) 92 CLLC ¶17,039 (Ont HRC).

[51] (1987) 87 CLLC ¶17,013 (Ont HRC).

[52] (NSW) ADA 1977 s 49A(1)(b)-(c); (SA) EOA 1984 s 66(c); (Vic) EOA 1984 s 17(4); (WA) EOA 1984 s 66A(1)(b)-(c). See also the similar provision under at least one Canadian provincial statute: (Man) HRC s 9(1)(b).

class may not be suitable would be unlawful discrimination.[53] A classic example of statistical discrimination (or discrimination by characteristics), which is often written into disability legislation, would be unfavourable actions taken by an employer against a visually-impaired person on the assumption that the person has or may be accompanied by a guide dog.[54] A further illustration would be actions taken on the ground that the complainant required to use a palliative or therapeutic device or auxiliary aid, such as a wheelchair.[55] Discrimination should also be regulated if less favourable treatment of a disabled person is informed by the fact that he or she is accompanied by an interpreter, reader, assistant or carer.[56]

Discrimination by association

Evidence submitted to the US Congressional hearings on the ADA 1990 suggested that disability-related discrimination touches the lives of those beyond the people with disabilities themselves. In one anecdotal instance, an employee was dismissed from a job that she had held for many years because her son, who had contracted AIDS, lived with her.[57] In Canada and the US, it is common to find that discrimination against a person, because of that person's actual or presumed association with a disabled individual, is also unlawful.[58] The outlawing of such discrimination in Australia is less usual, although such provision is made under Commonwealth law.[59]

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[53] See, for example: *Cooper v Ford Motor Co of Australia Ltd* (1987) AILR ¶284 (Vic EOB).

[54] (NSW) ADA 1977 s 49A(2); (SA) EOA 1984 s 66(e); (WA) EOA 1984 s 66A(4). The same logic should apply to hearing dogs or other animals trained to assist the disabled person: (Cth) DDA 1992 s 9(1). It is common to provide that the inclusion of this form of discrimination does not affect a disabled person's liability, if any, for injury, loss or damage caused by a guide dog.

[55] (WA) EOA 1984 s 66A(1)(d); (Cth) DDA 1992 s 7. Discrimination based upon the use of palliative devices is also unlawful under some Canadian provincial statutes: (Queb) CHR&F s 10.

[56] (Cth) DDA 1992 s 8.

[57] US Senate, 1989: 8; US House of Representatives, 1990a: 30; Burgdorf, 1991: 419.

[58] (Man) HRC s 9(1)(a) and (d); (NS) HRA s 5(1); (Ont) HRC s 12; (PEI) HRA ss 1(1)(d) and 13; (YT) HRA s 6.

[59] (Cth) DDA 1992 s 15(1)-(2). It might be possible to argue that the concept of discrimination by association is implicit in discrimination statutes. In Britain, for example, direct discrimination on racial grounds has been held to cover discrimination on the basis of another party's race: *Zarczynska v Levy* [1979] ICR 184 (where the EAT found in favour of a white employee dismissed for refusing to obey an employer's order to discriminate against black persons). See also: *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65 (EAT).

DISABILITY DISCRIMINATION AND EMPLOYMENT PRACTICES

Once the concepts of disability discrimination have been identified, it is necessary to prescribe the scope of prohibited discrimination. First, in what fields of human activity is the anti-discrimination principle to operate? Like the British sex and race discrimination statutes, Australian and Canadian discrimination legislation intervenes in employment, education, and the provision of goods, services, facilities and premises. The (US) ADA 1990 regulates discrimination against disabled citizens in employment, public services, transportation, commercial facilities, public accommodations (such as hotels, theatres, shops, schools, etc) and telecommunications. It builds upon the (US) RA 1973 and earlier related laws that addressed educational, architectural and health services barriers to disabled persons. Second, assuming that discrimination in the employment field is a high priority for redress, at which parties should the legislation be directed? Again, the common practice in the jurisdictions being studied is to ensure that employers, partnerships, self-employed parties, trade unions, employers' associations, employment agencies and training or qualifying bodies are within the compass of the law's reach. Third, and most pertinently for present purposes, what practices and activities in the employment field are to be regulated?

Australian legislation, like its British sex and race discrimination model generally applies to discrimination in recruitment and selection arrangements, terms of employment offers, refusals or omissions of employment offers, employment terms and conditions (including pay), access to opportunities for promotion, transfer or training, access to other benefits, facilities or services, dismissal or other detriment.[60] In Canada, the answer to this latter question varies from province to province. In Yukon Territory, for example, "no person shall discriminate... in connection with any aspect of employment or application for employment".[61] Alberta's law applies to refusals to employ or to continue to employ any person, and discrimination with regard to employment or any term or condition of employment.[62] In Saskatchewan province, the right to engage in an occupation is protected.[63] Québec applies the non-discrimination principle to hiring, apprenticeships, probationary periods, vocational training, promotion, transfer, displacement, laying-off,

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[60] See: SDA 1975 s 6 and RRA 1976 s 4. See further: (NSW) ADA 1944 s 49B; (SA) EOA 1984 s 67; (Vic) EOA 1984 s 21; (WA) EOA 1984 s 66B; (Cth) DDA 1992 s 15.

[61] (YT) HRA s 8(b). This also applies "in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association": s 8(c).

[62] (Alb) IRPA s 7(1). See to like effect: (BC) HRA s 8(1); (NB) HRA s 3(1); (New) HRC s 9(1); (NWT) FPA s 3(1); (PEI) HRA s 6(1).

[63] (Sask) HRC s 9. This is then amplified in the usual terms: (Sask) HRC s 16(1).

suspension, dismissal and conditions of employment.[64] Manitoba protects the opportunity to participate, or continue to participate, in an employment or occupation, its customs, practices and conditions, as well as training, advancement, promotion, seniority, remuneration or other employment compensation,[65] and any other benefit, term or condition of the employment or occupation.[66] In seeking to comply with the prohibition upon employment discrimination, Manitoban employers must take care not to penalise other employees by terminating their employment, reducing their wages or other benefits, or changing customs, practices and conditions of their employment to their detriment.[67] Some provinces even make separate provision for pay discrimination, without limiting it to gender-based pay differentials.[68]

The (US) ADA 1990 commands a general prohibition against disability discrimination in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[69] The regulations under the (US) RA 1973 and ADA 1990 further apply the non-discrimination principle to recruitment, advertising, job application procedures, hiring, upgrading, promotion, award of tenure, demotion, transfer, lay-off, termination, right of return from lay-off and rehiring.[70] Rates of pay, any other form of compensation and changes in compensation are also covered, as are fringe benefits available by virtue of employment (whether or not administered by the employer). An employer may not discriminate on the grounds of disability in respect of job assignments, job classifications, organizational structures, position descriptions, lines of progression, seniority lists, leaves of absence, sick leave or other leave. Selection and financial support for training (including apprenticeships, professional meetings, conferences and related activities) and selection for leave of absence to pursue training are

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[64] (Queb) CHR&F s 16. Furthermore, employees have a general right to fair and reasonable conditions of employment which have a proper regard for health, safety and physical well-being: (Queb) CHR&F s 46.

[65] Including salary, commissions, vacation pay, termination wages, bonuses, reasonable value for board, rent, housing and lodging, payments in kind, and employer contributions to pension funds or plans, long-term disability plans and health insurance plans.

[66] (Man) HRC s 14(1)-(2).

[67] (Man) HRC s 14(12). The implication is that the Code requires a levelling-up of employment standards and conditions rather than a levelling-down.

[68] See for example: (PEI) HRA s 7; (Queb) CHR&F s 19; (YT) HRA s 14.

[69] 42 USC §12112(a).

[70] 28 CFR §41.52(c); 29 CFR §1630.4; 45 CFR §84.11(b).

also affected. Finally, the regulations encompass employer-sponsored activities (such as social or recreational programmes) and any other term, condition or privilege of employment.[71]

In providing such detail, American disability discrimination law differs from civil rights laws in general by giving specific illustrations of what amounts to such discrimination. Supporters of the ADA wished the legislation to be as specific as possible and to be not reliant upon the subsequent issuing and content of administrative regulations. The ADA simply adopted and adapted many of the provisions already tried and tested under the RA 1973 regulations. Many aspects of disability discrimination are not readily apparent and certainly benefit from being made explicit.[72] Feldblum gives a number of practical examples, many of which are taken from the legislative history of the Act.[73] An employer would discriminate by placing disabled workers in a separate, segregated part of the workplace. Paying disabled employees less than other workers undertaking equivalent work would be unlawful. An employer who sends a disabled employee on a training course provided by a third party would be transgressing the law if the course or its location are inaccessible to a person with disabilities. The same logic would apply to the employer's selection of a hotel or conference centre for an annual retreat or convention for the workforce.[74] Discrimination would occur if the employer had works rules which excluded employees from bringing their own equipment or aids to work. This might screen out, for example, wheelchair users or visually-impaired persons who rely upon guide dogs. A job qualification criterion that employees should have a driving licence will also tend to screen out some disabled persons and could amount to discrimination if unjustifiable.

Canadian case law illustrates how an employer's employment policies and practices might transgress the non-discrimination requirement. For example, a failure to consider reassignment of a newly disabled employee to other work may be discriminatory. In *Boucher v Correctional Services of Canada*,[75] discrimination was found where a prison officer with nervous depression related to job stress was dismissed due to his inability to fulfil his duties, but where the employer failed to consider him properly for a transfer to the position of driver for

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[71] *Ibid.*

[72] Feldblum, 1991c: 92.

[73] Feldblum, 1991c: 90-92.

[74] In both these latter examples, the employer would be expected to make reasonable accommodation of the employee's disabilities, subject to the undue hardship defence. The employer would have to take reasonable steps to select accessible training courses or locations.

[75] (1988) 9 CHRR D/4910, (1988) 88 CLLC ¶17,000 (Can) HRT.

which he had applied. In contrast, in *Rivard v Department of National Defence*,[76] a soldier who incurred a knee injury which prevented him remaining in his present position was lawfully dismissed, despite seeking reclassification as an administrative clerk, where the evidence was that the sought-after reassignment still required the physical abilities of an active service soldier. However, reassignment need only be considered if the employee has actually *applied* for a transfer. In one case,[77] discrimination was found where the employer had not made a proper attempt to assess the employee's ability to perform the functions of a job, but had dismissed on a general assumption about the effect of a disability. However, there was no discrimination by simply failing to consider a reassignment to work for which the employee was suited but for which the employee had not applied. By way of further example, the adoption of reasonable policies on alcohol-dependent employees will usually be fair, but the employer must follow that policy carefully in order to avoid discrimination. In *Niles v Canadian National Railway*,[78] the employee was an alcoholic who became unable to perform his work. In accordance with the employer's policy, he was suspended and informed that he would be reinstated when capable of handling his responsibilities. After an alcohol rehabilitation programme, the employee asked to return to work seven months later. The employer refused, being unconvinced that the employee was no longer alcohol-dependent. The employee's subsequent dismissal was found to be unlawful by a federal tribunal because, although the employer's alcohol policy was fair and reasonable, it had not been correctly applied in this case. On appeal, a federal appellate court said that the employer's insistence that the employee should demonstrate ability to fulfil all the requirements of the job upon return from rehabilitation was adverse effects discrimination.

PRE-EMPLOYMENT SCREENING

Pre-employment screening for disability gives rise to additional opportunities for employment discrimination. Such screening may take the form of health-related questions in employment application forms, health questionnaires administered as part of the recruitment and selection process, or medical examinations insisted upon as a precondition of employment. Medical information gleaned in these ways is often used for making adverse employment decisions against people for trivial reasons, such as allergies, colour blindness and obesity,[79] and in

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[76] (1990) 90 CLLC ¶17,018 (Can) HRT.

[77] *Villeneuve v Bell Canada* (1985) 85 CLLC ¶17,016, (1986) 86 CLLC ¶17,016 (Can) HRT; affirmed (1987) 9 CHRR D/5093 (Can FCA).

[78] (1991) 91 CLLC ¶17,018 (Can) HRT; (1992) 92 CLLC ¶17,031 (FCA).

[79] Rothstein, 1983: 1422. See also: Craft *et al*, 1980; Hadler, 1986.

respect of the mildest of conditions that bear no relationship to the requirements of the job.[80] In respect of pre-employment screening, both employer and disabled person have necessary and legitimate concerns. Feldblum identifies these:

> The concern of people with disabilities is to get a fair chance to demonstrate their abilities for a particular job before an employer is informed about a disability that is irrelevant to a job. The concern of employers is to be allowed to assess whether an applicant or employee is qualified for, or remains qualified for a particular job.[81]

Disabled persons who reveal their disability status in response to a question on an application form or pre-employment questionnaire, and who subsequently do not receive a job offer, may never know whether they have been rejected because of their disability or because of a deficient *curriculum vitae*, a poor interview performance or any number of other imponderables.[82] "Many people with disabilities are often denied jobs because their disability is identified early in the application process and that fact taints the remainder of the application process".[83]

Uses and misuses of pre-employment screening

With the advent of genetic screening techniques, the possibilities also exist for eliminating from employment consideration those whose genetic traits predict an increased risk of future disease or injury.[84] A number of genetic conditions may lead to an increased risk of disease through certain occupational exposures.[85] For example, sickle cell anaemia may lead to splenic infarctions and sudden death at high altitude, thus restricting work at altitude or where there is relatively limited oxygen. This may restrict employment involving flying, mine work or diving.[86] There is also the possibility of a biochemical reaction with the gene, thus limiting work in the chemical industry. The human leucocyte antigen (HLA) system has been

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[80] For example, lower back weaknesses: Rockey *et al*, 1979. See also: Stickler and Sebok, 1992.

[81] Feldblum, 1991c: 97.

[82] Feldblum, 1991a: 531.

[83] US Senate, 1989: 39; US House of Representatives, 1990a: 72. Cited in Feldblum, 1991a: 533.

[84] Canter, 1984; Gostin, 1991; Rothstein, 1992a and 1992b; Wilkie, 1993.

[85] Rothstein, 1983; Canter, 1984.

[86] Rothstein (1983: 1444) records that New Jersey law specifically prohibits employment discrimination based on an individual's "atypical hereditary cellular or blood trait" (thus covering sickle cell and cystic fibrosis): NJ Stat Ann §10:5-5(y). Sickle cell trait is also protected under Florida, Louisiana and North Carolina law: Fla Stat Ann §448.075; La Rev Stat Ann §§23:1001:1004; NC Gen Stat §95-28.1.

linked statistically with numerous diseases and may be related to occupational exposure. Such diseases include bladder cancer, asbestosis, silicosis and pneumoconiosis. Consequently, HLA-typing has increasing importance in identifying high risk workers. On the other hand, the importance of non-occupational environmental factors must not be underestimated. Such factors include the increased risk of disease based on innate characteristics, such as age, race and ethnicity, sex and reproduction, and familial factors, or the increased risk based on geography or behaviour (such as diet, tobacco smoking, alcohol use, medical drugs and radiation, and general lifestyle). An individual's overall health and physical condition can contribute to the risk of occupational illness. Occupational exposure to toxins may also significantly affect sensitivity to further occupational exposures and increase risk accordingly. Hypersensitivity and chromosome aberrations are also contributors to occupational disease.

Nevertheless, Rothstein concludes that:

> The conclusiveness and predictive value of current medical evidence varies widely... Where employers use unreliable criteria, extensive screening unfairly denies employment opportunities to entire classes of people. Even where the evidence supports a finding of increased risk, medical screening by employers threatens to create two classes of workers, one containing disease-resistant employees, the other containing potentially productive but unemployable individuals who have genetic or other subclinical anomalies. The gaps in our medical knowledge make it difficult to respond to this prospect. Our national labor policy faces two potentially inconsistent goals: making job opportunities available to those persons capable of doing the work, while preventing job-related diseases.[87]

Apologists for pre-employment health screening argue that employing disabled workers increases insurance costs, endangers safety compliance, results in higher rates of turnover, absenteeism and sick leave, and creates a greater potential for civil liability. Rothstein counters that:

> Despite their widespread use, pre-employment medical examinations can be grossly inaccurate in attempting to screen for high-risk workers. Several studies confirm that employee selection procedures that do not use pre-employment physical examinations are as accurate in identifying high risk workers.[88]

Whatever the merits of these respective arguments, where employment decisions are taken having screened for disability, applicants or employees may never know whether their disability has informed a determination of their employment opportunities.

Pre-employment health screening is apparently widespread in the US.[89] A medical examination between the selection and placement stages of the recruitment process is

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[87] Rothstein, 1983: 1381-2.

[88] Rothstein, 1983: 1417.

[89] Rothstein, 1983 and 1987.

frequently a condition of engagement. Rothstein notes that in the US most employers regularly record health information about new employees through the use of pre-employment medical questionnaires (61 per cent of employees of small employers, 82 per cent of employees of medium employers, and 98 per cent of employees of large employers).[90] While employment applications rarely request detailed medical information, a medical examination is frequently a condition of employment. Rothstein states that the use of medical examinations is confined to the post-selection, pre-placement stages of recruitment, ostensibly to match the employee with the most suitable job.[91] In most cases these medical examinations are not required by health and safety legislation. Although British employers do not use medical screening to the same extent,[92] however, Morrell found that, in a survey of British employers, just over half had specific application form questions on health, while 10 per cent had medical examinations for every recruit and a further 14 per cent for certain recruits.[93] Medical examinations seemed to be used to follow up health information revealed on application forms or for senior positions and/or positions likely to be covered by occupational health insurance.

A test of the efficacy of discrimination law is its ability to control pre-employment screening.[94] Disability discrimination law must regulate such screening in application forms, in medical questionnaires and examinations, and in interview questions and inquiries. Pre-employment screening for disability is specifically controlled in several Canadian provinces.[95] In the US, under the Rehabilitation Act 1973, the section 504 regulations prohibited pre-employment medical examinations and inquiries designed to discover whether an applicant was a disabled person or as to the extent of his or her disability, except to determine ability to perform job-related functions.[96] The section 503 regulations permitted federal contractors to require selective pre-employment medical examinations, unless this had the effect of

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[90] Rothstein, 1983: 1411.

[91] Rothstein, 1983: 1412.

[92] Labour Research Department, 1989 and 1990.

[93] Morrell, 1990: 8.

[94] Britton, 1987.

[95] (Alb) IRPA s 8(1); (Man) HRC ss 14(3)-(4) and 18; (NB) HRA s 3(4); (NS) HRA s 8(2)-(3); (Ont) HRC s 23(2)-(3); (PEI) HRA s 6(3); (Queb) CHR&F s 18.1; (Sask) HRC s 19.

[96] 28 CFR §41.55 and 28 CFR §42.513. See also: 29 CFR §32.15 and 45 CFR §84.14. The regulations were held to be violated, for example, where an employer asked an applicant whether he had ever experienced a nervous breakdown: *Doe v Syracuse School District* (1981) 508 FSupp 333 (ND NY).

unjustifiably screening out qualified disabled applicants.[97] However, such protections were piecemeal and not universal. Tighter controls are now in place in the US under the ADA 1990.[98] In Australia too, pre-employment screening for disability and health status is likely to transgress state and federal disability discrimination laws, unless it is demonstrated to be relevant to the work in question (for example, on safety grounds).[99]

Pre-employment screening and the law in Britain

In Britain, concern that employers might discriminate on the grounds of disability might lead a disabled person to conceal the fact of disability during the recruitment and selection process. Unless the employer has solicited information about health or disability status, perhaps by appropriate questions on an application form, the non-disclosure of a disability is unlikely to lead to immediate legal implications. Except when the disabled employee is registered under the 1944 Act, he or she will have little employment protection in any case during the first two years of service. If the employee deliberately has concealed disability from the employer during pre-employment screening, then this might be grounds for termination of employment once the disability becomes apparent. On general principles, the employee has obtained employment by an actionable misrepresentation. Under unfair dismissal law, the dismissal is capable of justification by reference to capability or "some other substantial reason" and might be fair provided a reasonable procedure has been followed.[100] Otherwise, there is no redress for a disabled applicant or employee who believes that they have been discriminated against on the basis of health information or medical screening. Pre-employment screening controls in Britain, therefore, would need to be written upon a *tabula rasa*. Sex and race discrimination law does not provide an appropriate paradigm. Accordingly the experience of the US regulation of disability screening and medical

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[97] 41 CFR §60-741.6. By connecting job-relatedness to business necessity, s 503 required medical examinations and screening procedures to have a scientifically valid basis, a high predictive value, and to be the most accurate and least onerous alternative.

[98] 42 USC §12112(d). See: Feldblum, 1991a; Rothstein, 1992a; Maselek, 1992. It is reported that two US states (Wisconsin and Iowa) have already moved to control genetic testing in the workplace as a condition of employment. See *HR Focus* (September 1992) at 9 and *Personnel Journal* (September 1992) at 118.

[99] Johnstone, 1988. Johnstone cites evidence that suggests that nearly four-fifths of Australian employers in manufacturing use pre-employment health assessments (1988: 115). His analysis points to tensions and contradictions between the contract of employment, health and safety law and equal opportunities legislation in the context of screening for disability. He argues for the legal regulation of health screening so as to permit its proper use while safeguarding individual rights.

[100] *O'Brien v Prudential Assurance Co Ltd* [1979] IRLR 140 (EAT); *Walton v TAC Construction Materials Ltd* [1981] IRLR 357 (EAT).

examinations would need to be prayed in aid.

Pre-employment screening and the law in the United States

The US experience suggests a number of points for consideration. First, the use of medical examinations as a means of screening out disabled persons from employment would need to be regulated.[101] Such curbs should apply to *all* applicants and employees, regardless of disability. Employers would be prohibited from conducting a medical examination of any employment applicant, except for the single purpose of ascertaining ability to perform job-related functions. Second, however, once an offer of employment has been made, a medical examination could be required before the new recruit commences employment duties. In that case, the employer could make the employment offer conditional upon the results of the medical examination.[102] There is nothing in the American provisions that require employers to show that the examination or inquiries are related to essential job functions.[103] However, if a job offer is withdrawn following such an examination, the employer will need to demonstrate that the examination results are not based upon exclusionary criteria which screen out or tend to screen out disabled applicants or, if so, are job-related and consistent with business necessity and no reasonable accommodation could be made.[104] Rothstein suggests that to make out business necessity, the employer will have to show that the examination, test or procedure is job-related; that it has high predictive value and is the best that is feasible to use; that it indicates that there is a strong likelihood of the applicant developing a serious injury or illness in the near future and that this likelihood is a significant variation from the general employee population; that the discriminatory decision was based on an individualised determination of fitness; and that no reasonable accommodation will permit the individual to perform the necessary job functions.[105]

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[101] 42 USC §12112(c)(1) includes medical examinations and inquiries within the prohibition on disability discrimination. See also: 29 CFR §§1630.13-14.

[102] 42 USC §12112(c)(3); 29 CFR §1630.15(f).

[103] 29 CFR §1630.14(b). The business community objected to blanket controls on the administration of medical testing (as opposed to the limitations placed upon the use of examination results) and to the need to job-validate every medical examination (Feldblum, 1991a: 536). As a result, the legislative compromise now contained in 42 USC §12112(c)(2)-(3) was reached. As a result, employers are allowed in theory (although probably unwilling to do so in practice) "to identify *all disabilities* of applicants, after conditional job offers had been made, including those disabilities carrying social stigma": Feldblum, 1991a: 539-40 (emphasis supplied).

[104] Shaller and Rosen, 1991: 422.

[105] Rothstein, 1983: 1445.

Third, safeguards would have to built into the use of post-selection, pre-placement medical examinations, which should only be permitted if all successful applicants are subjected to such a medical examination. Taken literally, this could require employers to administer the *same* medical examination to all new recruits regardless of whether they were manual, white collar or managerial employees. However, the legislative history of the ADA 1990 makes it plain that the same medical examination need only be required of all new recruits in a particular job category.[106] Moreover, there would be nothing to prevent an employer from requiring disabled applicants to submit to a more extensive medical examination than others.

Fourth, once in employment, employees would not be required to undergo a medical examination at the behest of the employer, except to ascertain an employee's continuing ability to perform job-related functions.[107] Under the American statute, medical examinations and inquiries during employment are permissible provided that they are *both* "job-related *and* consistent with business necessity". This phrase was designed to ensure that the standard required under the ADA 1990 matched the jurisprudence of section 504 of the Rehabilitation Act 1973 and not that of the disparate impact standard under Title VII after the Supreme Court decision in *Wards Cove Packing Co v Atonio*.[108] As a result, the burden of proof is on the employer to show that any medical examinations or inquiries of employees measure actual ability to perform the essential functions of the job, with reasonable accommodation if necessary.[109] If an employee's actual performance in employment indicates that they are no longer qualified or able to do the job, with reasonable accommodation, they may be dismissed without any suggestion of unlawful discrimination. The ADA allows employers to make periodic medical examination and inquiry to establish the

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[106] This is also apparent from the EEOC regulations: 29 CFR §1630.14.

[107] 42 USC §12112(c)(4)(A). This allows employers to make fitness-for-duty decisions under federal, state or local laws: 29 CFR §1630.14(c) and Appendix. Under s 504, there were no apparent restrictions placed upon medical examinations of disabled employees once in employment. In *Leckelt v Board of Commissioners of Hospital District N° 1* (1989) 714 FSupp 1377 (ED La), *affirmed* (1990) 909 F2d 820 (5th Cir), the court thought that the medical examination provisions might only protect disabled *applicants* from *pre-employment* invasions of privacy and might not extend to *employees*.

[108] (1989) 490 US 642. See Mayerson, 1991b: 511-12 and Feldblum, 1991a: 546-7 for a fascinating account of the legislative negotiations and subsequent compromise represented by this phrase. The *Wards Cove* burden of proof upon the plaintiff in disparate impact cases has been modified, in any case, by §105 of the Civil Rights Act 1991. Once it is shown that a practice has an indirectly discriminatory effect upon a protected class, the burden shifts to the employer to prove job-relatedness and consistency with business necessity: 42 USC §2000e-2 as amended.

[109] This gloss is derived from the legislative history of the provision. See: 29 CFR §§1630.10(a) and 1630.13(b).

employee's ability to work, provided the twin tests of job-relatedness and business necessity are satisfied.[110] It is irrelevant that the employer does not intend to penalise the employee; the employee is entitled not to have a disability identified, with the consequent risk of stigma, unless it interferes with the ability to do the job. Where an examination or inquiry is validly undertaken, it may be required of a specific individual, and there is no need to show that such examinations or inquiries are required across the workforce (in contrast with pre-employment testing and questions).

Fifth, *voluntary* medical examinations may be conducted (and *voluntary* medical histories compiled) as part of an occupational health programme.[111] Feldblum records that it was never intended to prohibit voluntary medical examinations, so this provision was inserted to meet the concerns of businesses and for the avoidance of doubt.[112] However, it follows from general principles that occupational health schemes must be open to all employees without distinction based upon disability or health status. Sixth, where medical examinations and inquiries are acceptable under the legislation - whether during recruitment and selection or in employment - safeguards are built in to ensure the confidentiality and proper use of the medical information which has been solicited. Any information obtained from a lawful medical examination regarding the medical condition and history of a disabled person should be collected and maintained on separate forms and in separate medical files. Such information should be treated as a confidential medical record and in accordance with the anti-discrimination principle.[113] Thus, the results of a medical examination cannot be used to withdraw an employment offer, unless the examination demonstrates that the applicant is not qualified to do the work. However, the employer may inform supervisors and managers of any necessary restrictions on the work or duties of a disabled person and of any necessary accommodations. Furthermore, when appropriate, the employer may inform first aid and

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[110] This is explained by interpretative guidance in the EEOC regulations expanding upon 29 CFR §1630.13:

> The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity.

[111] 42 USC §12112(c)(4)(B).

[112] Feldblum, 1991a: 540.

[113] 42 USC §12112(c)(3). See also: 29 CFR §§1630.14(b) and 1630.15(f). These provisions are applied also to acceptable examinations and inquiries during employment: 42 USC §12112(c)(4)(C).

safety personnel where an employee's disability might require emergency treatment or necessitate the taking of special precautions.

Seventh, subjecting applicants or employees to a medical examination is not the only means that employers have used to screen out disabled employees. Application forms and pre-employment questionnaires frequently solicit the medical history of applicants and may be used to reach employment decisions which disadvantage persons with disabilities.[114] Such inquiries also occur face-to-face during the course of an interview or selection procedure. Employers should be prohibited from making inquiries of any applicants or employees as to whether they are a person with a disability. Similarly, employers may not inquire as to the nature or severity of a disability. In both cases, however, such inquiries may be made for the sole purpose of ascertaining an applicant's ability to perform job-related functions.[115] Eighth, these controls could create difficulties for "equal opportunity" employers monitoring the profile of job applicants and the composition of the workforce. Such questions are permitted by the section 504 regulations if designed to promote remedial action to remedy past discrimination, or voluntary action to overcome conditions which have limited participation by disabled persons, or affirmative action pursuant to section 503.[116] The ADA omits any reference to *voluntary* questions about disability. This omission has been explained as the consequence of the dynamics of the legislative process and, in particular, by congressional concern to write a law and not a regulation.[117] The EEOC felt unable to contradict the statutory language, so that the drafting of the ADA regulations does not allow for the gathering of voluntarily-supplied information about job applicants' disabilities, except for employers covered by section 503.[118] Feldblum opines that this lacuna is not necessarily to be regretted.[119] She argues that employers who wish to promote remedial or affirmative action for disabled individuals would do better to use outreach techniques to

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[114] This is a more common practice in Britain than in the US.

[115] 42 USC §12112(c)(2); 29 CFR §1630.14(a). For example, an individual with one arm, who applies for a position as a parcel deliverer, might be asked how he or she would lift parcels from the delivery vehicle and carry them to the point of delivery, with or without accommodation. Clearly, an employer cannot disguise a question in the following terms: "Do you have any disabilities which would prevent you performing the following job-related functions?". See Feldblum, 1991a: 537.

[116] 45 CFR §84.14(b).

[117] Feldblum, 1991a: 543.

[118] Interpretive guidance to 29 CFR §§1630.1(b), 1630.1(c) and 1630.14(a).

[119] Feldblum, 1991a: 545.

identify and encourage disabled applicants to apply for jobs. For example, contact might be made with rehabilitation agencies, independent living centres or local disability organizations. Furthermore, many disabled persons are better assisted towards equal employment opportunity by the general prohibition on pre-employment questionnaires, inquiries or examinations which identify all and any past or present medical conditions. However, in the present writer's view, if disability discrimination is to be addressed in the future by equal opportunity laws that require policy-making, targets and goals, positive action, and monitoring techniques, then some compromise between the right of the individual to privacy of status and the need of the employer to collect statistics will need to be forged.

From the above analysis, it can be seen that the North American legislation impose a two step framework on the use of medical examinations and inquiries by, first, restricting their use at the stage of application and recruitment while, second, allowing employers more freedom once a job offer has been made. Feldblum states that this allows disabled persons to isolate what influence, if any, their disability had upon the employment process, but enable employers to test whether a particular disabled individual could meet the ability to work standard.[120] Feldblum observes that the:

> restriction on the use of medical examination and inquiry results, together with potential liability for unwarranted disclosure of medical information, may convince many employers not to require broad-range medical examination and inquiries.[121]

Employers might see the sense of tailoring medical examinations to obtain only such information that has job-related relevance and to reduce the amount of confidential information in employers' possession that might lead to an inadvertent breach of privacy. On the other hand, employers might still prefer to have as full a medical profile of their employees as possible in order to assist in any potential personal injury or occupational compensation claim in the future.

CONCLUDING REMARKS

As we have seen in this chapter, any thoughts that existing British discrimination laws could be amended simply to include disability as a prohibited ground are ill-conceived. The nature of disability-informed discrimination is such that the legislation will have to be expansive as to the definition and descriptions of possible unlawful actions or consequences. In particular, especial attention must be given to the issue of discrimination by association or on the basis

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[120] Feldblum, 1991a: 533.

[121] Feldblum, 1991a: 538. Creasman and Butler (1991: 54) predict that the restrictions on pre-employment screening will force employers to rethink their approach to screening or interviewing candidates and that this will increase the costs associated with the recruitment process.

of characteristics and to regulation of pre-employment screening. The US, Canadian and Australian models all provide raw materials that could be combined to produce a definition of discrimination fit for its purpose in the context of a law designed to protect the employment rights of disabled persons. However, the problem of defining disability discrimination is perhaps less challenging than the problem of identifying who is a member of the newly-protected class. This issue is now considered in the following chapter.

CHAPTER XI:
IDENTIFYING THE PROTECTED CLASS

> While it is common to speak of 'protected classes' under civil rights laws, such statutes generally protect all individuals from discrimination on the grounds prohibited, whether it be age, race, sex, religion, or national origin. Disability non[-]discrimination laws, in contrast, have historically protected only a particular class of persons - individuals with disabilities.[1]

INTRODUCTION

With few exceptions, the identification of the protected class for the purposes of sex and race discrimination law has not been generally problematic. In Britain, some difficulties have arisen in the interpretation of discrimination on "racial grounds" or against "racial groups" and, in particular, in respect of the terms "national origins" and "ethnic origins".[2] So, for example, the question of how to treat groups whose identity is marked by a shared religious and cultural history or tradition (such as Sikhs and Jews) has exercised the courts.[3] Similar quandaries have arisen in respect of groups at the margins of society, such as gypsies and Rastafarians.[4] In sex discrimination law, potential problems could arise about the biological identity of a plaintiff, especially in the case of transsexuals or transvestites,[5] but the only question of note has been the debate over whether to regard differential treatment of pregnancy as being discrimination on the grounds of sex.[6]

It is not possible to be as sanguine about disability discrimination legislation.[7] The definition of "disability" must be both inclusive and exclusive: embracing individuals outside the limited popular perception of disability, yet excepting idiosyncrasies, human traits and transient

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[1] Burgdorf, 1991: 441.

[2] RRA 1976 ss 1 and 3.

[3] See, for example: *Mandla v Dowell Lee* [1983] ICR 385 (HL); *Seide v Gillette Industries Ltd* [1980] IRLR 427 (EAT). *Cf Gwynedd County Council v Jones* [1986] ICR 833 (EAT).

[4] See, for example: *Commission for Racial Equality v Dutton* [1989] QB 783 (CA); *Dawkins v Department of Environment* [1993] IRLR 284 (CA).

[5] See, for example: *White v British Sugar Corporation Ltd* [1977] IRLR 121 (IT).

[6] See: *Turley v Allders Department Stores Ltd* [1980] ICR 66 (EAT); *Hayes v Malleable Working Men's Club and Institute* [1985] ICR 703 (EAT); *Webb v Emo Air Cargo (UK) Ltd* [1992] 4 All ER 929 (HL). The determination of this question awaits the view of the ECJ.

[7] Prescott-Clarke (1990: 79) suggests that under the British DP(E)A 1944 there was appreciable variation between DROs (now PACTs) judging identical cases in the assessment of whether an individual is a disabled person for the purposes of registration under the Act.

illness. A distinction must be drawn between chronic or handicapping conditions and temporary or minor maladies. The boundaries between disabilities and handicaps which are the respective products of medical condition, social or environmental construction, and educational disadvantage must be carefully drawn. If it were otherwise, disability discrimination law would be easily subverted, and diverted to provide a cause of action for any aggrieved or disadvantaged worker. The law would be brought into contempt and its objectives of promoting equal employment opportunities for disabled persons would be easily undermined. It is, however, easier to state the problem than to provide a solution.

LEGAL DEFINITIONS OF DISABILITY

As used in this study, disability denotes a physical or mental condition substantially modifying daily life functions without destroying the ability to work.[8] In legal terms, the word "disability" is often used in a general sense to indicate incapacity for the full enjoyment of ordinary legal rights. In this sense, disability is frequently used to describe the compromised legal status of mental patients, infants and minors, and bankrupts. Their disability describes some limitation upon or exclusion of their freedom to exercise or to enjoy basic legal rights or facilities. So, for example, disability in this sense may affect an individual's ability to make a binding contract or to bring litigation or to qualify for an office (such as a director of a company). Furthermore, the legal status of disability may entail some advantages (although of doubtful value): for example, the postponement of limitations periods which would otherwise statute-bar a person under a disability from commencing legal action some years after the cause of action arose.[9] The use of disability in this context is of no assistance for the present purposes of identifying the protected class under discrimination law.

Social security and welfare law

A more appropriate definition of disability might be gleaned from social welfare or social security law. For the purposes of qualifying for the receipt of social welfare services,[10] for example, a disabled person is someone who is blind, deaf or dumb, or who suffers from a mental disorder, or who is substantially handicapped by illness, injury or congenital deformity or other prescribed disability.[11] In social security law, disablement benefit is payable to an

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[8] Borrowing from Weiss, 1974 and the jurisprudence of US disability discrimination law.

[9] Limitation Act 1980 s 33.

[10] See: *Halsbury's Laws of England* (4th ed) Vol 33 paras 902 and 927-8.

[11] National Assistance Act 1948 ss 29(1) and 64(1); Mental Health Act 1959 s 8(2); Chronically Sick and Disabled Persons Act 1970 s 2; Health and Social Services Adjudications Act 1983 Sch 4; Disabled Persons (Services, Consultation and Representation) Act 1986 ss

employed earner who suffers, as a result of an accident, from a loss of physical or mental faculty, provided the disability is assessed at not less than 14 per cent.[12] The disabilities to be taken into account are all disabilities incurred (as a result of the relevant loss of faculty) and that present a disadvantage or handicap to which the claimant may be expected to be subject in comparison with a person of the same age and sex whose physical and mental condition is normal. The claimant's particular circumstances would be disregarded in making this assessment, and loss of earning power or incurring of additional expenses would not be relevant. It is suggested that these definitions would not be appropriate in the context of disability discrimination laws.

Employment law

As our present concern is with employment discrimination against disabled persons, it might be possible to adopt existing definitions of disability in employment law. In the enquiry which preceded the enactment of the DP(E)A 1944, the Tomlinson Committee defined disability by reference to the handicap it created in obtaining suitable employment.[13] That definition covered disablements of all kinds and from all causes, excluding those of a minor or temporary character. A distinction between handicaps produced by disability and those resulting from other disadvantages was drawn. The definition was subjective, rather than dependent upon objective medical criteria, but recognised that disability is a changing social construct resulting from the interaction of person and environment. Accordingly, for the purposes of the 1944 Act, a disabled person is defined as:

> a person who, on account of injury, disease, or congenital deformity, is substantially handicapped in obtaining or keeping employment, or in undertaking work on his own account, of a kind which apart from that injury, disease or deformity would be suited to his age, experience and qualifications.[14]

The status of *registered* disabled person is the basis for certain, although not all, disabled employment rights in Britain. Registration as disabled under the Act is voluntary. Eligibility is determined in the light of medical and other relevant evidence. Disability must be likely to continue for at least 12 months and the applicant must be otherwise employable. Proof of registration is afforded by a certificate, commonly known as a "green card". A disabled person may be removed from the register upon ceasing to satisfy the registration criteria, or

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5, 9 and 16.

[12] See: *Halsbury's Laws of England* (4th ed) Vol 33 paras 504 *et seq* and 1993 Cumulative Supplement; Social Security Contributions and Benefits Act 1992. Benefit would also be payable in respect of prescribed industrial diseases and injuries.

[13] Tomlinson, 1943.

[14] DP(E)A 1944 s 1(1).

as a result of unreasonable failure to attend or complete vocational rehabilitation or training, or because of an unreasonable and persistent refusal of suitable work, or by application for deregistration.[15]

Although the definition of disability under the 1944 Act could be adopted and adapted for the purposes of disability discrimination law, the substance and framework of the definition is flawed and tainted. First, the definition is employment-specific, whereas discrimination law may need to address discrimination against disabled persons in a number of social fields. Second, the association of the definition with the process of registration is unfortunate. It is believed that the register:

> encourages the view that disabled people are a separate and stereotyped category of human being rather than individuals with diverse and changing needs.[16]

Registration can stigmatise and highlight disabilities rather than abilities, while producing a risk of permanent categorisation as disabled. While the individual should bear the burden of proving membership of a protected class, disabled persons ought not to be asked to register their status in order to enjoy basic human rights. If disability discrimination law is to be introduced in Britain, a legal redefinition of disability must precede the enfranchisement of disabled workers.[17]

Comparative perspective

In the US, disabled persons constitute a broadly defined protected class. In Canadian and Australian legislation the definition of disability is sufficiently precise to exclude negative judicial interpretation, but flexible enough to recognise disability as a product of self-definition and social construction. These comparative perspectives point a way forward. So, for example, under US law, "disability" is defined as an actual or recorded or perceived physical or mental impairment that substantially limits one or more of an individual's major life activities.[18] The test is a two-stage one: (1) does the plaintiff have a recognised impairment and (2) if so, does it represent a substantial limitation upon major life activities? In contrast, the Canadian definitions of disability tend to involve a one-stage test that focuses upon the

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[15] See Chapter IV where these provisions are discussed in more detail.

[16] NACEDP, 1986: para 6.11.

[17] Research carried out in the 1980s found that the 1944 definition of disability tended to match employers' perceptions of disability, but with a slight bias towards adopting an exclusive rather than inclusive definition: Morrell, 1990: 7.

[18] 29 USC §706(8)(B); 42 USC §12102(2). See the detailed discussion in Chapters VI and VII above. Originally, the 1973 definition defined a "handicapped" individual as someone whose disability limited employability: (US) RA 1973 §7(6).

nature or cause of impairment, and illustrates the types of disability intended to be covered.[19] Australian law comports much more closely with the one-stage test approach of the Canadian jurisdictions, although New South Wales departs from this pattern and employs a two-stage test similar to the US model.[20]

In Britain, recent attempts to introduce disability discrimination legislation have been patently influenced by the (US) RA 1973 and ADA 1990. The CRDP Bill borrows heavily from the definitional aspects of the ADA. In the view of the present writer, although the two-stage approach of the US model may be implicit in the Canadian and Australian statutes, the two-stage test needs to be made explicit. To do so will ensure that disability discrimination law can operate with a judicious mixture of flexibility and predictability, while balancing the legitimate rights, expectations and interests of disabled persons and employers. Accordingly, the two-stage approach will be adopted for the present analysis.

WHO IS A DISABLED PERSON?

Present or actual disability

In the US, the anti-discrimination provisions of the RA 1973 and the ADA 1990 address the employment rights of individuals with "handicaps" or a "disability".[21] This means that the protected class embraces any person who has a physical or mental "impairment".[22] A physical impairment is defined as:

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; *respiratory, including speech organs;* cardiovascular; reproductive, digestive; genitourinary, hemic and lymphatic; skin; and endocrine,[23]

while a mental impairment constitutes:

> any mental or psychological disorder, such as mental retardation, organic brain

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[19] See the detailed discussion in Chapter VIII above.

[20] (NSW) ADA 1977 s 4(1) and see the detailed discussion in Chapter IX above.

[21] 29 USC §§791(b), 793(a) and 794(a); 42 USC §12112(a). The burden of proof is on the plaintiff show that he or she is a disabled person. See, for example: *Prewitt v US Postal Service* (1981) 662 F2d 292 at 309 (5th Cir); *Pushkin v Regents of the University of Colorado* (1981) 658 F2d 1372 at 1385 (10th Cir); *Walders v Garrett* (1991) 765 FSupp 303 (ED Va).

[22] 29 USC §706(B); 42 USC §12102(2). See generally: Bogaards, 1982; Simon, 1984; Larson, 1986; Larson, 1988; Feldblum, 1991b.

[23] 29 CFR §1613.702(b)(1); 28 CFR §41.31((b)(1)(i); 29 CFR §1630.2(h)(1). The words in italics did not appear in the RA 1973 definition. The s 503 regulations do not define physical impairment.

syndrome, emotional or mental illness, and specific learning disabilities,[24]

although there are slight differences between the different regulatory definitions.

Canadian federal human rights law addresses the rights of persons with a "disability", but without amplification of the meaning of disability.[25] Provincial human rights laws variously protect persons with a "disability" or a "handicap". All provincial jurisdictions now address the question of discrimination against persons with physical *or* mental disabilities. Four provinces fail to define what is meant by disability or handicap, but Alberta defines "physical disability" as:

> any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device.[26]

Most other jurisdictions follow that model, except perhaps with the inclusion of illustrative disabilities. Nova Scotia's definition includes a "loss or abnormality of psychological, physiological or anatomical structure or function" and any "restriction or lack of ability to perform an activity",[27] while in Ontario "an injury or disability for which benefits were claimed or received under the Workers' Compensation Act" is deemed a disability.[28] The term "mental disability" is typically defined as:

> (a) any condition of mental retardation or impairment, (b) any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, or (c) any mental disorder.[29]

Alberta expands upon the concept of "mental disorder",[30] while in Yukon Territory a "mental

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[24] 29 CFR §1613.702(b)(2); 28 CFR §41.31((b)(1)(ii); 29 CFR §1630.2(h)(2). The section 503 regulations do not define mental impairment.

[25] (Can) HRA s 3(1). For this purpose, "disability" denotes "any previous or existing mental or physical disability...": (Can) HRA s 25.

[26] (Alb) IRPA s 38(i).

[27] (NS) HRA s 3(1).

[28] (Ont) HRC s 10(1).

[29] (NB) HRA s 2; (New) HRC s 2(h); (NS) HRA s 3(1); (Ont) HRC s 10(1); (Sask) HRC s 2(d.1)(ii); (YT) HRA s 34.

[30] (Alb) IRPA s 38(e.1):

> a disorder of thought, mood, perception, orientation or memory that impairs (A) judgment, (B) behaviour, (C) capacity to recognize reality, or (D) ability to meet the ordinary demands of life.

See also to like effect: (Sask) HRC s 2(i.1).

disability" includes any mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness or learning disability.[31]

In Australia, discrimination is prohibited on the ground of "impairment" or against a "handicapped person".[32] Victoria outlaws discrimination on the ground of "status", but defines status as including "impairment".[33] The more recent (Cth) DDA 1992 deals with "disability" discrimination. Building upon the South Australian and Victorian definitions,[34] it contains the most extensive definition of "disability" in relation to a person:

> (a) total or partial loss of the person's bodily or mental functions; or (b) total or partial loss of a part of the body; or (c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person's body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.[35]

In New South Wales, a "physical impairment" means:

> any defect or disturbance in the normal structure and functioning of the person's body whether arising from a condition subsisting at birth or from illness or injury,[36]

and an intellectual impairment is:

> any defect or disturbance in the normal structure and functioning of the person's brain, whether arising from a condition subsisting at birth or from illness or injury.[37]

The Western Australian definitions are derived from this root.[38]

What is immediately noticeable about these various and diverse definitions is four things. First, they are extremely incestuous and inter-bred, growing as they have out of the original 1973 definitions of the American legislation. The result is that it is possible to trace the genesis and subsequent evolution of each definition, and to see the influences which have

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[31] (YT) HRA s 34.

[32] (NSW) ADA 1977 ss 49A and 49P; (SA) EOA 1984 s 67; (WA) EOA 1984 s 66A.

[33] (Vic) EOA 1984 s 21.

[34] (SA) EOA 1984 s 5; (Vic) EOA 1984 s 4(1)

[35] (Cth) DDA 1992 s 4(1).

[36] (NSW) ADA 1977 s 4(1). The 1981 definition of "impairment" was in similar, although not exact, terms.

[37] (NSW) ADA 1977 s 4(1).

[38] (WA) EOA 1984 s 4(1).

produced slightly differentiated definitions at different stages in the development of disability discrimination theory. Second, the definitions are very much rooted in the medical model of disability and pay their respects to the WHO classification of impairment, disability and handicap.[39] We shall see shortly, however, that many of the jurisdictions being compared do admit a social construction of disability. Third, in the 20 years of disability discrimination law, with few exceptions, there has been an increasing preference for the terminology of "disability" or "impairment", rather than the pejorative "handicap". The one remarkable exception, which appears in a number of instances, is the use of the term "mental retardation" in the definition of mental disability. This is a term regarded as outdated by British disability rights activists.[40] These differences reflect the growing awareness of the negative power of labels and the predilection of disabled persons for descriptive language which focuses upon the individual rather than the disability. In legal terms, however, the choice of nomenclature is not significant and these terms are interchangeable without affecting their legal import. Finally, and not surprisingly, the most sophisticated or extensive definitions are those to be found in the most recent examples of reformist laws: the (US) ADA 1990 and the Australian (Cth) DDA 1992.

Record of disability

The protected class must admit to its membership those who are not presently disabled, but who have a previous history of disability (for example, a cancer rehabilitee or someone with a history of heart disease, depression or mental illness),[41] or who have been misclassified as disabled (for example, misclassification as learning disabled).[42] US legislation extends to individuals with a record of impairment or disability.[43] A person who has a record of impairment is someone who "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities".[44] In

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[39] WHO, 1980. See Chapter II above.

[40] It has been rejected in recent attempts to introduce disability discrimination legislation in Britain.

[41] See, for example: *Davis v Bucher* (1978) 451 FSupp 791 (ED Pa) (rehabilitated drug user); 45 CFR Part 84 Appendix.

[42] 29 CFR Part 1630 Appendix.

[43] 29 USC §706(8)(B)(ii); 42 USC §12102(2)(B).

[44] 28 CFR §41.31(b)(3); 29 CFR §1613.702(d); 29 CFR §1630.2(k); 45 CFR §84.3(j)(2)(iii). The record might be contained in educational, medical, employment or other records. A record as disabled for another purpose (for example, social security) would not necessarily bring an individual under the cover of this prong of the definition.

Canada, the laws of Prince Edward Island and Ontario protect a person from discrimination based on a previous disability.[45] In Australia, provision in Western Australia includes past impairments,[46] while Australian Commonwealth legislation incorporates past and present disabilities and, somewhat uniquely, a disability which may exist in the future.[47]

Perceived disability

Many disability rights advocates argue that a definition of disability which focuses upon functional limitations produced by impairment does not go far enough. The argument is that many disabled persons do not consider themselves to be limited in life activities, yet are "disabled" by the reaction of others. The rights of all persons with impairments should be protected, including those or who are wrongly perceived as being disabled (for example, someone who has a cosmetic disfigurement, such as a facial birthmark). The law must also be broad enough to cover situations where employment decisions are made based upon the misconceptions of co-workers.[48] Illustratively, the dismissal of an HIV-infected employee (or one erroneously assumed to be HIV-infected), because co-workers feared transmission of the virus, should be remediable. The employee should not need to show that the perception is incorrect nor that he or she is not actually disabled at all. It is the employer's perception which matters, not the employee's actual medical status.

The (US) RA 1973 and ADA 1990 formulae of "regarded as disabled" would seem to go a long way towards meeting these arguments.[49] The legislation seeks to protect individuals who are regarded as having an impairment or disability.[50] A person regarded as having an impairment is one who:

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated... as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as the result of the attitudes of others toward such impairment; or (C) has none of the impairments

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[45] (PEI) HRA s 1(1)(l); (Ont) HRC s 10(1).

[46] (WA) EOA 1984 s 4(1).

[47] (Cth) DDA 1992 s 4(1).

[48] Shaller and Rosen, 1991: 412. The OFCCP s 503 regulations indicate that this situation might be caught under the "record of impairment" provision: 41 CFR Part 60-741 Appendix.

[49] LaPlante, 1991: 63. However, US law does not deal with the question of "self-perceived disability". LaPlante reports that in a telephone survey, only half of respondents who were classified as possessing an activity limitation considered themselves to be disabled and 47 per cent thought that others considered them to be disabled: LaPlante, 1991: 64.

[50] 29 USC §706(8)(B)(iii); 42 USC §12102(2)(C).

> defined... but is treated... as having such an impairment.[51]

Thus, the protected class includes a person whose disability represents no handicap to employment but is treated by employers as if it did; or whose disability *is* a handicap to employment but only as a result of the attitudes of others towards it; or who has no disability at all but is erroneously treated by employers as disabled.[52] As the Supreme Court has explained:

> [An] impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment... Congress acknowledged that the society's accumulated fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[53]

Discrimination against disabled persons which is founded upon stereotypical attitudes and ignorance is caught, as well as that based upon prejudice. For example, an employer who, without any attempt at an individual medical assessment, inaccurately pre-judges epileptic applicants for positions as being unable to perform the job, will have treated those applicants as disabled, even though in fact their impairments might not limit their major life activities at all or only to the extent that others react adversely to them.[54] A severely scarred burns victim has been cited as an example of an individual who would be regarded as a disabled person under this branch of the definition.[55]

In Australia, the New South Wales statute requires regard to be had to "community attitudes" relating to a physical impairment and to the physical environment.[56] This would appear to recognise that disability is often a social construction rather than a medical condition. Victorian legislation embraces "an impairment which is imputed to a person",[57] and Commonwealth law includes imputed disabilities.[58] In Canadian federal legislation, there is

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[51] 28 CFR §41.31(b)(4); 29 CFR §1613.702(e); 29 CFR §1630.2(l); 45 CFR §84.3(j)(2)(iv).

[52] 29 CFR Part 1630 Appendix.

[53] *School Board of Nassau County, Florida v Arline* (1987) 480 US 273 at 283-284. In *Arline*, a plaintiff with tuberculosis was held to be disabled because the condition had required hospitalization and thus the plaintiff had a "record of impairment", but the case is equally explicable as one where the plaintiff had been discriminated against because of the perception of tuberculosis as a contagious disease. See Mayerson, 1991b: 504.

[54] *Duran v City of Tampa* (1977) 430 FSupp 75 (MD Fla).

[55] Jones, 1991a: 490; 29 CFR Part 1630 Appendix.

[56] (NSW) ADA 1977 s 4(1).

[57] (Vic) EOA 1984 s 4(1).

[58] (Cth) DDA 1992 s 4(1). Disability status is also found where a person possesses bodily

no express provision for perceived disabilities.[59] Perceived disabilities are protected in Nova Scotia and Ontario.[60] However, it would appear that, even in provinces where no explicit provision is made, there is scope for treating a person as discriminated against because of disability if an employer perceives a person's condition as a disability and acts upon that perception. For example, in *Davison v St Paul Lutheran Home*,[61] it was suggested that obesity could be a disability if caused by bodily injury, birth defect or illness or if its origins were a mental disorder. The employer's perception of the complainant was that she suffered from a disability. As a result, she had been judged on the basis of the employer's poor experience of a former employee with a weight condition. However, this decision was overturned on appeal because no findings of fact had been made as to whether obesity was a disability caused by bodily injury, birth defect or illness.[62]

SUBSTANTIAL LIMITATION ON MAJOR LIFE ACTIVITIES

In the US (and NSW) it is not enough to show that the plaintiff is an individual with an actual or recorded or perceived disability. It must also be demonstrated that the disability substantially limits the major life activities of that individual.[63] This second stage of a two-stage test acts to filter out from the protected class individuals with minor, temporary or trivial medical conditions and illnesses which do not really affect the individual's role in life. It is necessary to show that impairment or disability produces some form of "handicap". This incorporates by implication the WHO's conception of a handicap as being a:

> disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.[64]

In that regard, the US definition of an individual with disabilities is not far removed from the British definition of disabled person for the purposes of registration under the 1944 Act.[65]

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organisms capable of causing disease or illness, thus possibly addressing discrimination against carriers or persons with benign or stable viral infections.

[59] (Can) HRA s 25.

[60] (NS) HRA s 3(1); (Ont) HRC s 10(1).

[61] (1991) 91 CLLC ¶17,017 (Sask HRC).

[62] (1992) 92 CLLC ¶17,007 (Sask QB). Subsequently, the complaint was dismissed: (1992) 92 CLLC ¶17,026 (Sask HRC).

[63] 29 USC §706(8)(B); 42 USC §12102(2); (NSW) ADA 1977 s 4(1).

[64] WHO, 1980.

[65] See text at footnote 14 above.

Major life activities

Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty".[66] They are illustrated, without exhaustion, as meaning "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working", and might also include sitting, standing, lifting and reaching.[67] It is clear from the US Department of Labor's section 504 regulations and the OFCCP's section 503 regulations that persons are "substantially limited" in a major life activity if, because of their impairment or disability, they are likely to experience difficulty in securing, retaining or advancing in employment.[68] The inclusion of working as a major life activity is certain but controversial. Shaller and Rosen report that when the EEOC's ADA regulations were being drafted, employers objected to this inclusion because its effect would be to cover persons who were merely unable to perform particular types of job and who were not really disabled at all.[69] To address this fear, the EEOC regulations state that limitation in the major life activity of working can only be relied upon when an individual is not disabled in any other life activity.[70] The regulations also explain that a disability must preclude an individual from working in a class or broad range of jobs for an employer in order to constitute a substantial limitation on working activity.[71] Inability to work in a particular job or profession or for a particular employer is insufficient. This will be particularly the case where the disability merely prevents the individual pursuing a vocation in a specialised job or profession involving extraordinary skill, prowess or talent.

Substantial limitation

Minor impairments or disabilities are not contemplated by the definition. This is because of the requirement that there must be a *substantial limitation* on major life activities. The ADA 1990 regulations state that the term "substantially limits" means:

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[66] 29 CFR Part 1630 Appendix.

[67] 28 CFR §41.31; 29 CFR §1613.702(c); 29 CFR §1630.2(i) and Appendix; 45 CFR §84.3.

[68] 29 CFR §32.3; 41 CFR §60-741.2 and Appendix A. The Department of Labor regulations and the OFCCP regulations focus upon life activities which affect employability, including communication, ambulation, self-care, socialization, education, vocational training, employment, transportation, adapting to housing, etc, but primary attention is given to life activities affecting employability.

[69] Shaller and Rosen, 1991: 410.

[70] 29 CFR Part 1630 Appendix.

[71] 29 CFR Part 1630 Appendix.

> (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[72]

A distinction is thus drawn between permanent, chronic conditions, on the one hand, and temporary, non-chronic impairments (such as broken bones, sprains, influenza, etc), on the other.[73] Some impairments will be inherently substantially limiting; other impairments will constitute a limitation for one person, but not for another, depending upon how far it is advanced, what degree of disability it produces, and so on. A paraplegic, with paralysis of the legs, is undoubtedly substantially limited in the major life activity of walking, whereas an insulin-dependent diabetic is only substantially limited in a number of life activities *without* the aid of medication.[74] This means that some conditions (such as hypertension, diabetes, cancer or depression) will occupy a grey area. Burgdorf states that even with some so-called traditional disabilities it may be difficult to demonstrate a limitation on a major life activity.[75] For example, he cites medication-controlled epilepsy, insulin-regulated diabetes, multiple sclerosis or cancer in remission, cosmetic disfigurements, and amputation with prosthesis. In particular, doubts about whether cancer in remission was a protected disability led many commentators to call for amendment of existing US civil rights laws and a number of bills were introduced in Congress to attempt clarification.[76] It may be that these "grey area" cases are best resolved by focusing upon the discriminator's perception of the discriminatee's medical condition or status and arguing that it is the consequences of such negative attitudes that are disabling or a limitation on major life activities. rather than the physical (or mental) condition itself.

The nature, severity, duration, and permanent or long term impact of the impairment should be considered when determining whether an individual is substantially limited in a major life

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[72] 29 CFR §1630.2(j)(1). The RA 1973 regulations did not attempt such an explication.

[73] 29 CFR Part 1630 Appendix.

[74] The problems of fitting insulin-dependent diabetics into the protected class are explored by Bayler, 1992.

[75] Burgdorf, 1991: 448. He doubts whether the need for the legal ingredient of a limitation on a major life activity is self-evident.

[76] See: Sigel, 1984; Bazemore, 1986; Hoffman, 1986; Canfield, 1987; Streicher, 1987; McEvoy, 1990. Society's reaction to cancer rehabilitees demonstrates a clear need for disability discrimination laws. See for example: *Lyons v Heritage House Restaurants* (1982) 432 NE2d 270 where a restaurant manager was dismissed when it was discovered that she had uterine cancer, despite the fact that she did not require any time off to undergo her chemotherapy treatments.

activity.[77] There must be a causal connection between a disability and the substantial limitation on a major life activity. A job applicant who is unable to read because of dyslexia is considered as disabled, but not where illiteracy is due to lack of education.[78] In the case of the major life activity of working, a substantial limitation indicates a significant restriction, when compared to an average person with comparable skills, training and abilities, in a person's ability to perform a class of jobs or a broad range of jobs in various classes.[79] An inability to perform a single, particular job is not sufficient. For example, an individual with a minor vision impairment might be disqualified from being a commercial airline pilot, but might remain qualified for other flight crew positions.

The regulations also allow the consideration of a number of factors in the determination of whether an individual is substantially limited in the major life activity of working.[80] First, the geographical area to which the individual has reasonable access will be relevant. Second, consideration may be given to the job from which the individual has been excluded, and the number and types of jobs utilizing similar training, knowledge, skills or abilities (within the relevant geographical area) from which the individual is also disqualified. Third, a further or alternative factor is the job from which the individual has been disqualified, and the number and types of other jobs *not* utilizing similar training, knowledge, skills or abilities (within the geographical area) from which the individual is also excluded because of the impairment. The application of these factors is in turn illustrated by the regulations.[81] For example, an individual who suffers breathing difficulties as an allergic reaction to construction materials used in high-rise buildings would be substantially limited in the major life activity of working. He or she is prevented from working in a broad range of jobs of various descriptions that take place in high-rise office buildings within the geographical area to which he or she has reasonable access. Moreover, an individual with a back complaint might be substantially limited in the major life activity of working if the condition is a bar to any unskilled heavy labouring job (*ie*, a class of jobs), even if jobs of another class, such as semi-skilled work, remained open to him or her.

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[77] 29 CFR §1630.2(j)(2).

[78] 29 CFR Part 1630 Appendix.

[79] 29 CFR §1630.2(j)(3)(i).

[80] 29 CFR §1630.2(3)(ii).

[81] 29 CFR Part 1630 Appendix.

Judicial view

The requirement that an impairment should substantially limit major life activities has been problematic. As we have seen, under its section 503 regulations the Department of Labor defined substantial limitation by reference to the likelihood of a disabled person experiencing "difficulty in securing, retaining or advancing in employment because of a handicap".[82] In one case, a plaintiff with cerebral palsy whose condition could only be detected with sophisticated diagnostic medical equipment was not treated as a disabled individual, primarily because there was no evidence that any major life activities were substantially limited by the condition.[83] Mere character traits, diagnosed by a psychologist as including poor judgement, irresponsibility and impulsiveness, did not amount to a mental impairment substantially limiting major life activities.[84] In another case, the medical evidence suggested that the plaintiff suffered no substantial limitations resulting from knee and back injuries, where the only problem anticipated was the need to avoid walking for long periods while carrying heavy loads. The plaintiff was otherwise medically fit to perform the work in question.[85]

The fact that an impairment prevents individuals from carrying out a job in one particular way, or disqualifies them from one particular employment position only, or adversely affects one particular activity, is unlikely to convince a court that such individuals meet the substantial limitation condition. For example, in one case a knee injury prevented an employee from climbing telephone poles with spikes but not with ladders. He was able to undertake the duties of numerous other positions and the only activity that seemed to be affected was his ability to climb telephone poles.[86] In contrast, an employee with osteoarthritis of the hip was substantially limited in a way which disqualified him from any job involving manual labour or long periods of standing or walking.[87] Although mere back pain is not commonly recognized as a disability,[88] evidence that a severe lumbosacral sacroiliac sprain with radiculopathy

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[82] 41 CFR §60-741.2.

[83] *Pridemore v Legal Aid Society of Dayton* (1985) 625 FSupp 1171 (SD Ohio); *Pridemore v Rural Legal Aid Society of West Central Ohio* (1985) 625 FSupp 1180 (SD Ohio).

[84] *Daley v Koch* (1989) 892 F2d 212 (2nd Cir).

[85] *Taylor v US Postal Service* (1990) 771 FSupp 882 (SD Ohio).

[86] *Elstner v Southwestern Bell Telephone Co* (1987) 659 FSupp 1328 (SD Tex). See also to like effect: *de la Torres v Bolger* (1985) 610 FSupp 593 (DC Tex).

[87] *Coley v Secretary of Army* (1987) 689 FSupp 519 (D Md).

[88] *Diaz v US Postal Service* (1987) 658 FSupp 484 (ED Cal) where an employee with chronic lumbar or low back pain was otherwise able to perform all the arduous duties of a postal delivery worker.

caused the plaintiff severe pain and limited her ability to walk, sit, stand or drive convinced a court that the plaintiff was a disabled individual.[89] Clearly, plaintiffs need to establish that their impairment substantially limits the available choice of occupations or positions; but the fact that they might admit that an impairment does not prohibit the performance of a particular job is not fatal to establishing substantial limitation if they have not indicated that the present position held or applied for is the only one they are incapable of performing.[90] However, even if an individual's impairment does not *actually* substantially limit major life activities, the fact that a prospective employer *perceives* the individual to be suffering a condition that substantially limits major life activities may be enough to trigger the law's protection.[91]

The leading case under US federal law is *EE Black Ltd v Marshall* decided under section 503 of the Rehabilitation Act.[92] As a result of a pre-employment medical examination, an apprentice carpenter was refused employment. Although he had no symptoms, the examination revealed a congenital back abnormality (a partially sacralized transitional vertebra). At first instance, an administrative law judge found as a fact that the plaintiff was not impaired in his ability to perform all the elements of the job. The judge ruled that the plaintiff had an impairment but was not substantially limited in a major life activity because it only partially limited his access to employment. The test was whether the impairment impeded activities relevant to many or most jobs. On appeal to the Assistant Secretary of Labor for Employment Standards, the plaintiff was found to be a disabled individual. The Assistant Secretary's ruling derived from a reading of the Act as extending to any impairment that was a current bar to the employment of the individual's choice.

That reading was overturned by a district court which held that the statute envisaged a *substantial* handicap or limitation and nor merely any impairment or limitation to any degree. If it were otherwise, said the court, an acrophobic applicant offered 10 jobs by an employer, of which only one was on an upper storey, would be a disabled individual within the meaning of the Act, even though 9 other jobs within that person's limitations were on offer. The district court also rejected the administrative law judge's formulation of the test as being too narrow. Persons whose impairments are a handicap to employment in their chosen field are

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[89] *Perez v Philadelphia Housing Authority* (1987) 677 FSupp 357 (ED Pa).

[90] *Carty v Carlin* (1985) 623 FSupp 1181 (DC Md).

[91] *Pridemore v Rural Legal Aid Society of West Central Ohio* (1985) 625 FSupp 1180 (SD Ohio).

[92] (1980) 497 FSupp 1088 (D Haw). See: Haines, 1983.

substantially limited in a major life activity, even though more menial occupations, not employing their educational qualifications or training, might remain open to them. The district court ruled that the test to be applied was whether the perceived impairment of a rejected, but otherwise qualified employee, represented a substantial handicap to the employment of that individual. The focus was upon the individual job-seeker and not solely upon the impairment or perceived impairment. The court took account of the number and type of jobs from which the employee would be disqualified, the number of employees in the relevant area to which the criteria were applicable, the geographical area to which the employee had reasonable access, and the employee's job expectations and training. The court was prepared to assume that the disqualifying criterion would be used generally by employers. It would require the employer to show that the disqualifying criterion was not a general bar to employment. The court also assumed that an employer would attempt to place the applicant in a similar job at another location if the impairment had a bearing on employment in only one job location. The court concluded that the carpenter was a disabled individual because his medical status would substantially limit his opportunities for practising his trade in employment.

Flaccus comments that the *EE Black* decision made the definition of "individual with handicaps" fairly easy to meet in most cases.[93] Although the requirement that the disability must substantially limit major life activities appears to restrict the scope of that definition, she anticipated that the court's reasoning, together with the amplification provided by the model regulations, in fact expands the definition of who is protected. Larson explains *EE Black* as establishing:

> the rule that a specific physical or mental condition that has the exact same effect on different individuals may amount to a protected handicap for one person and not for the other. In other words, the definition of what is a protected handicap under the Rehabilitation Act is not limited to literal descriptions of disabilities... [and] most attempts to define protected handicaps solely on the basis of the nature of the disability will not be successful.[94]

That view is repeated in the ADA 1990 regulations, which draw on the *EE Black* jurisprudence.[95] Johnson believes that *EE Black* demonstrates the gap between the legal model of discrimination and the situation of disabled workers.[96] He points out that the courts are required to decide whether an impairment affects the plaintiff's ability to work, a

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[93] Flaccus, 1986b: 276.

[94] Larson, 1986: 764.

[95] 29 CFR Part 1630 Appendix.

[96] Johnson, 1986: 258-9.

ask for which they have no prior expertise. If so, only then can the court proceed to consider whether the plaintiff has been discriminated against because of his or her disability, and only if the answer to that question is affirmative can the court judge whether the discrimination is unlawful (because the employer failed to consider or to make reasonable accommodation).

An example of the *EE Black* reasoning in practice may be seen in *Jasany v US Postal Service*.[97] The plaintiff suffered from mild strabismus or crossed-eyes. He had passed a vision examination and had satisfied other requirements to become a postal sorting machine operator. After 3 months, the plaintiff developed eye problems and headaches as a result of using the machine in question. He refused to operate the machine and, after a medical examination, was dismissed as unfit for postal sorting. In subsequent litigation, the fact of an impairment was not disputed, but the employer argued that it did not amount to a substantial limitation on major life activities. The appeals court adopted the *EE Black* reasoning, but asserted that the burden of proof fell on the plaintiff to show both the existence of an impairment and a resulting substantial limitation on a major life activity. There was no evidence that the strabismus had ever had any effect on the plaintiff's other activities, apart from his ability to operate this particular machine. The court also doubted whether the crossed-eye condition even amount to an impairment itself.[98]

Subsequently, however, the courts applied *EE Black* narrowly and disallowed reliance upon the "regarded as having such an impairment" test of disability where the plaintiff had merely been rejected from a *single* job because of a physical or mental criterion.[99] This caused much confusion and criticism.[100] The legislative history of the ADA 1990 seeks to resolve this, so that rejection from a particular job based upon a physical or mental criterion means that the plaintiff has been regarded or treated as disabled.[101] On the other hand, other courts have tended to ignore the *EE Black rationes* by assuming that the plaintiff is a disabled person without discussing whether there is an impairment substantially limiting major life

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[97] (1985) 755 F2d 1249 (6th Cir).

[98] See for example: *Oesterling v Walters* (1985) 760 F2d 859 (8th Cir) (plaintiff's varicose veins were an impairment and limited major life activities by affecting her ability to sit and stand, but no evidence that this limitation was *substantial*).

[99] *Forrisi v Bowen* (1986) 794 F2d 931 (4th Cir); *de la Torres v Bolger* (1985) 610 FSupp 593 (ND Tex), *affirmed* (1986) 781 F2d 1134 (5th Cir); *Tudyman v United Airlines* (1984) 608 FSupp 739 (CD Cal) cited by Mayerson, 1991b: 506. But *cf Thornhill v Marsh* (1989) 866 F2d 1182 (9th Cir).

[100] See, for example: Bogaards, 1982.

[101] Mayerson, 1991b: 507-8.

activities. When faced with "traditional" disabilities, such as epilepsy, cardiovascular disease or mental depression, it is easy to presume that the condition is substantially limiting in the manner required. It might also take little proof of some limitation in life activities for a court to conclude that the plaintiff is a member of the protected class. In many cases too, whatever the expected limitation created by an impairment, the attitude of others towards it might convert it into a substantially limiting condition.[102]

PARTICULAR DISABILITIES

Introduction

What individual impairments constitute a recognizable disability (or handicap)? In the American legislation, no attempt is made to list specific diseases or conditions which would constitute impairments. It would be impossible to do so (although examples and illustrations are given in other jurisdictions). No comprehensive catalogue of diseases or conditions could be easily assembled, nor would it be possible to anticipate or predict what new impairments might emerge in the future, in the way that HIV and AIDS has done so during the 1980s.[103] Some assistance may be gleaned from the (US) RA 1973, which in another context (for the purposes of access to rehabilitation programmes and services) defines the term "severe handicap" as a disability requiring multiple services over an extending period and resulting from:

> amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction.[104]

Regulations issued by the US Department of Justice illustrate impairments as including:

> such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.[105]

The congressional reports on the ADA 1990 also indicate that specific learning difficulties or infection with HIV should be regarded as examples of covered diseases and conditions.[106] However, none of these paradigms is really of assistance.

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[102] Richards, 1985: 7-8.

[103] Feldblum, 1991c: 84.

[104] 29 USC §706(13).

[105] 28 CFR §41.31.

[106] US Senate, 1989: 22; US House of Representatives, 1990a: 51; US House of Representatives, 1990b: 28.

In the US courts, the substantive definition of "individual with handicaps" has been held to apply to a variety of impairments and disabilities including, for example, asbestosis,[107] back injury,[108] cardiovascular disease,[109] epilepsy,[110] severe depressive neurosis,[111] schizophrenia,[112] and visual impairment.[113] Nevertheless, as has just been seen, in developing disability discrimination laws, it may be that it is not the description of disability that matters, but rather its effect upon a person's major life activities. The existence of an impairment or disability must be demonstrated, but must also represent a substantial handicap to the individual's life. Most medical conditions will have some, if not a substantial, impact on life activities. For example, dyslexia will cause problems in learning and in education; paraplegia will create difficulties for mobility; and emphysema produces breathing problems which might reduce physical activity.[114] On the other hand, mere physical characteristics, such as left-handedness, are not normally classified as impairments.[115] However, between these two extremes lies a grey area which only judicial interpretation or legislative clarification can resolve.

For example, is a general status of ill health to be protected? In the US, in *Stevens v Stubbs*,[116] an employee experienced health problems of uncertain diagnosis involving repeated absences from work. He unsuccessfully sought reassignment. During this period his work was unsatisfactory, although the employer's medical officer had passed the employee

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[107] *Fynes v Weinberger* (1985) 677 FSupp 315 (ED Pa).

[108] *Schuett Investment Co v Anderson* (1986) 386 NW2d 249 (medical evidence of inability to lift heavy weights).

[109] *Bey v Bolger* (1982) 540 FSupp 910 (DC Pa).

[110] *Reynolds v Brock* (1987) 815 F2d 571 (9th Cir) (a wrongful discharge case).

[111] *Doe v Region 13 Mental Health-Mental Retardation Commission* (1983) 704 F2d 1402 (CA Miss). In this case, the plaintiff's work record was excellent, suggesting that the employer might have challenged the plaintiff's status as a disabled individual. However, there was extensive evidence of the plaintiff's behaviour outside the workplace to suggest a specific psychological disorder.

[112] *Halberman v Pennhurst School and Hospital* (1977) 446 FSupp 1295 (DC Penn); *Gladys v Pearland Independent School District* (1981) 520 FSupp 869 (DC Tex).

[113] *Norcross v Sneed* (1983) 573 FSupp 533 (DC Ark).

[114] Feldblum, 1991c: 85.

[115] *de la Torres v Bolger* (1986) 781 F2d 1134 (5th Cir). See: McEvoy, 1988.

[116] (1983) 576 FSupp 1409 (DC Ga).

as fit for duty. The court refused to accept that the employee was a "handicapped individual" because the term "impairment" could not be said to encompass transitory illness which has no permanent effect on a person's health. In Canada, in *Ouimette v Lily Cups Ltd*,[117] a board of inquiry had no difficulty in finding that influenza did not constitute a protected disability, although asthma might have been but for problems of evidence in the particular case. In contrast, chronic fatigue immune dysfunction syndrome has been held to be a protected disability,[118] while a combination of impairments might render an individual disabled.[119] In Canada, it has been accepted that hypertension is within the scope of the human rights codes' protection.[120] On the other hand, an intermittent eye inflammation did not constitute a disability where, despite inability to attend work predictably, constantly and on schedule, the applicant could meet all the physical criteria of the job description.[121] Equally, acrophobia has not been recognised as a disability,[122] although it might be better to say that such a condition might prevent an employee from fulfilling the "otherwise qualified" condition examined in Chapter XII.

The problem remains of where and how to draw the lines between marginal or unorthodox impairments and true disabling conditions. Difficulties also arise as to how to address the argument which seeks to exclude from protection disabilities that might be regarded as the product of voluntary actions. A number of problematic "disabilities" are now examined to see whether and how they would fit the framework established by the discussion so far.

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[117] (1990) 12 CHRR D/19, 90 CLLC ¶17,109 (Ont HRC)

[118] *Walders v Garrett* (1991) 765 FSupp 303 (ED Va).

[119] *Fitzgerald v Green Valley Area Education Agency* (1984) 589 FSupp 1130 (DC Iowa) (nocturnal epilepsy, dyslexia and cerebral palsy with left side hemiplegia); *Carty v Carlin* (1985) 623 FSupp 1181 (DC Md) (manic depression and myocardial infarction with probable coronary artery disease); *Harrison v Marsh* (1988) 691 FSupp 1223 (WD Mo) (typist less able to type continuously because of mastectomy involving removal of upper arm and shoulder muscle); *Johnson v Sullivan* (1991) 764 FSupp 1053 (D Md) (heart condition, narcolepsy and stress disorder).

[120] *Horton v Regional Municipality of Niagara* (1988) 88 CLLC ¶17,004 (Ont HRC).

[121] *Santiago v Temple University* (1990) 739 FSupp 974 (ED Pa).

[122] *Forrisi v Heckler* (1985) 626 FSupp 629 (MD NC); *Forrisi v Bowen* (1986) 794 F2d 931 (4th Cir). The plaintiff did not assist his case by testifying that his fear of heights had never affected his life or work prior to his present position as a utility systems repairer. However, this plaintiff might have succeeded by arguing that he was a person "regarded as having a disability": Jones, 1991b: 43.

Alcoholism and drug abuse

Whether drug or alcohol abusers should be within the protected class of disabled individuals is a controversial issue.[123] In Larson's view,[124] there are two complicating factors. First, stimulant abuse is an elusive disability, because for much of the time, when not under the influence of drugs or alcohol, the abuser might appear to be perfectly capable of employment. Second, there is the perception that drug addiction or alcoholism is voluntary and, therefore, not meriting civil rights protection. However, it is undoubtedly the case that drug abuse and alcoholism attract social stigma. This has meant that few claims based upon this alleged "handicap" have been litigated.[125]

Prior to 1978, alcohol dependency was recognised as an implicit disability under the (US) RA 1973. However, an alcoholic employee might fail to show that he or she was "otherwise qualified" for employment, particularly when the behavioural manifestations of alcoholism were taken into account.[126] In any event, in *Davis v Bucher*,[127] a US federal district court ruled that only individuals who had overcome or were attempting to overcome alcoholism were covered by section 504. Then in 1978, responding to employers' concerns about whether they could be forced to employ or retain alcoholic workers, Congress amended the legislation to make it clear that only rehabilitating or rehabilitated alcoholics were protected and not those who were simply in need of rehabilitation.[128] This distinction was followed by most courts,[129] although the appellate court in *Simpson v Reynolds Metal Co*[130] took a contrary view that individuals with current problems or histories of alcoholism *were*

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[123] Canadian federal legislation expressly includes previous or existing dependence on alcohol or a drug: (Can) HRA s 25. Nova Scotia law includes persons with previous dependency on drugs and alcohol: (NS) HRA s 3(1).

[124] Larson, 1986: 757.

[125] As a result, the legal literature is voluminous and speculative. See generally: Bertman, 1979; Spencer, 1979; Nold, 1983; Johnson, 1985; Postol, 1988; Goff, 1990a and 1990b; Henderson, 1991.

[126] 45 CFR Part 84 Appendix; *Simpson v Reynolds Metals Co* (1980) 629 F2d 1226 (7th Cir); *Crew v Office of Personnel Management* (1987) 834 F2d 140 (8th Cir).

[127] (1978) 451 FSupp 791 (ED Pa).

[128] See now: 29 USC §706(8)(C)(v).

[129] See, for example: *Tinch v Walters* (1985) 765 F2d 599 (6th Cir); *Anderson v University of Wisconsin* (1988) 841 F2d 737 (7th Cir); *Railway Executives' Association v Burnley* (1988) 839 F2d 575 (9th Cir); *Whitlock v Brock* (1984) 790 F2d 964 (DC Cir).

[130] (1980) 629 F2d 1226 (7th Cir).

members of the protected class unless their addiction or prior use prevented them from meeting the otherwise qualified standard.[131]

The position now would appear to be that, under US law, a person who merely made casual use of alcohol short of dependency would not normally be treated as impaired, but an employer who acted as if such use were an impairment would be regarding that person as disabled and might be caught by the legislation. Employers may discriminate against alcoholics in need of rehabilitation, and against rehabilitating and rehabilitated alcoholics whose condition prevents them from performing the job or poses a threat to property or safety. The Supreme Court has insinuated that employers have a fairly wide discretion in deciding whether an alcoholic can perform the job effectively and safely.[132] Apart from these provisions, alcoholics are entitled to the same protection under the Act as individuals with other disabilities.[133]

The original definition of an "individual with handicaps" did not address the question of whether an illegal drug user was a disabled person for the purpose of the (US) RA 1973. Despite that, trial courts had held persons with histories of drug use, including participants in methadone maintenance programmes, to be protected persons.[134] The 1978 amendments excluded from protection drug abusers whose current use of drugs prevented them from performing the job or caused them to be a risk to safety or property.[135] Now, individuals who are current illegal users of drugs are excluded from coverage under the ADA

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[131] The otherwise qualified standard is discussed in Chapter XII.

[132] *New York City Transport Authority v Beazer* (1979) 440 US 568.

[133] See further: 29 CFR §§1630.10 and 1630.16. See generally: Sullivan, 1985; Clark, 1991; Fitzpatrick, 1991; *William and Mary Law Review*, 1992.

[134] *Davis v Bucher* (1978) 451 FSupp 791 (DC Pa) (former narcotics addict undertaking methadone treatment denied employment because of his history of drug use, despite having passed a drugs test). In this case, the court relied upon 45 CFR §84.3(j)(2) and the US Attorney-General's opinion that drug addiction and alcoholism were impairments. See generally: *Columbia Human Rights Law Review*, 1973; *New York University Law Review*, 1974.

[135] 42 USC §706(7)(B). Mandatory drug testing of employees, regardless of suspicion, has been held not to contravene the 1973 Act: *American Federation of Government Employees, AFL-CIO v Skinner* (1989) 885 F2d 884 (DC Cir). A heroin-addicted police officer, whose addiction made him unfit for work, was not a "handicapped individual": *Heron v McGuire* (1986) 803 F2d 67 (2nd Cir); nor were unrehabilitated employees who tested positive for current illegal drug use: *Burka v New York City Transit Authority* (1988) 680 FSupp 590 (SD NY).

1990 and that Act amends the earlier legislation accordingly.[136] So an employer may discriminate against a current drug user (if such discrimination is grounded in such use) even though that person is quite capable of fulfilling the requirements of the job. In contrast, rehabilitating or rehabilitated drug users are covered, provided they are no longer using drugs.[137] Discrimination against such individuals would be discrimination against a person with a record of disability. A person who is erroneously perceived as a current illegal drug user would also be protected from discriminatory actions. Psychoactive substance use disorders resulting from current illegal use of drugs is expressly excluded as a protected disability.

As we have noted immediately above, the (US) ADA's protection does not extend to individuals whose disability is the product of current illegal drug use. The ADA is thus consistent with federal policy on drug-free workplaces.[138] It permits, but does not necessarily encourage, drug-testing of applicants and employees, enabling employers to make discriminatory employment decisions based upon test results.[139] First, an employer may adopt and administer reasonable policies and procedures, including drug-testing, to ensure that allegedly rehabilitating or rehabilitated illegal drug users are not engaging in drug abuse.[140] Second, an employer may prohibit the use of alcohol or illegal drugs in the workplace, require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace, and require employees to conform with the Drug-Free Workplace Act 1988.[141] Third, an employer may hold an illegal drug user or alcoholic to the same qualification standards for employment, job performance and behaviour as other employees, and it is irrelevant whether or not any unsatisfactory performance or behaviour

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[136] 42 USC §§12114(a) and 12111(6); 29 CFR §1630.3(a).

[137] 42 USC §12114(b); 29 CFR §1630.3(b). See: Rand, 1988; Robbins, 1991.

[138] Drug-free Workplace Act 1988: Pub L N° 100-690 §§5151-5160; 102 Stat 4181, 4304-4308; codified at 41 USC §§701-707. This Act requires federal contractors and federally-funded employers to formulate and publish policies to restrict the use of alcohol and illegal drugs in the workplace. These exclusions only apply to a user of controlled substances and not to prescribed drugs or patent medicines. Thus a valium-addicted individual would be a disabled person for the purposes of the law.

[139] 42 USC §12114(d)(2); 29 CFR §1630.3(c). A drug test is not a medical examination for the purposes of the Act: 42 USC §12114(d)(1); 29 CFR §1630.16(c)(1).

[140] 42 USC §12114(b); 29 CFR §1630.3(c). The interaction of drug-testing policies and disability discrimination law has exercised many American employers. See generally: Black, 1988; Heshizer and Muczyk, 1988; Lips and Lueder, 1988; Bible, 1990; Crow, 1992. As to the efficacy of drug-testing, see: MacDonald *et al*, 1993.

[141] 42 USC §12114(c)(1)-(3); 29 CFR §1630.16(b)(1)-(3).

is related to drug use or alcoholism.[142] Fourth, employers in the defence and transport industries may require employees to comply with particular federal government regulations regarding illegal drug use and alcohol which apply to those industries.[143] Finally, employers in the transport sector may test employees and applicants for illegal drug use and on-duty alcohol impairment with regard to positions involving safety-sensitive duties and to remove from such positions anyone who tests positive.[144]

Drug users and drug dependants acquire no greater rights under the equal protection clause of the Fourteenth Amendment. In *New York City Transit Authority v Beazer*,[145] the employer had refused to engage participants in a methadone maintenance programme until job applicants had successfully completed 5 years of the programme. This policy was challenged under the equal protection clause and it was argued that this period of exclusion was too long. The evidence was that many of the participants in the programme were employable. Nevertheless, the Supreme Court upheld the employer's policy because it bore a rational relationship to employment and served the general objectives of safety and efficiency.

Contagious diseases and infections

In 1988, a further amendment was made to the RA 1973 to deal with the question of whether contagious diseases or infections are a covered disability:

> For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.[146]

This provision clarifies the extent of the recognition by the Supreme Court in *School Board of Nassau County, Florida v Arline* that a person suffering from the contagious disease of tuberculosis could be a disabled person within the meaning of the statute.[147] This

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[142] 42 USC §12114(c)(4); 29 CFR §1630.16(b)(4).

[143] 42 USC §12114(c)(5); 29 CFR §1630.16(b)(5)-(6).

[144] 42 USC §12114(e); 29 CFR §1630.16(c)(2).

[145] (1979) 440 US 568.

[146] 42 USC §706(8)(D).

[147] (1987) 107 SCt 1123, 480 US 273.

amendment survives the 1990 reforms.[148] The contagiousness of a disease is more likely to make an individual disabled than the disease itself, especially by how others react to or perceive him or her. On the other hand, the very contagiousness of the disease makes the disabled individual a risk to others and so he or she may be unable to surmount the "otherwise qualified" hurdle. In *Arline* the plaintiff had contracted tuberculosis as a child, but had subsequently qualified and worked as a teacher for a number of years. She was dismissed after she suffered three relapses of the disease. The district court refused to accept that Congress intended contagious diseases to be within the mischief of the RA 1973. A federal appeals court found that tuberculosis was an impairment of the respiratory functions and fell within the definition of disability under the statute and regulations. That view was upheld by the Supreme Court, but it directed an inquiry as to whether the plaintiff could satisfy the "otherwise qualified" standard, especially given the possibility of risks to the health of others or the plaintiffs ability to carry out the duties of a teacher.

HIV and AIDS[149]

Under US legislation, a person with HIV would be regarded as someone with a physical or mental impairment substantially limiting major life activities. Any form of the illness would seem to suffice, ranging from asymptomatic infection through to AIDS.[150] Case law established as much under the RA 1973,[151] while the legislative history of the ADA 1990 indicates that Congress intended to continue these precedents.[152] Asymptomatic HIV-positive individuals are within the Act as persons "regarded as having" a physical impairment[153] and AIDS sufferers are similarly able to establish a *prima facie* status as a disabled individual. The position would appear to be similar under Canadian and Australian legislation.[154] The remaining question, therefore, is whether a person with HIV or AIDS is

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[148] Subject to the food handling exception: 42 USC §12112(d); 29 CFR §1630.16(e).

[149] A treatise upon the impact of HIV and AIDS upon the workplace and employment law is beyond the scope of the present study. The legal literature is voluminous. In the present context, the following sources are of assistance: *Harvard Law Review*, 1986; Leonard, 1987; National Gay Rights Advocates, 1987; Rothstein, 1987; Wasson, 1987; Fagot-Diaz, 1988; Kushen, 1988; Sherman, 1989; Alexander, 1990; Waters, 1990; Cohen, 1992.

[150] Feldblum, 1991c: 86.

[151] *Chalk v US District Court* (1988) 840 F2d 701 (9th Cir).

[152] US Senate, 1989: 22; US House of Representatives, 1990a: 52; US House of Representatives, 1990b: 28 n[18].

[153] *Harris v Thigpen* (1991) 941 F2d 1495 (11th Cir).

[154] See: Kenney, 1988; Kussner, 1989; Smith, 1989; Roussos, 1990; Waters, 1990. For

otherwise qualified for employment and whether their condition represents a risk to health and safety.

Physical appearance disabilities

The boundaries of disability discrimination law have been frequently tested by its reaction to discrimination on the basis of physical appearance or characteristics, such as weight, height or disfigurement. Appearance discrimination has been defined by reference to the "immutable aspects of bodily and facial appearance", in contrast with such mutable aspects as hair length, cleanliness and orthodoxy of dress.[155] There have been a number of studies of the incidence of discrimination on the basis of physical attractiveness,[156] while there is historical evidence of local legislation in the US regulating the appearance in public of "unsightly" diseased, deformed or mutilated persons.[157] Because disability discrimination laws are often applied beyond the circumference of "traditional" disabilities, it would seem possible to extend the law to appearance discrimination (although there would be undoubted problems of proof and causation).

In the US, the definition of impairment expressly includes "cosmetic disfigurement", including "disfiguring scars".[158] In any event, if employers react adversely to facial or bodily appearance, it would be possible to argue that the object of such reaction has been treated or perceived as impaired, and the failure to be granted employment opportunity has interfered with a major life activity.[159] An employer might seek to justify such discrimination by reference to the "otherwise qualified" standard, and this might be easier to sustain in respect of certain occupations - such as modelling, acting, cabin crew, retail selling, etc - where it might be argued that appearance is an aspect of the job. However, in the context of sex discrimination, appearance has been rejected as an essential job function, at least in the context of employer and customer preference for female flight attendants.[160] There seems

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the position under British law, see: Southam and Howard, 1987; Napier, 1989 and 1991; Adam-Smith *et al*, 1992; Watt, 1992. For a comparison between the legal position in the US and the EC see: Dworkin and Stegger, 1989.

[155] *Harvard Law Review*, 1987: 2035. Physical appearance discrimination might also affect persons with restricted or stunted growth or abnormal height: Miller, 1987.

[156] *Harvard Law Review*, 1987: 2037-42.

[157] Burgdorf and Burgdorf, 1975: 863.

[158] Canadian federal law also includes disfigurement as a disability: (Can) HRA s 25.

[159] *Harvard Law Review*, 1987: 2044-5.

[160] *Diaz v Pan American World Airways* (1971) 442 F2d 385 (5th Cir). It has been

no reason in principle why the same logic should not apply to disability discrimination.

The issue is sharply focused in respect of weight discrimination. In *Davison v St Paul Lutheran Home*,[161] a Canadian provincial decision, a complainant with a weight problem was not offered employment and successfully claimed disability-related discrimination at first instance. A board of inquiry concluded that obesity could be a disability if caused by bodily injury, birth defect or illness or if its origins were a mental disorder. The board concluded that the employer's perception of the complainant was that she suffered from a disability and she had been judged on the basis of the employer's poor experience of a former employee with a weight condition. However, this decision was overturned on appeal.[162] In *Horton v Regional Municipality of Niagara*,[163] a board of inquiry refused to find that obesity was a disability where no medical evidence was brought to show that the plaintiff's weight condition was caused by bodily injury, birth defect or illness. A similar approach has been taken in the US.[164] The question is whether weight or obesity is a physical characteristic or the result of a recognizable physiological disorder. If the latter, and there is interference with a major life activity (such as walking or breathing), obesity should be a protected disability.[165] However, in *Tudyman v United Airlines*,[166] the plaintiff was refused employment as a cabin crew member because he exceeded the airline's weight requirements due to his body-building activities. The court rejected his claim on the grounds, *inter alia*, that the applicant's weight problem was voluntary and not the result of a physiological disorder.

Smoking and passive smoking

Non-smokers with an allergic reaction to tobacco smoke or who otherwise alleged harm from

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suggested that the employment selection process could be altered to eliminate unnecessary judgements made on appearance: *eg* by using telephone interviewing rather than face-to-face interviews, by interviewing behind screens, or by separating the interviewing function from the selection function: *Harvard Law Review*, 1987: 2049-51.

[161] (1991) 91 CLLC ¶17,017 (Sask) HRC.

[162] (1992) 92 CLLC ¶17,007 (Sask QB). Subsequently, the complaint was dismissed: (1992) 92 CLLC ¶17,026 (Sask HRC).

[163] (1987) 9 CHRR D/4611, 88 CLLC ¶17,004 (Ont) HRC.

[164] See generally: Baker, 1982; Mason, 1982; Bierman, 1990; Shapiro, 1991; McEvoy, 1992; Stolker, 1992. The ADA regulations do not appear to regard obesity as an impairment: 29 CFR Part 1630 Appendix.

[165] Feldblum, 1991b: 19.

[166] (1984) 608 FSupp 739 (DC Cal). See also: *Russell v Salve Regina College* (1986) 649 FSupp 391 (D RI).

passive smoking have not been automatically treated as individuals with disabilities.[167] Employers will be more willing to challenge the basis of the disability claim because, as tolerance to tobacco smoke is not an essential element of any job, the second line defence based upon the "otherwise qualified" standard cannot be utilised. However, unusual sensitivity to tobacco smoke might constitute a disability, especially if that hypersensitivity produces a substantial limitation upon a major life activity of the individual, such as an inability to work in an environment that was not smoke-free.[168] It might be possible, therefore, that persons with particular pulmonary problems (such as emphysema) might be able to use disability discrimination law to require employers to make reasonable accommodation by ensuring a smoke-free working environment.

An interesting and topical question is whether *smokers* can be regarded as persons with disabilities protected from discrimination by the (US) ADA 1990? The Act does not prevent employers prohibiting or restricting smoking in the workplace and non-smokers are thus afforded a degree of protection from passive smoking.[169] This does not answer the question either way.[170] However, it is unclear whether or not a smoker is covered by the Act in the sense of whether he or she might be an individual with a disability. If so, an employee who smoked, and who was treated differently or unfavourably because of this, might have an action for employment discrimination under disability discrimination law.[171]

CONCLUDING REMARKS

The identification of disabled persons for the purposes of delineating the protected class will always prove difficult for the drafters of disability discrimination laws. The British system of identifying the law's beneficiaries by registration of status appears fundamentally objectionable and, in any event, does not alleviate the problem of how to determine (and who is to determine) whether the individual is covered by the statute. An alternative approach might be suggested by the position under section 503 of the Rehabilitation Act 1973, where

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[167] *GASP v Mecklenburg County* (1979) 256 SE2d 477 (CA NC) (a case under state law in which the RA 1973 definition was used for guidance). Ironically, this is one alleged disability to which social stigma does not attach. Quite the opposite, in fact, for such a plaintiff often becomes the focus of public support (Larson, 1986: 759).

[168] *Vickers v Veterans Administration* (1982) 549 FSupp 85 (DC Wash).

[169] 42 USC §12201(b).

[170] Jones, 1991b: 43.

[171] This conjecture has given rise to a lively debate in the legal literature in the US. See, for example: Vaughn, 1988; Fox and Davison, 1989; Goh, 1991; Sculco, 1992; Garner, 1993; Grasso, 1993.

a disabled plaintiff alleging breach of a federal contractor's affirmative action obligations towards him or her must *self-certify* their status, specifying their impairment or disability.[172] Further documentation or evidence may be required of the complainant and the contractor may require an applicant or employee to submit medical documentation or undergo a medical examination to verify their status as a protected person. However, whilst self-certification might be useful as a device for identifying targeted minorities under equal opportunity planning or positive action programmes, it is unlikely to be acceptable in the litigious context of complaints of disability discrimination.

A further dilemma for British reformers will be whether to list or illustrate the types of impairment or disability that might be envisaged as protected by any newly introduced disability discrimination legislation. A court might refuse to treat as a disability any condition unlisted, while a failure to exemplify indicative impairments could be a hostage to fortune as courts will tend to construe the protected class narrowly. Public policy might also require the exclusion or exceptional treatment of certain "disabilities", such as alcoholism, drug dependence and contagious diseases.[173] It might be that few claimants will want to attract the social stigma which attaches to a characterisation of a person as disabled. Relatively few cases are litigated in the US unless the plaintiff is clearly a person with disabilities. Moreover, in marginal cases, the court will have to be convinced that a substantially limiting disability exists but that, as a result, the individual is not *so* disabled as to be unable to perform the job in question. This "Catch-22" will affect a claimant's perception of the chances of winning a case.[174] On the other hand, American employers seldom challenge a plaintiff's claim to be a disabled person. As in personal injury litigation, marshalling expert medical evidence to undermine a claimant's contentions will cause employers to measure the costs against the benefits of doing so. Defendants will not wish to lose the sympathy of the court by aggressively attacking the plaintiff's disability status, especially when there is a second line of defence - a challenge to the plaintiff's ability to work or qualification for employment - to

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[172] 41 CFR §60-741.7.

[173] Special rules have also been developed under US law to address the exclusionary treatment of homosexuality, bisexuality, so-called "sexual behaviour disorders" and anti-social behaviour (such as kleptomania): 42 USC §§12208 and 12211.

[174] Employer can have it both ways. They may discriminate against someone because they are "disabled", but then defend that discrimination by arguing that the disability is not serious enough to warrant the protection of the legislation. Yet it was presumably serious enough to warrant a denial of employment opportunity: Burgdorf, 1991: 448-9. See for example two cases cited earlier in this chapter: *Forrisi v Bowen* (1986) 794 F2d 931 (4th Cir) (the dismissal of an acrophobic not protected); *Jasany v US Postal Service* (1985) 755 F2d 1244 (6th Cir) (dismissal of individual with mild strabismus not unlawful).

be discussed next.

CHAPTER XII:
FITNESS FOR WORK AND QUALIFICATION FOR EMPLOYMENT

INTRODUCTION

Anti-discrimination and equal opportunity legislation is often said to promote reverse discrimination or preferential treatment in favour of the minority or group the law was designed to protect. It is argued that the law results in employers unwillingly or unwittingly engaging or promoting minorities, regardless of their abilities or qualifications, and whether or not they are the best person for the job. Disability discrimination law is remarkably sensitive to this argument. The contention that employers will be forced to employ or retain disabled persons incapable of doing the job is met head on. There are a number of legal formulae by which any suggestion of reverse discrimination is ruled out.

The (US) RA 1973 only prohibits discrimination against "otherwise qualified" individuals with handicaps.[1] Although the Act embraces all individuals with an impairment that limits major life activities, whether or not the impairment is related to ability, only "otherwise qualified" persons may seek the protection of the statute's anti-discrimination directive. The (US) ADA 1990 also contains a similar "otherwise qualified" condition,[2] and state disability laws frequently contain an "ability to work" specification.[3] In Canadian federal legislation, the same effect is achieved by allowing employers to discriminate against disabled workers who cannot satisfy a "*bona fide* occupational requirement" or "qualification".[4] This formula is also to be found in Canadian provincial laws, although in various shapes and guises.[5] State and Commonwealth legislation in Australia also expects that, as a pre-condition to alleging disability-based discrimination, the disabled plaintiff is able to carry out the work in question.[6] It is thus a defence to show that the reason for the alleged act of discrimination

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[1] Sections 503 and 504: 29 USC §§793(a) and 794(a); 41 CFR §60-741.1 and 28 CFR §41.51. Although the "otherwise qualified" requirement is not explicit in the language of s 501 (29 USC 791(b)), it is assumed to be implicit by the implementing regulations: 29 CFR §1613.703.

[2] 42 USC §12112(a); 29 CFR §1630.4. The ADA 1990 applies to "qualified" individuals with disabilities.

[3] Flaccus, 1986b: 299-303 and see Chapter VI above.

[4] (Can) HRA s 15(a).

[5] (Alb) IRPA ss 7-8; (BC) ss 6 and 8; (Man) HRC s 14; (NB) HRA ss 3 and 6; (New) HRC s 9; (NS) HRA s 6; (Ont) HRC ss 11, 17 and 25; (PEI) HRA ss 6 and 14; (Queb) CHR&F s 20; (Sask) HRC s 16; (YT) HRA s 9.

[6] For example: (Cth) HR&EOCA 1986 s 3; (Cth) DDA 1992 s 15; (NSW) ADA 1977 ss

was not the plaintiff's disability but rather an inability to perform the work in question.[7]

As was noted in the previous chapter, Larson points out that American employers seldom challenge a plaintiff's claim to be a disabled individual.[8] Conceding this question allows the employer's defence to concentrate on establishing that the employee is not "otherwise qualified" for the employment.[9] Larson's explanation of why employers do not tackle the threshold question of whether the individual is disabled is convincing. Few claimants will want to attract the social stigma which attaches to a characterisation of a person as disabled, so few cases are litigated unless the plaintiff is clearly a person with disabilities. Furthermore, in marginal cases, a plaintiff will have to convince the court that a substantially limiting disability exists but that as a result the individual is not so "handicapped" as to be unable to perform the job in question. Such a contradictory task may affect a claimant's perception of the chances of winning a case.[10] Defendant employers will also not wish to lose the sympathy of the court by aggressively attacking the plaintiff's disability status, especially when there is a second line of defence presented by the "otherwise qualified" standard. One might also add that, as the experience of personal injury litigation suggests, the need to marshall expert medical evidence to undermine a claimant's contentions will cause an employer to measure the costs against the benefits of doing so. Given the uncertainties of psychology and psychiatric medicine, there will also be additional problems in challenging a plaintiff who seeks to rely upon mental disability to qualify for the protected class. Larson refers to the "catch-22" which faces a plaintiff seeking to show mental impairment so as to enjoy the Act's protection while still retaining sufficient ground to demonstrate ability to

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49I and 49X; (SA) EOA 1984 s 71; (Vic) EOA 1984 s 21; (WA) EOA 1984 s 66Q.

[7] In Britain, a similar defence was proposed in the Civil Rights (Disabled Persons) Bill 1992-93 and would be lifted directly from the (US) ADA 1990.

[8] Larson, 1986; 755.

[8] See for example the cases cited by Larson (1986: 754-5): *Strathie v Department of Transportation* (1983) 716 F2d 227 (3rd Cir) (hearing aid user unable to pass employer's hearing requirements); *Longoria v Harris* (1982) 554 FSupp 102 (DC Tex) (leg amputee refused re-employment as bus driver); *Fitzgerald v Green Valley Area Education Agency* (1984) 589 FSupp 1130 (DC Iowa) (multiple-handicapped person refused employment as teaching aide).

[10] Nevertheless, such marginal disability cases are litigated on occasion. See for example: *de la Torres v Bolger* (1983) 610 FSupp 593 (DC Tex) (left-handedness not a handicap, although it caused the dismissal of a postal worker who was unable to work quickly with his right hand: the plaintiff was healthy and the court would not accept left-handedness as an impairment). See McEvoy, 1988.

undertake employment.[11]

An "ability to work" or "otherwise qualified" or "*bona fide* occupational requirement" standard will inevitably reduce eligibility for membership of the protected class. Applied literally or strictly, such a standard would exclude from discrimination protection large numbers of disabled persons who can meet the employer's educational and vocational criteria, but who cannot satisfy the employer's physical or occupational or environmental requirements. For example, a wheelchair-user applying for the post of assistant solicitor with a law firm might have the necessary academic and professional qualifications for the position, but might fail to meet the firm's demands for mobility or might be unable to negotiate the architectural barriers and inaccessibility of the firm's office building. A visually-impaired individual applying for a skilled craft job might have completed an apprenticeship and have the necessary vocational qualifications, but might fail the employer's pre-employment eyesight requirements. As Flaccus comments:

> When statutes are restrictive both in the definition of 'handicap' and the ability to work requirement, they tend to eliminate from coverage both people whose handicap is sufficiently mild that it does not interfere with their ability to work and people whose handicap is sufficiently severe that it necessitates some change in the work place or job duties in order for them to be able to do the job. A statute with both a narrow definition of 'handicap' and a strict ability to work requirement places the plaintiff in a dilemma.[12]

The dilemma is do disabled persons argue that their disabilities are serious, thereby attracting the defence that they are unable to carry out the essential elements of the job, or do they contend that their disabilities are not so severe as to affect employability, thereby risking a finding that they are not sufficiently disabled to attract the law's protection?

If disability discrimination law is to achieve real change in the attitude to disabled workers, it must find a solution to this impasse. One way might be to subject the employer's requirements to the strict scrutiny of a business necessity test or essential job functions approach. Another might be to require the employer to adjust or modify working practices or environment. Aspects of both solutions are to be found in the substance of legislative "fitness to work" standards. This topic is now examined by looking at the North American models adopted in the US and in Canada, and subsequently by comparing the Australian approach.

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[11] Larson, 1986: 759. See, in particular: Larson, 1988.

[12] Flaccus, 1986b: 272.

OTHERWISE QUALIFIED IN THE UNITED STATES[13]

Business necessity test

Subjecting employers' actions that have an adverse impact upon minority groups, or which discriminate indirectly against them, to the strict scrutiny to a business necessity or justification test is a familiar feature of the anti-discrimination laws of the major common law countries. In the race discrimination case of *Griggs v Duke Power Co*, a landmark for discrimination law in general, the US Supreme Court stressed that the law required:

> the removal of artificial, arbitrary, unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[14]

The Court continued that:

> The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited.[15]

In various degrees, this business necessity test survives to inform anti-discrimination law beyond race-based prejudice and beyond the jurisdiction of the US.[16]

Regulations promulgated under section 503 of the (US) RA 1973 require a disabled plaintiff to be capable of performing the particular job, but at the same time insist that any qualifications should be job-related and consistent with business necessity and safety.[17] Federal contractors who are subject to section 503 must review and apply physical or mental job qualification requirements insuring that, to the extent that they screen out qualified disabled persons, they are job-related and consistent with business necessity and safe job performance. Under the ADA 1990, employers may not use qualification standards, employment tests or other selection criteria that screen out disabled persons unless shown to be job-related and consistent with business necessity.[18] Furthermore, medical examinations and inquiries as to disability must satisfy the job-relatedness and business

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[13] See generally: Maffeo, 1990 and Snyder, 1993 (reviewing the position under the RA 1973 and the ADA 1990).

[14] (1971) 401 US 424 at 430-1.

[15] (1971) 401 US 424 at 431, adopting the test proposed by a federal appeal court in *Local 189, Papermakers v United States* (1969) 416 F2d 980 (5th Cir).

[16] See, for example, its reincarnation as the objective justification test in British race and gender discrimination law: SDA 1975 s 1(1)(b)(ii); RRA 1976 s 1(1)(b)(ii). How strict the justification test is has been problematic in that context, but is beyond the scope of this study.

[17] 41 CFR §§60-741.2 and 60-741.6(c).

[18] 42 USC §§12112(b)(6) and 12113(a).

necessity tests.[19]

Essential functions approach

In the US, an alternative approach to the identification of a disabled individual, who is "otherwise qualified" for the employment in question, begins with the question: can he or she satisfy the requisite skills, experience, education and other job-related requirements of the position? If so, is he or she a person who "can perform the essential functions of the job in question".[20] The "essential functions" approach has been described as:

> a further mediating principle between the equal treatment and equal impact paradigms. It retains a core notion of functional competence and efficiency but at the same time indicates a zone of marginal incapacity that an employer must either tolerate or accommodate.[21]

Accordingly, if a disability only prevents a person from discharging non-essential tasks or job duties, he or she is "otherwise qualified". In determining who is an otherwise qualified disabled person, the US Supreme Court envisioned a two-stage inquiry.[22] First, without reference to disability, it is necessary to decide whether the individual satisfies the prerequisites for the job and then, second, determine whether he or she can perform the essential functions of the position, with or without reasonable accommodation. This two-step process is also reflected in the EEOC's ADA 1990 regulations.[23] The problem inherent in this approach, however, is how to differentiate between essential and non-essential functions of a job.

Significantly, the RA 1973 regulations did not attempt to identify any test for essential job functions. This was left to the courts on a case-by-case basis. In *Simon v St Louis County*,[24] for example, the plaintiff police officer had been dismissed after being shot while on duty. The defendant employer argued that his resulting paraplegia prevented him from performing the role of a police officer. Although some tasks were marginal to his present duties, the

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[19] 42 USC §12112(d)(4)(A).

[20] 28 CFR §41.32 (Department of Justice s 504 regulations); 29 CFR §1613.702(f) (EEOC s 501 regulations); 42 USC §12111(8) (ADA 1990); and 29 CFR §1630.2(m) (EEOC ADA regulations).

[21] *Harvard Law Review*, 1984: 1011.

[22] *Southeastern Community College v Davis* (1979) 442 US 397.

[23] 29 CFR §1630.2(m).

[24] (1981) 656 F2d 316 (8th Cir), *certiorari denied* (1982) 455 US 976. See also: *Bentivegna v Department of Labor* (1982) 694 F2d 619 (9th Cir); *Stutts v Freeman* (1983) 694 F2d 666 (11th Cir); *Jasany v US Postal Service* (1985) 755 F2d 1244 (6th Cir).

police authority insisted that he should be multi-capable in accordance with its job flexibility practices. The federal appeal court remitted the case for an inquiry as to whether an ability to perform all the tasks of a police officer was a reasonable, necessary and legitimate qualification.[25] In contrast, the EEOC's ADA 1990 regulations assay a definition of "essential functions" of a job. At first, this is rather circular and reiterative in stressing that essential functions are "fundamental job duties" excluding "marginal functions".[26] However, more helpfully the regulations proceed to explain that:

> A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.[27]

The EEOC's interpretative guidance to and commentary upon the regulations is more expansive.[28] There is a two-stage inquiry. First, does the employer actually require employees in the relevant position to perform that function as a matter of practice? Second, if so, would removing that function fundamentally alter the job position? This second stage will involve a consideration of one or more of the factors quoted above.

The application of the essential functions test under the ADA 1990 is illustrated by the EEOC interpretative guidance. An ability to proof-read documents is clearly an essential function of the position of proof-reader in a publishing house and is the very reason the position exists at all. Furthermore, in a small employer's undertaking, the possibilities for reallocating marginal functions will be fewer and farther between. The EEOC's example is based upon *Treadwell v Alexander* where the employer lawfully refused to employ an applicant with a heart condition as a park technician.[29] His disability prevented him from walking more than one mile per day and the ability to walk substantial distances was an essential function of a job which involved patrolling a 150,000 acre park. There were only up to four other

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[25] The trial court subsequently found that the police authority's requirements were reasonable, necessary and legitimate: (1983) 563 FSupp 76 (DC Mo). This was upheld on appeal: (1984) 735 F2d 1082 (CA Mo).

[26] 29 CFR §1630.2(n)(1) based on the legislative history of the statute: US Senate, 1989: 26. An example of a marginal job function might be a requirement of a driving licence where driving is not a major or frequent component of the actual work done or where any driving duties could be allocated to co-workers.

[27] 29 CFR §1630.2(n)(2).

[28] 29 CFR Part 1630 Appendix.

[29] (1983) 707 F2d 473 (11th Cir).

employees available and it was not realistic to "double up" patrolling duties. Such problems might even arise in a larger undertaking with a fluctuating work flow cycle and labour intensity. In one case,[30] an individual with a growth disorder was denied employment as a postal distribution clerk. He could not perform the essential functions of the job because of his less than average height and reach. Because the employer's operations required multi-skilled employees to cope with heavy demand for labour-intensive work during peak periods, it was not feasible to allocate task-specific duties to the plaintiff within his capabilities. Furthermore, in the case of highly skilled or professional occupations, many tasks will be central to the position and not capable of delegation.

Each case must be decided on its merits as a question of fact. The EEOC regulations list various kinds of evidence that will be crucial to this exercise.[31] In deciding what functions are "essential", due consideration is given to the employer's judgement, but the employer's view is not determinative of the issue. The existence of a written job description prepared in advance of recruitment and selection is considered evidence of the job's essential functions, but would not be accepted uncritically.[32] Evidence might also be brought of the amount of time spent performing the function, the consequences of it not being performed by the job-holder, the relevant terms of any collective agreements, the work experience of past holders of the position, and the current work experience of co-workers in similar jobs. For example, in *Hall v US Postal Service*,[33] the postal service failed to defend its job criteria, which included a requirement that workers should be able to lift up to 70 pounds weight. The evidence was that the plaintiff had never been asked to meet this criterion previously, nor did any of her co-workers perform such heavy lifting.

Best practice suggests that to comply with the law employers must identify and document the requirements for a position in terms of skills, experience and education, and should apply job analysis techniques to catalogue the essential functions of the post.[34] The legislation

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[30] *Dexler v Tisch* (1987) 660 FSupp 1418 (D Conn).

[31] 29 CFR §1630.2(n)(3).

[32] Although, in practice, it may inhibit a court from substituting its judgement for that of the employer. The plaintiff might also need to overcome a rebuttable presumption that a task contained in a job description is "essential". On the other hand, an incomplete job description might be used to counter an employer's claim that a task is an essential function of the job: *Guinn v Bolger* (1984) 598 FSupp 196 (D DC).

[33] (1988) 857 F2d 1073 (6th Cir).

[34] Barlow and Hane, 1992; Phelan, 1992.

does not attempt to second guess the employer's choice of standards or criteria. Provided these standards and criteria are uniformly and actually imposed and required, a court will not question the reasoning behind them. However, if it is suspected that such standards and criteria were intentionally selected to exclude disabled persons from employment opportunities, then the employer might be called upon to offer a rational and non-discriminatory reason for their selection.[35] Nevertheless, despite the best efforts of the EEOC to produce a litmus test for essential job functions:

> The distinction between essential and non[-]essential functions, however, is ultimately artificial and is unable to provide a consistent or articulable standard for distinguishing cases. The dichotomy implies that different job functions may be rationally separated according to a pre[-]existing standard of evaluation... A non[-]controversial standard of differentiation simply does not exist.[36]

The regulations are probably no more than instructive and much will depend upon the lessons to be learned from cases under the RA and future litigation.[37]

BONA FIDE OCCUPATIONAL REQUIREMENT IN CANADA

Under Canadian federal legislation, an employer might defend an employment decision based on disability if it can be shown to have been informed by the need for a "*bona fide* occupational requirement".[38] A defence of *bona fide* occupational qualification or requirement is available in all Canadian provinces, with the exception of the Northwest Territories.[39] In Saskatchewan, implementing regulations provide that a reasonable occupational qualification is one:

> (i) that renders it necessary to hire members... of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or (ii) that is essential or an overriding, legitimate business purpose; or (iii) that renders it necessary to hire members... of a certain physical ability exclusively in order that the

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[35] 29 CFR Part 1630 Appendix.

[36] *Harvard Law Review*, 1984: 1011-12. The anonymous author of this commentary was writing in the context of the RA 1973 and did not have the EEOC's ADA 1990 regulations in mind.

[37] Holtzman *et al*, 1992: 282. A recent, post-ADA 1990 example of the application of the "otherwise qualified" standard under the RA 1973 is *Walders v Garrett* (1991) 765 FSupp 303 (ED Va). A civilian naval employee suffering from a chronic fatigue syndrome was dismissed without being offered reasonable accommodation. The employer's evidence was accepted as showing that the essential requirements of the employment included regular and predictable work attendance, so that substantial, irregular absenteeism would undermine the employee's contention that she was otherwise qualified for the employment in question.

[38] (Can) HRA s 15(a). See generally: Barrett, 1989.

[39] (Alb) IRPA ss 7(3) and 8(2); (BC) HRA ss 6 and 8; (Man) HRC s 14; (NB) HRA ss 3(5) and 6; (New) HRC s 9(1); (NS) HRA s 6(e)-(f); (Ont) HRC ss 11 and 17; (PEI) HRA ss 6(4)(a)-(b) and 14(1)(d); (Queb) CHR&F s 20; (Sask) HRC s 16(7); (YT) HRA s 9(a),(d).

duties of the job involved can be performed safely.[40]

However, this does not include an occupational qualification which is "based on assumptions of the comparative employment characteristics" of physically disabled persons in general, or which is based on "stereotyped characterizations" of physical disability,[41] or which is based on "the preferences of co-workers, the employer, clients or customers".[42]

Canadian case law is rich in examples of the *bona fide* occupational requirement exception being applied or denied. In *Ward v Canadian National Express*,[43] on the evidence there was no *bona fide* occupational requirement where a physically fit plaintiff with a good work record and relevant experience was refused employment as a warehouseman because he had no fingers on one hand. In contrast, in *Husband v Canadian Armed Forces*,[44] the armed forces minimum standards for uncorrected vision were held to be a *bona fide* occupational requirement for a military musician because even a musician could be required to carry out military tasks and the use of corrective lenses under military conditions was not practicable. In *Bicknell v Air Canada*,[45] the defence was made out where an airline refused to employ a licensed commercial pilot with colour vision impairment. Although he had passed federal vision standards, he could not meet Air Canada's higher standards, which had been established in good faith and had been adopted in order to maintain the highest standards of air safety. In *Gaetz v Canadian Armed Forces*,[46] the dismissal of a supply technician in the armed forces, who was an insulin-dependent diabetic, was successfully defended on the grounds that, for the performance of his duties, he could be required to work shifts and be stationed away from medical or food supplies. He needed to counteract his condition by an ingestion of sugar and could lapse into a diabetic coma without warning. His ability to work

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[40] Section 1(b)(i)-(iii) of the 1979 Regulations under the Saskatchewan Human Rights Code: Sask Reg 216/79 as amended by Sask Reg 258/79 and Sask Reg 144/91.

[41] (Sask) HRC Reg s 1(b)(iv)-(v). See *Davison v St Paul Lutheran Home* (1991) 91 CLLC ¶17,017 (Sask HRC) concerning assumptions made about obese persons and discussed in the previous chapter.

[42] (Sask) HRC Reg s 1(b)(vi).

[43] (1982) 82 CLLC ¶17,012 (Can HRT).

[44] (1991) 91 CLLC ¶17,030 (Can HRT).

[45] (1984) 84 CLLC ¶17,006 (Can HRT).

[46] (1989) 89 CLLC ¶17,014 and ¶17,023 (Can HRT). For a review of comparable case law on insulin-dependent diabetics in the US see: Bayler, 1992.

as required had not been demonstrated. In *Seguin v Royal Canadian Mounted Police*,[47] the setting of minimum uncorrected visual acuity standards for police positions involving guard duties and day-to-day police work was held to constitute a *bona fide* occupational requirement, especially where the same standards were adopted by other police forces and had previously been investigated by the Human Rights Commission without action being taken. In *Lee v British Columbia Maritime Employers Association*,[48] a longshoreman with complications from a childhood brain injury was dismissed without discrimination. He had a speech impediment and left-side lack of co-ordination, which the employer successfully argued prevented the employee from performing various loading tasks, from walking across the uneven surfaces of the workplace, from understanding instructions and from responding quickly to emergency situations.

An example of the *bona fide* occupational requirement defence being operated under Canadian provincial law is provided by *Cook v Noble, Prysianziuk, Ministry of Human Resources, and Tranquille Hospital*.[49] The plaintiff had been born with cerebral palsy, resulting in under-development of the limbs of the body's left side and some curvature of the spine. This imposed few limitations on the plaintiff's life activities. He had a previous work history involving physical activity and had recently completed a course to qualify as a community health care worker. He was refused employment in such a role in an institution for the mentally disabled. His complaint of disability-based discrimination was dismissed. The essential functions of the job included emergency lifting of patients which, based upon medical opinion, the employer concluded the plaintiff would not be able to perform. The refusal to hire was held to be fair and based upon reasonable cause. In *Cameron v Nel-Gor Castle Nursing Home*,[50] a plaintiff with abnormally short middle digits of her left hand was refused employment as a nursing aid after revealing the disability in a pre-employment medical questionnaire. The employer had formed the honest opinion that the plaintiff would be unable to perform gripping and lifting tasks which were components of the job, but this opinion had been reached without testing the plaintiff's abilities and without reference to any previous medical or employment records. The complaint was upheld. The board of inquiry

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[47] (1989) 89 CLLC ¶17,018 (Can HRT).

[48] (1989) 89 CLLC ¶17,025 (Can HRT). This is a case where a safety risk was also made out.

[49] (1983) 83 CLLC ¶17,020 (BC HRC). See also: *British Columbia Forest Products Ltd v Foster* (1980) 80 CLLC ¶14,023 (BC SC); *Matlock v Canora Holdings Ltd* (1983) 83 CLLC ¶17,022 (BC HRC); *Isaac v Tahsis Co Ltd* (1984) 84 CLLC ¶17,007 (BC HRC).

[50] (1984) 84 CLLC ¶17,008 (Ont HRC).

stated that intention or malice was not a relevant ingredient of unlawful discrimination under the Code (although would be relevant to any remedy awarded). Furthermore, the employer could not establish objectively that the disability prevented performance of the essential functions of the job. In *Sandiford v Base Communications Ltd*,[51] an employee suffered an epileptic fit at work and was dismissed. The employer refused to reinstate her, despite a letter from her doctor stating that she was capable of performing the duties of a switchboard operator (the position she had held) and the evidence from her newly-commenced employment elsewhere that she was rated as an above-average employee. Her complaint of disability-based employment discrimination succeeded, and she recovered lost wages and damages for humiliation, because the employer could not demonstrate objectively that a requirement that a switchboard operator should not be an epileptic was a reasonable occupational qualification.

QUALIFICATION FOR EMPLOYMENT IN AUSTRALIA

Australian Commonwealth legislation expects that the disabled person must be able to carry out the "inherent requirements" of the job in order to be protected from discrimination.[52] In New South Wales and Western Australia, discrimination informed by a person's disability is permitted if the employer has taken a reasonable view that the disabled person would be unable to carry out the work "required to be performed", or could do so only with *unreasonable* accommodation.[53] An employer may also allow a disability, or the limitations and requirements of a disabled person, to be a factor in making employment decisions and extending employment opportunities.[54] South Australia allows employers to discriminate if a disabled person is not able adequately to perform the work "genuinely and reasonably required" for job in question.[55] The employer's main defence under Victorian disability discrimination law arises where a plaintiff has been shown to be unable adequately to perform the "reasonable requirements" of the job.[56] In deciding this question, the plaintiff's past

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[51] (1984) 84 CLLC ¶17,024 (Sask HRC). See also: *Anderson v Woloschuk & Saskatchewan Economic Development Corporation* (1986) 86 CLLC ¶17,011 (Sask HRC); *McDougall v Saskatchewan Transportation Company* (1989) 89 CLLC ¶17,009 (Sask QB) and (1991) 91 CLLC ¶17,006 (Sask HRC).

[52] (Cth) DDA 1992 s 15(4)(a). The employer is permitted to take into account the individual's record of relevant training, qualifications, experience and employment performance, together with any other reasonably relevant factors.

[53] (NSW) ADA 1977 ss 49I(1) and 49X(1); (WA) EOA 1984 s 66Q(1).

[54] (NSW) ADA 1977 ss 49I(2) and 49X(2); (WA) EOA 1984 s 66Q(2).

[55] (SA) EOA 1984 s 71(2).

[56] (Vic) EOA 1984 s 21(4)(g). For a criticism of this aspect of the Victorian legislation,

training, qualifications and relevant experience (and, where appropriate, employment performance) must be taken into account.[67]

The leading case on employment qualification or fitness for work in the Australian jurisdictions is *Jamal v Secretary, Department of Health*.[68] Dr Jamal had been refused employment by a hospital because bilateral cataracts had impaired his vision. This prevented him from doing fine suturing work and driving at night between different parts of the hospital. The hospital's defence was that his capacity to fulfil the requirements of the position was not the same or similar to that of an able-bodied applicant who had been appointed to the disputed post. In short, it was contended that Dr Jamal was unable to carry out the full range of functions or duties of a hospital doctor. Suturing was part of the routine work of a medical officer while, because the hospital occupied 12 acres of grounds, it was accepted practice that doctors had to be able to drive between wards.

Although the case revolved around the question of whether the hospital should have made reasonable accommodation for Dr Jamal's impairment,[69] an Equal Opportunity Tribunal found that the hospital had failed to demonstrate that the plaintiff could not do the work. In particular, the Tribunal decided that the hospital should have considered whether Dr Jamal could satisfy the "essential nature" of the position and, on the evidence, the Tribunal was not satisfied that it was essential to be able to do the suturing or night driving. On appeal to the Supreme Court, Hunt J ruled that it was not the Tribunal's view of whether the plaintiff could perform the work required that mattered, but rather whether it appeared to the employer that Dr Jamal would be unable to carry out the work. Hunt J criticised the Tribunal's formulation (or introduction) of a test of the essential nature of the job and ruled that what had to be assessed was the plaintiff's ability to do the actual job applied for (and not some approximation of that job). The Court of Appeal agreed with the criticisms made by the Supreme Court:

> The clearest mistake on the part of the Tribunal was its reference to what it described as 'the *essential nature* of the job'. There is no warrant in the Act for differentiating

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see: Johnstone, 1989.

[67] Discrimination in employment terms or conditions is also permitted to take account of any limitations in working capacity or any accommodations made to enable a disabled employee to work, as well as to accord with collective bargaining arrangements: (Vic) EOA 1984 s 21(4)(i).

[68] (1986) EOC 92-162 (NSW EOT); (1986) EOC 92-183 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

[69] Discussed in Chapter XIV below.

> between 'essential' and 'non-essential' aspects of the job. The Act requires a global approach to be taken... [It] requires consideration to be given 'with respect to *the work* required to be performed'. It is only if it appears to the employer, on grounds upon which it is reasonable to rely, that the physically handicapped person because of physical impairment would be unable to carry out *that* work... that the discrimination escapes categorisation as unlawful.[60]

Hence the appellate court was of the view that, subject only to any question of reasonable accommodation, a disabled worker has to be able to satisfy all the requirements of the job. The Court of Appeal also confirmed that the test is a subjective one, in the sense of whether it appeared to the employer that the applicant was unable to perform the required work, rather than an objective one.

Although the legal reasoning in *Jamal* may be faultless in its literality, it reinforces what Astor has called the "inflexible definition of work" in the New South Wales statute.[61] Thornton comments that:

> This focus on the physically impaired person's ability to perform all aspects of the job, conceived in terms of physical normalcy, constitutes further evidence of a desire to impose an overly narrow construction on... [disability discrimination legislation]. It would seem that the practical effect of this interpretation is that a... [disabled person] would simply never be able to meet the insuperable nature of the burden, for there would necessarily always be some aspect of the job, however minor, which the applicant could not perform if a strict comparability test were to be applied, but which could constitute the subject of reasonable accommodation negotiations.[62]

It may even encourage employers to draft job descriptions with a view to excluding otherwise well-qualified disabled candidates from proper consideration. Thornton opines that:

> The deference to managerial prerogative in assessing an applicant's ability to perform all aspects of the job clinches the elusiveness of the legislation as a remedial tool for people with impairments.[63]

The Victorian and South Australian legislation (but not the Western Australian statute) appear to avoid this possibility by focusing upon the work which is genuinely or reasonably required for the position in question. Astor believes that such a focus might "persuade or require unimaginative or intransigent employers to make adjustments in job design where such adjustments are reasonable".[64] The present writer is not so convinced. The latter formulation certainly allows a tribunal or court to scrutinise what actually happens in practice

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[60] (1988) 14 NSWLR 252 at 260 (Kirby P), emphasis in the original. See to like effect Samuels JA at 264 and Mahoney JA at 267-9.

[61] Astor, 1990: 122.

[62] Thornton, 1990: 113.

[63] Thornton, 1990: 114.

[64] Astor, 1990: 122.

and would prevent employers deliberately designing jobs on paper to exclude disabled workers. However, it stops short of permitting scrutiny of the essential functions of a job, leading to the possibility that the employer must tolerate or accommodate the disabled employee's inability to perform marginal or non-essential functions. The requirement in Australian federal legislation that the disabled person should be able to carry out the "inherent requirements" of the job would seem to be a beacon for reform. It would also seem to promote an objective test and demote the employer's view of what should be the necessary constituents of employment.

FITNESS FOR WORK AND FUTURE SAFETY RISK

Reconciling disability discrimination with health and safety

An aspect of fitness for work and qualification for employment which is worthy of separate treatment is the question of whether demonstrability that a disabled person does not represent a future safety risk is an aspect of the otherwise qualified standard or a *bona fide* occupational requirement. The importance of this issue derives from the fact that employers' obligations under health and safety laws are often used to justify employment discrimination against disabled persons. Utilisation of safety-related arguments as the basis for compromising disabled employment rights reflects a fear, often baseless, that the nature of an employee's disabilities makes him or her an unusual safety risk. The safety risk alleged might appertain to the disabled person himself or herself, or to fellow workers, or to third parties. It might even embrace concern for a risk to property.

This is undoubtedly one area where the potentially conflicting objectives of disability discrimination legislation and health and safety laws need to be reconciled. At common law, employers owe a duty of reasonable care to provide for the occupational health and safety of their employees.[65] In exercising that duty of care towards a disabled employee, the employer must take into account the greater risk and degree of injury faced by employees with particular disabilities. This may lead to the employer needing to take additional steps or precautions to ensure the safety of disabled workers than might otherwise apply to their able-bodied colleagues. For example, the need for enhanced training or closer supervision of some disabled employees might be called for. This analysis is underlined by the Health and Safety at Work etc Act 1974 which indicates that the employer has a duty to the work-force to provide safe fellow employees, and a duty to third parties not to expose their health and safety to risk through the activities of the employer's business.

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[65] See the fuller discussion of this issue in Chapter IV above.

Safety risk and occupational qualification in the United States

Somewhat controversially, US employers are permitted to adopt as a qualification standard a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace.[66] Because this provision is offered as a defence, the burden of proof of safety risk is clearly placed upon the employer. However, the threat must involve a significant risk to health and safety which cannot be eliminated by reasonable accommodation. Avoidance of safety risk might be implied as part of the essential functions of a job under the "otherwise qualified" standard in any event. The origin of the safety risk defence (or, at least, its authoritative judicial treatment) is the Supreme Court's decision in *School Board of Nassau County v Arline*.[67] The plaintiff in *Arline* had a history of tuberculosis and the court was of the view that, in order to satisfy the "otherwise qualified" test of ability to work, the plaintiff would have to show that she did not pose a significant risk to the health and safety of others. In order to:

> achieve the goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks,[68]

the inquiry as to whether the plaintiff did pose a safety risk must be individualised and based upon objective medical evidence about the nature, duration and severity of the risk.

The EEOC ADA 1990 regulations take the premise presented by *Arline* and the Act itself, and expand it into a full-blown safety risk defence.[69] An employer may set a qualification standard that an individual shall not pose a direct threat to the health or safety of the *individual* or others in the workplace. There must be a significant risk of substantial harm to health or safety that cannot be eliminated or reduced by reasonable accommodation. This is to be determined by an assessment, based upon a reasonable medical judgement relying on current medical knowledge or the best available objective evidence, of the individual's present ability to perform the essential job functions safely. The assessment should take account of various factors, including the duration of the risk, the nature and severity of potential harm, the likelihood of such harm occurring, and the imminence of potential harm. It is clear from the legislative history of the ADA 1990, as codified by the EEOC regulations, that employment opportunities should not be denied to disabled persons simply because there is

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[66] 42 USC §§12113(b) and 12111(3). See: Frierson, 1992a.

[67] (1987) 480 US 273.

[68] (1987) 480 US 273 at 288.

[69] 29 CFR §§1630.15(b)(2) and 1630.2(r).

a slight increase in safety risk.[70] There must be a high probability of substantial harm, rather than speculative or remote risk. The employer may only act having identified the specific risk posed by an individual, and this must be done on a case-by-case basis, avoiding stereotypes, subjective perceptions, irrational fears and patronising attitudes. Account should be taken of all the evidence, including the view of the disabled individual, his or her prior experience in similar positions, and the expert opinion of doctors, counsellors or therapists with direct knowledge of the individual or the disability.

The safety risk defence was not explicit in the RA 1973 or its regulations,[71] but it was implicit in the "otherwise qualified" standard. The pre-1990 case law is replete with useful illustrations of the safety risk controversy.[72] For example, in *Strathie v US Department of Transportation*,[73] a hearing-impaired individual was rejected as a school bus driver. The federal appellate court held that it was not necessary to eliminate all possible safety risks, but only those risks which were appreciable (and this could be done with reasonable accommodation). In *Doe v Region 13 Mental Health-Mental Retardation Commission*,[74] in contrast, the defendant's dismissal of a staff psychologist was permitted where the defendant had substantial, rational grounds for concluding that the plaintiff's psychological condition could pose a risk to her patients. In *Mantolete v Bolger*,[75] an epileptic with 12 years accident-free experience in a mechanized working environment was rejected for employment as a machine distribution clerk on safety grounds. The appellate court held that the refusal was discriminatory because an elevated risk of injury on the job was not enough; there must be a reasonable possibility of substantial harm. The case law clearly establishes that a remote chance of future safety risk is not sufficient to deny a disabled person the status of an "otherwise qualified" individual.[76] If a remote risk or elevated risk to safety were to permit a comprising of disabled employment opportunities, almost any disabled

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[70] 29 CFR Part 1630 Appendix.

[71] With the exception of the s 501 regulations which defined "qualified handicapped person" by reference to ability to perform the essential functions of a job "without endangering the health and safety of the individual or others": 29 CFR §1613.702(f).

[72] See: Perras and Hunter, 1986.

[73] (1983) 716 F2d 1227 (3rd Cir).

[74] (1983) 704 F2d 1402 (5th Cir).

[75] (1985) 767 F2d 1416 (9th Cir). See Berns, 1986.

[76] See also: *Prewitt v US Postal Service* (1981) 662 F2d 292 (5th Cir); *Bentivegna v US Department of Labor* (1982) 694 F2d 610 (9th Cir); *EE Black Ltd v Marshall* (1980) 497 FSupp 1088 (D Haw).

person could be excluded from the workplace because many disabilities are capable of being characterised as presenting an increased risk of injury.[77]

It is noteworthy that the safety risk defence allows employers to discriminate where an individual with disabilities poses a heightened safety risk to himself or herself. The EEOC illustrates this point by saying that an employer could refuse to hire as a carpenter a narcoleptic who frequently and unexpectedly loses consciousness, where the essential functions of the job involve the use of power saws or other dangerous equipment.[78] However, the employer may not act upon generalised fears. For example, a job applicant with a history of mental illness should not be refused employment on the general ground that the work is stressful and this might cause a recurrence of emotional disturbance. Similarly, employers should not make assumptions - for example, about wheelchair users - concerning a disabled person's safety in evacuation of the workplace or other emergency procedures. The risk to the disabled person must be assessed on the basis of individualised and objective evidence. Despite this guidance, objection can be taken to the inclusion of a "safety risk to self" defence in the EEOC regulations, as it goes beyond the wording of the Act.[79] This would seem to allow paternalism in through the back door and give employers additional or stronger grounds for raising the safety issue. It ignores the right of disabled persons to make judgements about their own lives and the risks that they are prepared to undertake. Disability rights advocates were unsuccessful in their attempt to get the EEOC to erase this reference to safety risk for self. It can be expected that this will be an early battleground in litigation under the ADA 1990. Under the RA 1973, moreover, a federal court had already held that a qualification for employment based on a future risk of injury to the disabled person would be subjected to special scrutiny.[80]

Safety risk and occupational qualification in Canada

In Canadian federal human rights law, a *bona fide* occupational requirement will include a need to avoid posing a significant safety risk to the disabled individual, fellow employees and

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[77] Adelman, 1986: 157. But contrast *Leckelt v Board of Commissioners* (1990) 909 F2d 820 (5th Cir) where the court suggests that an HIV-positive health care worker might not be "otherwise qualified" because of the threat posed to patient's health, even though the transmission of HIV was extremely unlikely. This would appear to be a case where the nature, severity and duration of the risk was allowed to outweigh the probability or imminence of the risk.

[78] 29 CFR Part 1630 Appendix, subject to reasonable accommodation.

[79] See: Neal, 1992.

[80] *Bentivegna v US Department of Labor* (1982) 694 F2d 610 (9th Cir).

others.[81] Employers must rely upon medical evidence rather than uninformed assumptions,[82] but it is the employer's judgement which ultimately seems to count.[83] Health and safety requirements may also be taken into consideration in provincial law, either implicity as a *bona fide* occupational requirement, or explicitly as a statutory concession.[84] The case law is instructive.

In *De Jager v Department of National Defence*,[85] there was discrimination where an asthmatic was dismissed because of a blanket policy with respect to asthmatics which was based upon stereotypical assumptions rather than medical fact and where there was no evidence that asthmatics posed a significantly greater safety risk than other employees. In contrast, in *Canadian Pacific Ltd v Canadian Humans Rights Commission*,[86] there was no discrimination where a diabetic was refused employment as a trackman, despite evidence that he was a stable diabetic with low odds of having a severe hypoglycaemic reaction, because there was nevertheless a real safety risk. Sufficiency of risk refers to the reality, not the degree, of risk said the court. Similarly, in *Rodger v Canadian National Railways*,[87] no discrimination was found where a railwayman, diagnosed as an epileptic, was reassigned to restricted duties because the original position involved physically demanding work with heavy machinery and, if a seizure was to occur at work, there was a risk to the safety of the employee, co-workers and the general public. However, after a seizure-free period of sufficient length, a refusal to reassign to the old position might no longer be supported by reference to a *bona fide* occupational requirement, it was suggested. In *Galbraith v Canadian*

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[81] *De Jager v Department of National Defence* (1986) 86 CLLC ¶17,017 (Can HRT); *cf Canadian Pacific Ltd v Canadian Human Rights Commission* (1985) 85 CLLC ¶17,025 (Can HRC), (1987) 40 DLR (4th) 586 (Can FCA); *Rodger v Canadian National Railways* (1985) 85 CLLC ¶17,019 (Can HRT). See the further discussion in Chapter XIII and Barrett, 1989.

[82] *Erikson v Canadian Pacific Express & Transport Ltd* (1987) 87 CLLC ¶17,005 (Can HRT).

[83] *Forseille v United Grain Growers Ltd* (1985) 85 CLLC ¶17,024 (Can HRT); *cf Cinq-Mars v Les Transports Provost Inc* (1987) 88 CLLC ¶17,002 (Can HRT).

[84] See, for example: (Ont) HRC s 11(1)(a) and (2); also s 1(b)(i)-(iii) of the 1979 Regulations under the Saskatchewan Human Rights Code.

[85] (1986) 86 CLLC ¶17,017 (Can HRT).

[86] (1985) 85 CLLC ¶17,025 (Can HRC), (1987) 87 CLLC ¶17,023 and (1987) 40 DLR (4th) 586 and (1987) 76 NR 385 (Can FCA).

[87] (1985) 85 CLLC ¶17,019 (Can HRT).

Armed Forces,[88] a plaintiff with a catheter as a result of colostomies failed in a challenge to the armed forces' refusal to engage him in the reserve militia because he could not meet minimum enrolment standards which screened out such applicants as being a safety risk in the field. In *Erickson v Canadian Pacific Express & Transport Ltd*,[89] a heavy truck driver whose hearing loss required the use of a hearing aid was dismissed because of his employer's blanket policy of not employing hearing aid users. A finding of discrimination was made because the employee met federal standards and licensing requirements and there was no evidence that the employer had tested the employee on an individual basis for evidence of work inability or increased safety risk. In *Forseille v United Grain Growers Ltd*,[90] the employee was a diabetic hired as a grain handler. He was dismissed when medical evidence commissioned by the employer suggested that the diabetes was unstable, although this was contradicted by the employee's medical evidence. The assessment of risk therefore had to be made by the employer, who concluded in good faith that there was a safety risk in continuing to employ the employee. The *bona fide* occupational requirement defence was made out. In contrast, in *Cinq-Mars v Les Transports Provost Inc*,[91] a truck driver with a congenital spine deformation was held to have been unlawfully dismissed where the medical evidence was conflicting and merely suggested a possibility of a safety risk, while the employer had re-engaged the plaintiff without restricting or limiting his driving duties.

Safety risk and occupational qualification in Australia

The Victorian EOA 1984 permits disability-informed discrimination if the nature of an impairment, the working environment or the nature of the work gives rise to a likely and unreasonable risk that the disabled person will injure others or there is a substantial risk that the person will injure himself or herself.[92] In *MacLeod v State of Victoria*,[93] the EOB rejected a complaint of discrimination brought by a diabetic police driver where the police authority had refused to reissue his driving permit on the grounds of a poor driving record and a substantial risk of injury to himself or others. However, employers may not generalise about who or what condition represents a risk to safety. Medical evidence and other relevant

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[88] (1989) 89 CLLC ¶17,021 (Can HRT).

[89] (1987) 87 CLLC ¶17,005 (Can HRC).

[90] (1985) 85 CLLC ¶17,024 (Can HRT).

[91] (1987) 88 CLLC ¶17,002 (Can HRT).

[92] (Vic) EOA 1984 s 21(4)(h).

[93] (1987) AILR ¶285 (Vic EOB).

factors must be accounted for.[94] It has been suggested that the safety risk exception should be restricted to cases where the employer cannot reduce the risk to a level similar to other employees by reasonable accommodation, but should be extended to allow for a significant risk to a person's health, safety *or property* to inform employment decisions.[95] In South Australia, an employer's defence to disability-based discrimination arises if a person with an impairment would not be able to perform the work without endangering himself or herself or other persons or to respond adequately to reasonably anticipated situations of emergency in connection with the employment.[96]

CONCLUDING REMARKS

Proposals for reform in Britain retain the concept of the qualified individual with disabilities. This will ensure that to some extent British employers will be able to predetermine which disabled persons qualify for membership of the protected class. Although the emphasis will be upon the individual's ability to carry out the essential functions of a job, with or without reasonable accommodation, there is much scope for employers to define or redefine job parameters. The prognosis is not good. In a survey of British employers, employers' perceptions of job requirements were tested.[97] The respondents were asked to identify the abilities they considered to be vital for various types of job.[98] The results of this question are reproduced in Table XIV below. The table "emphasises the extent of barriers to the employment of disabled people which still have to be surmounted".[99] It is clear from these results that employers' perceptions of job requirements are very narrowly drawn and that this can act only to the disadvantage of disabled persons and their frequent exclusion from the scope of any new emancipatory legislation.

The need for disabled persons to prove their fitness for work and qualification for employment is inherently part of the requirement of proving membership of the protected class. As has been seen, it is an additional hurdle that must be leapt in order to have one's basic civil rights entertained. This might not seem unreasonable at first blush. However, as Burgdorf argues:

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[94] *Urie v Cadbury Schweppes P/L* (1987) AILR ¶283 (Vic EOB).

[95] Law Reform Commission of Victoria, 1989 and 1990a.

[96] (NSW) ADA 1977 s 71(2).

[97] Morrell, 1990: 10 and Table 12.

[98] In the sense of whether loss of a particular ability would result in inability to carry on in the job without substantial assistance.

[99] Morrell, 1990: 9-10.

	Management	Degree level business professional	Ancillary professional staff	Office staff or other non-manual	Personal services	Skilled manual	Semi-skilled manual	Other manual
Walk fairly long distances	41	31	36	19	57	60	58	61
Climb stairs	65	62	66	53	67	67	69	73
Travel fairly frequently	73	59	28	14	18	35	26	18
Physical exertion or lifting weights etc	23	11	23	8	68	81	81	88
Manual dexterity	38	36	40	48	67	86	81	68
Written or typed communication	86	87	80	88	43	40	23	10
Speak clearly and quickly	89	84	79	82	63	45	32	19
Good eyesight	72	77	67	73	81	85	77	74
Good hearing	76	72	65	69	71	65	58	53
Good appearance or presentation	85	76	60	69	81	34	23	24
Other requirements	15	16	8	8	10	13	13	9
Don't know/no answer	6	8	8	6	6	7	8	8

Source: Adapted from Morrell, 1990: Table 12

Table XIV: British employers' perceptions of job requirements (%)

> the notion of otherwise qualified should be subsumed in the question of discrimination on the basis of disability: if an individual is denied an opportunity because of a failure to meet qualification standards, then the individual is not being disadvantaged on the basis of disability, but rather because of a failure to meet applicable job standards. In contrast, other types of civil rights laws do not require establishing membership in a protected class. These statutes focus on the discriminatory acts that occur, not the qualities of the person discriminated against.[100]

It seems incomprehensible that a person's ability to do the job or be qualified for employment should go to the question of whether or not the court or tribunal has jurisdiction, rather than to the issue of whether or not there has been discrimination on a prohibited ground. The disappointing irony of this situation will not be lost upon disabled persons themselves. Having spent much of their lives under disability stressing their abilities rather than their limitations, they are forced in the arena of litigation to prove that they are disabled or handicapped by their impairment or medical condition. Then, having established their deviation from the "norm", they must then show that they are not so disabled that they are incapable of working. In sex and race discrimination cases, no one suggests that female or black plaintiffs should re-establish in the eyes of the tribunal their right to a hearing of the substantive issues. The legislature has established that right and it is not for the judiciary to second guess that right. Similarly, it should be sufficient in disability discrimination law to show that the plaintiff has a recognisable impairment or medical condition (or a record of one) or is perceived as disabled. The question of whether their disability predetermined the outcome of their employment opportunities or whether they were simply not the best person for the job would then be the sole issue for the court.

A fitness for work condition or a qualification for employment requirement or an absence of safety risk proviso in any disability discrimination legislation may be neutralised or at least ameliorated if the law also requires employers to afford reasonable accommodation to the disabilities of a disabled worker. If the requirements of the job are in essence unchallengeable, then the efficacy of disability discrimination law will depend upon whether those requirements are capable of being met by other means, and whether disabled persons are allowed and enabled to demonstrate ability on their terms. We next turn to consider the role of reasonable accommodation in permitting disabled workers to compete in the labour market on an equivalent, if not equal, footing with their "able-bodied" peers.

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[100] Burgdorf, 1991: 442. See also the earlier analysis of Lang (1978). The burden of proof would appear to be upon the disabled plaintiff, but whether that should be so is questionable (see Schau, 1986).

CHAPTER XIII:
RECOGNISING DIFFERENCE: DISABILITY AND THE DUTY OF REASONABLE ACCOMMODATION

INTRODUCTION

Anti-discrimination legislation is based on the concept of comparability. Employers are required to treat individuals of one group in society in the same way as any other group would be treated. The comparability approach does not work well in respect of disabled people where disability creates a difference in the way in which a job can be done, so that disabled applicants are often not directly comparable with able-bodied applicants.[1] This point is well made by West:

> Often a stated goal of non[-]discrimination policy for persons in other stigmatized groups is to be treated in a neutral fashion, or just like everyone else; this may not be the case for persons with disabilities. The goal may be to 'forget' that the individual is a woman, or an African-American, as standards are applied. It is often said that the law should be administered in a 'color blind' fashion. While this may be the case in some situations for persons with disabilities, in other situations the goal, in fact, may be the opposite: a recognition of the functional impairment and an effort to adapt an environment or situation to enhance functioning and/or discover alternatives that will yield meaningful involvement.[2]

Accordingly, equality of opportunity requires anti-discrimination legislation to take account of the needs of disabled persons to have accommodations made for disability, save where this would cause an employer undue hardship. This necessitates a balancing act between the needs of the employer to conduct a profitable business and the aspirations of disabled people to enjoy employment opportunities.[3]

It follows that the concept of reasonable accommodation is the keystone of disability discrimination laws. Reasonable accommodation involves the making of modifications or adjustments in the employment process and to the workplace environment so as to ensure that disabled persons are not discriminated against, but may enjoy equal employment opportunities with others.[4] The US Commission on Civil Rights has described reasonable accommodation as:

> providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Its essence is making opportunities available to handicapped persons on an

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[1] Astor, 1988: 79-80.

[2] West, 1991b: 8.

[3] Astor, 1988: 80.

[4] See the EEOC regulations under the (US) ADA 1990: 29 CFR §1630.2(o).

individualized basis.[5]

Reasonable accommodation has also been portrayed as:

> the extent of an employer's duty to make a job amenable to a current or prospective employee who has a special requirement that imposes extra cost or inconvenience upon the employer.[6]

More simply and succinctly, Hearne has defined reasonable accommodation as "any intervention that facilitates a person's ability to perform a job".[7] In its legal sense, the term "reasonable accommodation" originated under US law. Legal recognition of a duty to make reasonable accommodation in the US dates from 1966 when EEOC guidelines first required employers to accommodate employees' religious practices.[8] At first subject to a defence that the accommodation would create serious inconvenience to the employer's undertaking, the guidelines were then amended to provide an "undue hardship" defence in relation to the employer's business.[9] The requirement to make reasonable accommodation of religious belief and practice, and its associated "undue hardship" exception, are now incorporated within Title VII of the Civil Rights Act 1964.[10] Subject to the defence, it is unlawful discrimination for an employer not to make reasonable accommodation for the religious practices of applicants and employees.

Although it can be argued that the principles underlying the notion of reasonable accommodation are pervasive in anti-discrimination law at large,[11] it is in the context of disability discrimination legislation that the concept is both explicit and fundamental. The

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[5] US Commission on Civil Rights, 1983: 139. See also: US Department of Labor, 1982.

[6] Dolatly, 1993: 524.

[7] Hearne, 1991: 124.

[8] 29 CFR §1605.1(a)(2) (1966 edition).

[9] 29 CFR §1605.1(b)(c) (1967 edition). The "undue hardship" defence in religious accommodation cases was interpreted as requiring no more than a *de minimis* effort on the part of employers: *Trans World Airlines v Hardison* (1977) 432 US 63. This decision was undoubtedly influenced by constitutional considerations (the prohibition on established religions) and was not intended to apply in the context of disability: US Commission on Civil Rights, 1983: 104. That view was accepted under the comparable provisions of the RA 1973: *Prewitt v US Postal Service* (1981) 662 F2d 292 at 308. It was also made clear in the congressional history of the ADA 1990: US Senate, 1989: 36; US House of Representatives, 1990a: 68 and 1990b: 40.

[10] 42 USC §2000e(j).

[11] For example, in gender discrimination, an employer might be said to have a duty to "accommodate" pregnancy and maternity or, in race discrimination, cultural differences (as in dress codes).

philosophy of reasonable accommodation informs disabled employment policies and practices in all Western industrialised democracies but, most pertinently for present purposes, is enshrined in the language of many, but not all, equal opportunity statutes that embrace disabled persons within their protection. A requirement to make reasonable accommodation in respect of disability is a feature of the RA 1973 in the US,[12] although that terminology does not appear in the substantive provisions of the Act. Rather, in a remarkable example of legislating via administrative rule-making,[13] the reasonable accommodation mandate emerged from the implementing regulations of the Department of Labor under section 503 in 1976, from where it proceeded to influence the content of the section 501 and section 504 ordinances.[14] Reasonable accommodation is also central to the control of discrimination under the (US) ADA 1990. In Canada and Australia, however, the importation of a statutory directive of reasonable accommodation is not a universal feature of national or sub-national disability laws,[15] and, even in those jurisdictions where provision is made, its effect is often less than complete.

LEGAL FRAMEWORK OF REASONABLE ACCOMMODATION

The legal concept of reasonable accommodation plays four possible roles. First, it might determine whether a disabled person is within the protected class for the purposes of protection from discrimination. Reasonable accommodation is thus often an aspect of the decision whether disabled persons are "qualified" or not, in the sense of whether they can perform the essential functions of the job. If they can do the job - with or without reasonable accommodation - then they are "qualified".[16] This aspect of the term has been seen in the preceding chapter and need not be explored in detail here. Second, a failure to make reasonable accommodation might be a primary act of discrimination, as might be a refusal to employ disabled applicants because the employer would have to accommodate their disabilities. Again, this has been referred to before (in Chapter X). Third, reasonable

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[12] See generally: Martin, 1980; Kelly, 1986; Sklar, 1986. For a comparison of the position under federal and state disability discrimination laws see Kaufman (1987) and the relevant section of Chapter VI above (discussing, in particular, the findings of Flaccus, 1986b).

[13] For an account of this process, see: Scotch, 1984 and Percy, 1989.

[14] See Chapter VI above and the discussion which follows below.

[15] See, for example: (Can) EEA 1985 ss 2 and 4; (Man) HRC ss 9(1)(d) and 11-12; (NSW) ADA 1977 ss 49I(1) and 49X(1); (WA) EOA 1984 s 66Q(1); (Cth) DDA 1992 s 15(4)(b).

[16] The reasonable accommodation question is thus treated as part of the "otherwise qualified" inquiry: *Brennan v Stewart* (1988) 834 F2d 1248 (5th Cir). This ensures that "employers may not summarily determine what qualifications they wish to impose and then hold individuals with disabilities to them": Burgdorf, 1991: 458, citing 42 USC §12111(8).

accommodation might form part of the positive remedies available to a tribunal or court redressing an individual act of discrimination or fashioning a remedy to prevent future incidents of disability discrimination. This will be returned to in a later chapter below (Chapter XV). Fourth, where legislation permits, encourages or requires affirmative action, reasonable accommodation will almost invariably be a feature of such action, as will be seen in Chapter XVI. In the present chapter, however, it will be useful to examine how far, if at all, reasonable accommodation is recognised in the three countries that have specific anti-discrimination measures covering disabled persons. Moreover, the judicial reaction to reasonable accommodation must be assessed here.

United States

Federal disability discrimination laws in the US protect qualified individuals with a disability. For this purpose, a qualified disabled individual is someone who can perform the essential functions of the job, *with or without reasonable accommodation*.[17] Furthermore, a refusal to make reasonable accommodations to the limitations of an otherwise qualified disabled person is a discriminatory act, as would be a denial of employment opportunities to such a person because the employer would have to make reasonable accommodations for him or her.[18] In addition, an employer might seek to justify the use of indirectly discriminatory qualification standards, tests or selection criteria (which are job-related and consistent with business necessity) provided that even the provision of reasonable accommodation would not equip a disabled applicant to satisfy the standard, test or criterion in question.[19]

Despite the seeming clarity of these provisions today, judicial reaction to them in the early days of the RA 1973 now appears antediluvian. The seminal case was *Southeastern Community College v Davis*.[20] The plaintiff, who had a serious hearing disability, wished to train as a registered nurse but was denied admission to the defendant's training programme.

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[17] 42 USC §12111(8) (ADA 1990); 29 CFR §1613.702(f) (RA 1973 s 501 regulations); 41 CFR §60-741.2 (RA 1973 s 503 regulations); 28 CFR §41.32 (RA 1973 s 504 regulations).

[18] 42 USC §12112(b)(5) (ADA 1990); 29 CFR §1613.704 (RA 1973 s 501 regulations); 41 CFR §60-741.6(d) (RA 1973 s 503 regulations); 28 CFR §41.53 (RA 1973 s 504 regulations).

[19] 42 USC §12113(a). This is implicit in the RA 1973 s 501 and 503 regulations: 29 CFR §1613.705(a) and 41 CFR §60-741.6(c). See also: 28 CFR §41.54 (RA 1973 s 504 regulations).

[20] (1976) 424 FSupp 1341 (ED NC); (1978) 574 F2d 1158 (4th Cir); (1979) 442 US 397 (US SC). For a critique of the impact of this case upon the reasonable accommodation requirement, see: Olenik, 1980.

It was believed that she could not participate in the programme or subsequently practise as a nurse because her disability raised safety questions. Any modifications to the programme to accommodate her disability would radically alter her training as a nurse. Her complaint of disability discrimination under section 504 of the RA 1973 was dismissed by the federal district court on the ground that her disability prevented her from safely performing the role of a nurse in both training and employment, so that she was not a qualified individual protected under the statute. The federal appellate court overturned that decision, arguing that section 504 required the college to appraise the plaintiff solely on her academic and technical qualifications, without regard to her disability, and that section 504 required the defendant to modify its programme to accommodate applicants with disabilities.

The Supreme Court restored the first instance decision. Powell J, giving the opinion of the court, noted that:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap', indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[21]

Accordingly, an "otherwise qualified person is one who is able to meet all of a program's requirements *in spite of* his handicap".[22] Addressing the plaintiff's argument that the college should be compelled to undertake "affirmative action" by dispensing with parts of the training programme and providing her with individual supervision, Powell J concluded that section 504 could not be interpreted as requiring such particular accommodations. What was being proposed went beyond mere modifications in the programme and, even if the section 504 regulations required such extensive accommodations, it "would constitute an unauthorized extension of the obligations imposed by" the Act.[23]

The decision in *Davis* was a definite setback for the proponents of reasonable accommodation and was widely criticised.[24] What is especially noticeable is the Supreme Court's interpretation of section 504 as requiring only "evenhanded treatment of qualified

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[21] (1979) 442 US 397 at 405 (footnote omitted).

[22] (1979) 442 US 397 at 406 (my emphasis).

[23] (1979) 442 US 397 at 410.

[24] See, for example: Egan, 1979; Butler, 1980; Forsyth, 1981.

handicapped persons" and excluding any mandate of affirmative action.[25] The decision is probably correct on its facts, but its *ratio decidendi* narrowed the scope of reasonable accommodation by regarding it as some form of "affirmative action" (and, therefore, suspect as preferential treatment) rather than as properly part of the non-discrimination standard. The confusion in the mind of the court itself is evident in the following passage:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens... *Thus situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.*[26]

The italicised portion suggests that the court could have disposed of *Davis* on its facts without muddying the waters of reasonable accommodation.

Subsequently, *Davis* was frequently distinguished by the lower courts and confined to its narrowest *ratio* to the effect that employers cannot be required to make accommodations, however reasonable, which would not assist the disabled person in any event.[27] In *Simon v St Louis County*, for example, a police officer was dismissed after becoming paraplegic, the employer arguing that he could not perform all the elements of police work, despite the fact that not all police positions required performance of all those elements. The contention was that he could be required to transfer from one job to another and, therefore, must be multi-capable. The court appeared unconvinced that this requirement was reasonable and of business necessity. Such a case was ripe for reasonable accommodation to be made. In *Strathie v Department of Transportation*, a hearing-impaired bus driver was dismissed because

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[25] (1979) 442 US 397 at 410-11.

[26] (1979) 442 US 397 at 412-13 (emphasis supplied). The court's reference to "technological advances" raises questions beyond the scope of this study. Technology not only provides new means for the accommodation of disabled workers, but the new technology industries create additional job opportunities for disabled persons. See generally: Hunt and Berkowitz, 1992.

[27] See for example: *Jasany v US Postal Service* (1985) 755 F2d 1244 (6th Cir); *Georgia Association of Retarded Citizens v McDaniel* (1983) 716 F2d 1565 (11th Cir); *Strathie v Department of Transportation* (1983) 716 F2d 227 (3rd Cir); *Stutts v Freeman* (1983) 694 F2d 666 (11th Cir); *Dopico v Goldschmidt* (1982) 687 F2d 644 (2nd Cir); *New Mexico Association for Retarded Citizens v New Mexico* (1982) 678 F2d 847 (10th Cir); *Bentivegna v Department of Labor* (1982) 694 F2d 619 (9th Cir); *Simon v St Louis County* (1981) 656 F2d 316 (8th Cir), *certiorari denied* (1982) 455 US 976.

he wore a hearing aid. The employer argued that passengers' safety could be endangered by the plaintiff losing his hearing aid, by the device suffering mechanical failure, by the driver choosing to turn down its volume to block out background noise, or by the driver being unable to localize sounds. The court, in remitting the case for a re-examination of the evidence, doubted whether reasonable accommodation had been made. The employer's fears could be met by the assurance that the driver would use a hearing aid built into his glasses, that he would carry spare batteries or submit the aid to periodic testing, that the device should be used at a preset volume, and that the driver's stereo aided-hearing be tested to determine his ability to locate sounds. In *Stutts v Freeman*, the employer had refused to promote a dyslexic person to the position of heavy equipment operator because a low score on a general aptitude test suggested that he would be unable to complete successfully a pre-promotion training course. The employer argued that it had attempted to make reasonable accommodation by trying to get access to earlier independent tests of the employee, which he said showed him to be of above average intelligence, and by attempting to have the aptitude test administered orally. The court held that these unsuccessful efforts did not amount to reasonable accommodation.

The Supreme Court did not get an opportunity to indulge in revisionism for almost 6 years. That chance came in *Alexander v Choate*.[28] The case concerned a challenge to Tennessee's proposed reduction in the number of days in a fiscal year that the state would pay hospitals on behalf of a Medicaid recipient. It was alleged that this would have a disproportionate impact upon disabled individuals and thus was discriminatory contrary to section 504. The district court had rejected the class action on the ground that section 504 did not address disparate impact discrimination. The federal appeal court rejected that view. The Supreme Court overruled the appellate court, assuming that section 504 did reach some forms of indirect discrimination but not the species of disproportionate effect alleged in Tennessee's budgetary prudence. The first question before the court was whether proof of discriminatory *animus* or intent is a necessary ingredient of section 504 or whether the provision also attacks discrimination against disabled people by effect rather than by design.[29] Marshall J for the court recognised that disability discrimination:

> was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign neglect...
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> In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed

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[28] (1985) 469 US 287; *sub nom Jennings v Alexander* (1981) 518 FSupp 877 (MD Tenn); (1983) 715 F2d 1036 (6th Cir).

[29] (1985) 469 US 287 at 292.

to proscribe only conduct fuelled by a discriminatory intent.[30]

However, the court could not accept that it followed that section 504 reached all actions having a disparate impact upon disabled people:

> Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden.[31]

The court was minded to balance the need to give effect to the objectives of section 504 and a desire to keep it within manageable bounds. So, having assumed that section 504 did capture some instances of indirect discrimination, what instances were within "manageable bounds"? This would require the revisiting of *Davis* and the court chose to start with its almost final words cited above.[32] This allowed the court in *Choate* to explain *Davis* as striking a balance between the legal rights of disabled people to social integration and the legitimate interests of businesses and institutions to preserve the integrity of their activities. Thus:

> while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones.[33]

Disabled persons are entitled to be given meaningful access to a benefit, such as training or employment, and reasonable accommodation may be necessary to assure such access. The benefit cannot be defined in a way that effectively blocks access to it for disabled persons.

Although the disabled class action in *Choate* did not succeed on its facts, it did much to restore the standing of reasonable accommodation. This process was continued in *School Board of Nassau County, Florida v Arline*.[34] The plaintiff school teacher had suffered relapses of tuberculosis contracted some years previously. She was dismissed on the grounds of her susceptibility to the disease. Her claim that this violated section 504 was rejected by

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[30] (1985) 469 US 287 at 295 and 296-7 (footnoted omitted).

[31] (1985) 469 US 287 at 298, citing *Harvard Law Review*, 1984: 1008 in support of this analysis of the problems of applying indirect discrimination theory in the context of employment discrimination against disabled persons.

[32] (1985) 469 US 287 at 300. See the italicised portion of the quotation in the text to footnote 26 above.

[33] (1985) 469 US 287 at 301.

[34] (1985) 772 F2d 759 (11th Cir); (1987) 480 US 273. The first instance decision is unreported.

the district court, which ruled that infection with a contagious disease did not bring her within the definition of the protected class and, even if it did, she was no longer "qualified" to teach because of her condition. The appellate court rejected the first finding and remitted the case for a rehearing as to whether the plaintiff was "otherwise qualified", with or without reasonable accommodation. On further appeal by the school board, however, the Supreme Court held by a majority that a person with a record of contagious disease was covered by section 504 and that tuberculosis was a protected disability.[35] The case was remanded for further findings as to whether the risk of infection, if any, rendered the plaintiff not "otherwise qualified" as a teacher. Brennan J, speaking for the majority, noted that:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.[36]

The rehabilitation of reasonable accommodation in the US was complete.

Canada[37]

The position of reasonable accommodation under federal Canadian law is not so secure. Although employers are permitted to take special action to prevent, eliminate or reduce disadvantage faced by disabled individuals in employment opportunities,[38] this provides blessing only to voluntarily conceded reasonable accommodation. The federal legislation does not contain an express reasonable accommodation requirement and, furthermore, an employer might defend an employment decision based on disability if it can be shown to have been informed by the need for a "*bona fide* occupational requirement".[39] This combination was interpreted in *Bhinder*, a case of religious discrimination, as excluding any duty of reasonable accommodation and any requirement of an individualised assessment of the impact of an employer's policy or practices upon an identifiable group of workers.[40] The decision was

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[35] The minority held that the dismissal was by reason of contagiousness rather than impairment and that contagiousness in itself was not a disability.

[36] (1987) 480 US 273 at 289 n[19].

[37] See generally: Ratushny, 1986; Barrett, 1989; Taras, 1992.

[38] (Can) HRA s 16(1).

[39] (Can) HRA section 15(a). This section also includes exceptions based on the age of an individual (*eg* in respect of retirement or pensions). Federal Bill C-108, introduced in December 1992, will amend the (Can) HRA so as to require employers to make reasonable accommodation for the needs of protected minorities, including disabled persons.

[40] *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can) SC.

attacked in many quarters, not least by the Canadian Human Rights Commission, which declared:

> The effect of the *Bhinder* decision is to... put the Commission's ability to achieve its legislatively-defined objectives in doubt. This can mean, for example, that workplaces may not have to be modified to enable disabled individuals to earn a livelihood...[41]

Some commentators argued that this interpretation would not be applied in disability discrimination cases because, unlike religious or racial groups, disabled persons were not a homogenous class and so as a matter of necessity had to be treated on an individual basis.[42] In *O'Malley*,[43] another religious discrimination suit, the Supreme Court had ruled that in cases of adverse effects discrimination employers *are* required to attempt reasonable accommodation of an individual discriminated against by the effects of a *bona fide* occupational requirement or rule. Although a duty to accommodate was not part of human rights law, "it was introduced by the Supreme Court as part of the baggage of the concept of 'adverse effect' discrimination borrowed from the United States".[44]

The apparent contradiction between the positions of the Canadian Supreme Court in *Bhinder* and *O'Malley* was resolved in *Alberta Human Rights Commission v Central Alberta Dairy Pool*, a third religious observance case.[45] The Court ruled that in cases of direct discrimination, a work rule or condition that is a *bona fide* occupational requirement gives rise to no duty to accommodate the employee; if it is not a *bona fide* occupational requirement, then the question of accommodation does not even arise because the rule will be struck down as discriminatory. In contrast, in cases where a work rule has indirectly discriminatory effects, but is shown by the employer to be a *bona fide* occupational requirement, in order to be able to defend its use the employer has to show that there was a reasonable attempt to accommodate the plaintiff short of undue hardship.[46] The compromise achieved in *Central*

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[41] Canadian Human Rights Commission, 1986: 4. See also: Berlin, 1985.

[42] See, for example: Barrett, 1989: 167-9, relying upon the earlier arguments of Gittler, 1978: 979.

[43] *O'Malley v Simpson Sears* (1985) 23 DLR (4th) 321 (Can SC). The case originates under Ontario's Human Rights Code.

[44] McKenna, 1992: 330.

[45] (1990) 72 DLR (4th) 417 (Can SC), a decision under Alberta's Individual Rights Protection Act. For a commentary on the case see: Vizkelety, 1991; Tara, 1992.

[46] For a discussion of this decision and the different approaches of the majority and the minority in the court, see: McKenna, 1992: 334. The minority (concurring in the result) argued that reasonable accommodation was a necessary part of establishing that an occupational requirement was *bona fide* in the first place in both direct and indirect discrimination.

Alberta Dairy Pool is still less than satisfactory, however, and McKenna, for example, has proposed that Canadian legislation should be amended to impose a positive duty of accommodation upon employers in all cases of discriminatory treatment or impact (subject to an undue hardship defence).[47]

The tensions inherent in the trilogy of Canadian Supreme Court decisions are likely to be replicated in provincial human rights statutes that contain an express *bona fide* occupational requirement exception without a countervailing reasonable accommodation duty. Nevertheless, *Central Alberta Dairy Pool* arose under Alberta's Individual Rights Protection Act and the Supreme Court's resolution of that litigation should go some way towards plugging the gap in provincial laws. A better approach, however, is that adopted in those provinces that spell out the clear distinction between direct and indirect discrimination and that require employers to make reasonable accommodation.[48] In spite of this, many argue that employment equity laws provide a more proactive solution by providing a framework in which institutionalised discrimination can be removed by collective positive action.[49] Canada's Employment Equity Act 1985 and Ontario's Pay Equity Act 1987 are often cited as model measures in this regard.[50]

Australia

The incongruities witnessed in Canadian jurisprudence on reasonable accommodation are also evident in the Australian case law. The leading decision in Australia is the disability discrimination case of *Jamal v Secretary, Department of Health* under the (NSW) ADA 1977.[51] The plaintiff was a doctor with a visual disability caused by bi-lateral cataracts. This resulted in an inability to perform work tasks such as fine suturing and night driving which were both job-related requirements. He had been refused employment at a hospital because of his inability to carry out the full range of tasks required to be performed. The NSW EOT found unlawful discrimination and held that the respondent employer had failed to prove that

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[47] McKenna, 1992: 336-7.

[48] See, for example: (Man) HRC s 9(1)(d) in combination with s 9(3); (Ont) HRC s 11 in combination with s 17. Ontario's HRC requirements are supplemented by guidelines to employers for the assessment of reasonable accommodations for disabled workers: Ontario Ministry of Citizenship, 1989.

[49] McKenna, 1992: 338.

[50] The role of employment equity legislation is discussed in Chapter XVI below.

[51] (1986) AILR ¶433 and (1986) EOC 92-162 (NSW EOT); (1987) AILR ¶280 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

the plaintiff was unable to fulfil the *essential* requirements of the job or that the provision of any services or facilities required was not reasonable in the circumstances. The plaintiff could have walked or might have been driven by another colleague, while the fine suturing was an infrequent element of the work in question and could be undertaken by another doctor if it did arise.

That decision was overturned on appeal. Hunt J in the NSW Supreme Court held that section 49I of the NSW ADA 1977 did not require the employer to redefine the work to be performed. That section states that, in determining who should be offered employment, an employer is permitted to discriminate on the ground of disability if:

> with respect to the work required to be performed in the course of the employment or engagement concerned, it appeared to the employer..., on such grounds as, having regard to the circumstances of the case, it was reasonable to rely, that the... handicapped person, because of his... impairment- (a) would be unable to carry out that work; or (b) would, in order to carry out that work, require services or facilities which are not required by persons who are not... handicapped persons and which, having regard to the circumstances of the case, cannot reasonably be provided or accommodated by the employer...[52]

In Hunt J's view, this entitled an employer to reject an application if it appeared that the applicant's physical impairment would result in an inability to carry out the work or would require the provision of special facilities which would be unreasonable in the circumstances. It was for the employer to decide whether services or facilities could be reasonably provided. Section 49I was not a charter for affirmative action.[53]

Astor comments that the decision of Hunt J in *Jamal* created "significant problems for the employment prospects of people with disabilities" and demonstrated "how a well intentioned and much needed piece of legislation can rapidly become almost useless to help those it was designed to protect".[54] The result of *Jamal* would be to require disabled applicants for employment to demonstrate at the first hurdle that they are able to perform *all* the elements of the job in comparison with their able-bodied competitors. If they cannot perform all the elements of the position *as described by the employer*, or can do so only by adjustments to the manner or extent of performance, then the employer will not have treated them less favourably than in similar circumstances non-disabled persons would have been treated. They would have been treated differently because their inability to do the work without

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[52] (NSW) ADA 1977 ss 49I(1) and 49X(1).

[53] Thus Hunt J falls into the same trap as the US Supreme Court in *Davis* by assuming that reasonable accommodation is some form of preferential treatment.

[54] Astor, 1988: 79.

accommodation was a material difference in the circumstances. Section 49I would not need to be considered because it merely provides an employer with a defence and does not import any, or even the most minimal, requirement of reasonable accommodation. The Act would then only protect a disabled applicant who is automatically rejected for employment by an employer whose prejudice against disabled applicants is intentional and manifest. Section 49I(b) would be rarely relevant, if at all, as a disabled person who surmounts the hurdle in section 49I(a) must have been capable of doing the job without any accommodation. Where section 49I was relevant, it would be the employer's judgement of what accommodation was reasonable that would matter.

Fortunately, some of the reasoning, but not the decision, of Hunt J was subsequently overturned by the NSW Court of Appeal, having first reviewed the background to and purposes of the legislation prohibiting employment discrimination on the ground of physical disability. Kirby P, the presiding appellate judge and giving the leading judgment, relied upon the reasoning of the US Supreme Court in *Alexander v Choate*,[55] together with the report of the NSW Anti-Discrimination Board upon which the law reform was based and the parliamentary debates which preceded the legislation.[56] He ruled that, unless section 49I is construed as part of the provisions prohibiting disability discrimination, the effectiveness of the legislation would be nullified and section 49I would be virtually redundant. However, Kirby P then agreed with Hunt J that the statute required a global approach to the consideration of what was the work which the job required to be performed, as defined by the employer. There was no mandate in the Act which called for the employer to consider only whether an applicant could perform the *essential* elements of the job: an applicant's ability to perform the job as a whole was a relevant criterion upon which to base an employment decision. If the applicant could not perform all the elements of the job then, and only then, was the inquiry to be directed to whether the job could be carried out with reasonable accommodation. Finally, the judge agreed that the consideration of whether an accommodation was reasonable or not was a matter for the subjective judgement of the employer.

Thornton, commenting upon the Court of Appeal decision in *Jamal*, concludes that:

> The deference to managerial prerogative in assessing an applicant's ability to perform all aspects of the job clinches the elusiveness of the legislation as a remedial tool for people with impairments... [There] is no attempt to read the section [section 49I] either in the light of the overall intention of the legislation or in the light of the

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[55] (1985) 469 US 287, discussed above.

[56] NSW ADB, 1979 and 1981.

> employment problems arising from the ground of impairment... Strict literalism will always operate to legitimate the employer's decision and thereby retain the status quo.[57]

Waters observes that the net result is that the legislation:

> may be of limited assistance to individuals whose handicaps have some moderate impact on their work capacities, but it is unlikely to be of much assistance to the more significantly impaired.[58]

He points out that *Jamal* is likely to influence the course of reasonable accommodation in those Australian jurisdictions, such as Western Australia,[59] whose comparable statutes are modelled upon the NSW template. Waters is more optimistic that the more objective language of the Victoria and South Australia legislation will produce a more flexible approach to reasonable accommodation in line with developments in the US.[60] However, the Victorian legislation, like that of NSW and Western Australia, fails to express reasonable accommodation as a positive obligation, but rather incorporates reference to it as part of the excusatory language of the exception clauses where discrimination is *permitted*; a flaw that is carried forward into recent Commonwealth legislation.[61] This is hardly calculated to raise reasonable accommodation as a priority in the minds of employers.[62] The error of drafting is perpetuated solely because disability is treated as merely one of a number of prohibited grounds of discrimination in a statutory context where the paradigm is one of equal treatment. The concept of reasonable accommodation of disabled persons fits uneasily into such a model.[63]

LIMITS OF REASONABLE ACCOMMODATION

As we have seen, the mandating of reasonable accommodation of disabled persons in the workplace has been capricious in the jurisdictions that have moulded the anti-discrimination principle to fit the experience of disability. The combination of political reticence, poor legal

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[57] Thornton, 1990: 114.

[58] Waters, 1990: 404.

[59] (WA) EOA 1984 s 66Q which is based on s 49I of the NSW Act.

[60] (SA) EOA 1984 ss 66(d) and 71(2), as amended in 1989; (Vic) EOA 1984 s 21(4)(g). See the concurring view of Astor, 1990: 122.

[61] (Cth) DDA 1992 15(4).

[62] This criticism of weak draftsmanship is echoed by Johnstone, 1989: 729.

[63] This criticism is made more cogently by Nothdurft and Astor, 1986: 340-1 and by Astor, 1990: 119. The NSW ADB has recommended in its annual reports that the NSW ADA 1977 should be amended to include a positive obligation to make reasonable accommodation, subject to undue hardship, along American lines.

draftmanship and antipathetic judicial reasoning has placed unnecessary limitations upon what should be the most incisive weapon in the fight against disability discrimination. The honourable exception, of course, is recent federal enactments in the US (and the remaining discussion in this chapter will focus upon the US model), but even here some boundaries have necessarily been placed upon the concept of *reasonable* accommodation. Employers are not expected, nor should they be, to accommodate without regard for their own self-interest; but how is legitimate self-interest to be recognised?

Undue hardship defence

In the US, a failure to make reasonable accommodation is subject to the defence of "undue hardship".[64] If the employer can demonstrate that the proposed accommodation would cause undue hardship to the operation of the business, a failure to provide accommodation is not discriminatory. In considering what would amount to undue hardship, the nature and cost of the accommodation should be looked at.[65] The availability of grants from public funds to meet the expense of the accommodation will thus be significant. The effect of the accommodation on the workplace should be examined in the context of its financial resources, its workforce, its expenses, and the impact upon the operation of the site. Nevertheless, in many cases, especially where the employer is part of a corporate group, it may be necessary to widen the inquiry so as to consider the employer's overall financial resources, the overall size of the business, the type of operation, and the overall composition, structure and functions of the workforce. Otherwise, there is a danger that a parent company might prefer to close a small or isolated branch or site rather than incur investment costs in making reasonable accommodation or, alternatively, might argue that compliance with reasonable accommodation will result in job losses. On the other hand, the EEOC regulations certainly contemplate that the question of undue hardship may be site-specific in certain circumstances. For example, a franchisee operating an independently-owned fast-food unit, and receiving no financial assistance from the franchiser, will not be judged by the resources of the overall franchise venture.[66]

The burden of proof should be upon the employer to demonstrate undue hardship. The employer is simply in a better position to know what the job involves, to assess the options for accommodation, to apply the experience of other employers in like circumstances, or to

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[64] See, for example, under the (US) ADA 1990: 42 USC §12112(b)(5); Gardner and Campanella, 1991.

[65] 42 USC §12111(10).

[66] 29 CFR §1630.2(p) Appendix. See also: Shaller and Rosen (1991: 419).

seek the advice of specialist agencies. What amounts to "undue hardship" is a question of fact to be decided on the individual merits of the case; but the American legislation defines undue hardship as an action requiring significant difficulty or expense. What is a significant difficulty or expense is relative to the employer in question. The issue of how far accommodations should go - or what accommodations it is reasonable to make - was tackled in the leading case of *Nelson v Thornburgh*.[67] This was a decision cited with approval by Congress during the ADA debates.[68] A number of blind employees were held entitled to be accommodated by the provision of readers, braille forms and a braille-compatible computer. The cost of these accommodations was not insubstantial. However, in the context of the size of the programme, the employer's operation and the composition of the workforce, the cost was a mere fraction of the employer's personnel budget and, therefore, quite reasonable and not an undue hardship. The decision would clearly have been otherwise if the employer in question had been a small business with limited resources. The ADA regulations give the additional example of a visually-impaired person applying for a position as a waiter in a dimly lit nightclub. The request that the club should be brightly lit as a reasonable accommodation to assist the applicant to perform the essential elements of the job will not involve the employer in any great expense. However, the accommodation is not reasonable if as a result the ambience of the nightclub is radically changed.[69]

A costs ceiling or efficiency defence?

Despite, or maybe because of, the flexible approach in *Nelson*, subsequent cases, although demonstrating consistency of approach, do not always reveal consistency of outcome.[70] In addition, the flexibility of the undue hardship standard caused concern to many American employers. As Feldblum recognizes:

> Understandably, businesses want certainty; it is hard for an employer to imagine providing reasonable accommodation if the employer can never be sure whether a particular accommodation would ultimately be required under the law or not.[71]

Furthermore, the right to reasonable accommodations for disabled persons inevitably entails expense for employers. Thornburgh points to the need for employers to offset such costs

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[67] (1983) 567 FSupp 369 (ED Pa), *affirmed* (1984) 732 F2d 146 (3rd Cir), *certiorari denied* (1985) 469 US 1188. See Schreiber, 1984; Janis, 1986. See also: *Gardner v Morris* (1985) 752 F2d 1271 (8th Cir).

[68] US House of Representatives, 1990b: 41. See Mayerson, 1991b: 519.

[69] 29 CFR §1630.2(p) Appendix.

[70] Dolatly, 1993: 537.

[71] Feldblum, 1991c: 95.

against the benefits that can accrue at large.[72] Not only does the employer gain access to an enlarged pool of labour, but many accommodations in the workplace benefit existing employees as well. Besides, the ADA 1990 mandates the provision of technical assistance by the state for employers willing to employ disabled workers. In any case, there is no reason why the costs of accommodating disabled persons in the workplace should be onerous or cannot be subsumed within existing budgets supporting the needs of other workers.[73]

In the US, 75 per cent of employers said that the average cost of hiring a disabled person was about the same as that for a non-disabled person.[74] Nevertheless, American businesses argued that a cost ceiling should be placed on any accommodation. Ten per cent of the annual salary of the job in question was suggested. This was rejected as tending to focus insufficiently on the employer's resources and producing a low threshold of accommodation for jobs attracting low pay.[75] A cap of 10 per cent of the employer's gross income would take no account of whether the employer's other expenses had been particularly burdensome or not that year, while a limit of 10 per cent of net income would allow employers too much discretion to allocate income to other expenses, whether or not these had a social utility. The cost of an accommodation should not be relevant to the employer's defence, in any case, where external funding or assistance is available.[76] In any event, if outside funding is unavailable and the cost of an accommodation would otherwise be an undue hardship, the disabled individual might be allowed - although never required - to contribute to the *net* cost of the accommodation. That means that the disabled person may be allowed to pay the proportion of the cost that is attributable to undue hardship and which has not been recoverable through an alternative funding source.[77]

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[72] Thornburgh, 1991.

[73] Job Accommodation Network, 1987; Du Pont and Company, 1990.

[74] Louis Harris and Associates, 1987: 9. See also: US Commission on Civil Rights, 1983: 106-8; National Council on the Handicapped, 1988: 15.

[75] Jones, 1991a: 484; Mayerson, 1991b: 518.

[76] 29 CFR §1630.2(p) and Appendix (for example, in the form of tax credits or a vocational rehabilitation agency grant). To support employer efforts of compliance with the ADA 1990, the US Congress also fine-tuned the tax code so as to allow businesses some relief for ADA-related expenditure: Schaffer, 1991. Note also the provisions for financial support and technical assistance from federal agencies authorised under the ADA to assist employers to better comprehend and comply with their obligations under the Act: ADA §506; 42 USC §12206 (and see also: 29 CFR §1630.9(c)).

[77] 29 CFR §1630.2(p)(2)(i) and Appendix.

The costs and efficiency argument remains at the heart of the debate about reasonable accommodation requirements. Writing from an economist's perspective, Collignon comments:

> Unlike other provisions that focus on the fact that disabled persons may be just as productive as other potential workers, the accommodation provision recognizes that some disabled persons will *not* be as productive as other workers *unless* the accommodation occurs.[78]

This means that an accommodated disabled worker will potentially cost the accommodating employer more to employ than a non-disabled worker (or a disabled worker who does not require accommodation). It would be tempting to reflect this extra cost by depressing the wage received by the accommodated worker or to demand higher productivity from him or her to offset the cost. Moreover, that in turn would produce a separate act of discrimination informed by the worker's disabled status. However, society undoubtedly receives some benefit from the accommodation - a reduction in the social security burden, an additional contributor to the gross national product, a further source of income tax revenue, etc - but it is the individual employer who bears the cost of producing these social gains. In theory, an employer cannot seek to pass on these costs in higher prices because the competitive product market militates against such a solution. Accordingly, an employer who is committed to making reasonable accommodation will do so at the expense of profit margins. This will act as a disincentive to employers at large adopting positive policies towards disabled workers and will give an incentive to a minority of employers to look for loopholes or ways around any duty to make reasonable accommodation.[79] That argument becomes less convincing, however, if there is a general duty to accommodate placed upon all employers. Then the costs of accommodation can be passed on to the consumers in increased prices, or to the taxpayer if the costs of accommodation would qualify for tax credits or favourable tax treatment.[80]

Collignon himself rebuts these arguments.[81] First, he points out that an accommodation can improve general production efficiency by improving the working environment and practices of all workers in the workplace. As a result, the true cost of an accommodation should be calculated across all the employer's workers and should be discounted to reflect any marginal benefits which accrue to all. Second, the cost of accommodating the disabled individual will

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[78] Collignon, 1986: 206 (emphasis in the original).

[79] Collignon, 1986: 207.

[80] See Schaffer, 1991.

[81] Collignon, 1986: 207-11. At least one health economist takes a diametrically opposed set of views. Chirikos (1991) argues that the ADA 1990 will lead to more *severely* disabled persons entering employment and that they will require expensive accommodations.

be quickly written off by the evidence which supports the view that disabled workers experience lower turnover, less absenteeism and greater loyalty to employers than non-disabled workers. There might even be gains in higher productivity. Third, accommodation of a disabled worker with special skills in short supply will be self-justifying. Many highly skilled jobs are often designed around the person best qualified for the position, in any case, without such designs being labelled "accommodations". Fourth, for the employee who becomes disabled on the job, and for whose disabilities the employer would be liable, there are compelling reasons to accommodate the employee in order to maintain their employment and reduce compensation costs.

REASONABLE ACCOMMODATION IN ACTION

The reasonable accommodation provisions of the ADA 1990, although welcomed, have also attracted predictions of practical problems and litigious issues.[82] It is less the broad scope of the Act and more the generality of its requirements that informs such concerns. It would seem that many of these problems and issues will have to be resolved by case law, which in turn will undoubtedly produce uncertainty and inconsistency.[83]

Examples of reasonable accommodation

In the US legislation, reasonable accommodation includes:

> making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and... job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[84]

The ADA 1990 regulations categorise reasonable accommodations in three ways. First modifications or adjustments to the job application process may be necessary to enable a qualified disabled applicant to be considered for the position.[85] Second, reasonable accommodation may need to be made to the working environment, or to the manner and circumstances in which the job is customarily performed, in order to allow a qualified disabled

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[82] See for example: Barnard, 1990; Cooper, 1991; Lavelle, 1991; Murphy, 1991; Shaller, 1991; Stuhlbarg, 1991; Weirich, 1991; Stine, 1992; Schiff and Miller, 1993; Dolatly, 1993. Some commentators have been hostile to the reasonable accommodation requirement: Holtzman *et al*, 1992.

[83] Dolatly, 1993: 544.

[84] 42 USC §12111(9). See further: Cooper, 1991; Weirich, 1991.

[85] 29 CFR §1630.2(o)(i).

employee perform the job's essential functions.[86] Third, so as to enable a disabled employee enjoy employment benefits and privileges in equal opportunity with other similarly placed (but non-disabled) employees, it may be necessary to make further modifications or adjustments.[87]

Job restructuring entails the reallocation or redistribution of non-essential or marginal functions, or the alteration of the performance of an essential function. It should not involve a fundamental alteration of the position's particular requirements.[88] The regulations cite with approval the example of *Coleman v Darden*,[89] a case where an employer refused to hire a visually impaired applicant for the position of research analyst, having concluded that the possible accommodation of appointing a reader to assist the applicant would not be reasonable as it would result in the duties of employment being largely performed by the reader and not by the applicant. Despite this, it is clear that the EEOC otherwise considers that the hiring of a personal assistant might be a reasonable accommodation in some circumstances.[90]

Unlike the RA 1973 and its regulations, the ADA 1990 explicitly includes reassignment to a vacant position as an example of reasonable accommodation.[91] As the original section 504 model regulations defined "qualified handicapped person" as a "handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question",[92] judicial interpretation was against job reassignment as reasonable accommodation. In *Carter v Tisch*,[93] the court held that a duty of reassignment, if any, could not be a reasonable accommodation if it flew in the face of a collective bargaining agreement. The plaintiff was thus denied reassignment to permanent light duties where such

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[86] 29 CFR §1630.2(o)(ii).

[87] 29 CFR §1630.2(o)(iii).

[88] 20 CFR §§1630.2(o)(2) Appendix and 1630.2(n) Appendix.

[89] (1979) 595 F2d 533 (10th Cir).

[90] 29 CFR §1630.2(o) Appendix (page turner for manually disabled employee or sight guide to assist blind employee during occasional business trips) but without further guidance.

[91] 42 USC §12111(9). See 29 CFR §1630.2(o)(2)(iii); *cf*, for example, 45 CFR §84.12 under the RA 1973. The doubts about whether reassignment was a required form of reasonable accommodation under the pre-1990 law are explored by Tate (1989).

[92] 45 CFR §84.3(k)(1).

[93] (1987) 822 F2d 465 (4th Cir).

positions were reserved under the collective agreement according to seniority, a condition which the plaintiff did not satisfy. The same result was reached even in the absence of a collective bargaining agreement in *Carty v Carlin*,[94] where the court thought that the absence of reassignment among the enumerated forms of reasonable accommodation in the relevant regulations was significant. Furthermore, another court held that "job restructuring", an explicit form of reasonable accommodation under the regulations, did not connote reassignment to a different job.[95] However, according to the Supreme Court decision in *School Board of Nassau County, Florida v Arline*,[96] if other employees were given the option of reassignment under the employer's existing personnel policies then, as a matter of equal treatment or non-discrimination (rather than as a matter of reasonable accommodation or affirmative action), a disabled person should also be offered reassignment.

These difficulties should be avoided under the ADA 1990, which not only expressly includes reassignment as a means of reasonable accommodation, but also defines "qualified person with a disability" in a way which makes it clear that it is not only the person's current job which must be considered.[97] Mayerson adds that the legislative history of the ADA 1990 makes it clear that employers cannot use collective bargaining agreements to circumvent the objectives of the legislation,[98] although whether such agreements could be used for determining whether the accommodation was reasonable or not (for example, by articulating job-related standards for the position subject to the reassignment question) remains to be seen. The EEOC regulations under the ADA merely state that collective agreements may be relevant for determining whether an otherwise reasonable accommodation would constitute an undue hardship.[99] In any event, reassignment need only be considered in respect of positions for which the disabled person is qualified. If a vacant position is not immediately

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[94] (1985) 623 FSupp 1181 (D Md).

[95] *Alderson v Postmaster General* (1984) 598 FSupp 49 (WD Okla).

[96] (1987) 480 US 283.

[97] 42 USC §12111(8) defining a qualified disabled person as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires". *Cf* 45 CFR §84.3(k)(1) defining a qualified handicapped person as a "handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question".

[98] Mayerson, 1991b: 515.

[99] See further on this point Shaller and Rosen, 1991: 419. The interaction of the reasonable accommodation mandate and collective bargaining agreements is expected to cause much confusion and scope for litigation. See generally: Ervin, 1991; Smith, 1992; Mello, 1993; Stahlhut, 1993.

available, reassignment should only be considered if the employer knows of a position which will become vacant within a reasonable time (say, a period of a few weeks). It is also permissible to reassign to a job at a lower grade if the employee cannot be accommodated in the present job and there are no equivalent vacant positions. Ideally, the salary of the disabled employee should be "red-circled" or maintained at its present level, but only if red-circling would also occur upon reassignment for other reasons.[100] Reassignment should not be in itself a cause of disability discrimination. Reassignment of disabled employees to segregated or undesirable work militates against the general principles of the Act.[101]

Alongside job restructuring or reassignment, the ADA 1990 also contemplates the acquisition or modification of equipment or devices as a reasonable accommodation. Reasonable accommodation could be made in the form of adaptive equipment or software to enable a disabled employee to undertake the work, albeit in a different manner.[102] The regulations further provide that disabled employees must be allowed to use their own equipment, aids or services, even if the employer would not be required to provide them as a reasonable accommodation. It is unlikely, for example, that an employer would be required to provide a visually impaired employee with a guide dog, but should be prepared to allow such employee to use his or her own guide dog in the workplace.[103]

Implementing reasonable accommodation

What will amount to appropriate accommodation will be an individualized question. The interpretation of what amounts to reasonable accommodation will be a question of fact and will necessarily vary from individual case to case.[104] In West's view:

> Unlike race and gender, ...disability is often a dynamic and changing characteristic. A disability that may require no accommodation in one situation may demand complex technological intervention in another. Furthermore, some disabilities change in their intensity from day to day or week to week and may require different

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[100] 29 CFR §1630.2(o) Appendix.

[101] 29 CFR §1630.5.

[102] Jones, 1991a: 483; Mayerson, 1991b: 510.

[103] 29 CFR §1630.2(o) and Appendix.

[104] This is the view taken under the comparable provisions of s 504 of the RA 1973: *Alexander v Choate* (1985) 469 US 287; *Southeastern Community College v Davis* (1979) 442 US 397. Reasonable accommodation of individuals with certain types of disabilities (such as mental disabilities, alcoholism, drug dependence or substance abuse) will challenge the imagination of employers, but does not necessarily present insuperable difficulties: Haggard, 1993. The focus upon an individualised inquiry means that employers must not make assumptions about the possibilities (or impossibilities) of reasonable accommodation.

> accommodation at various times. The same impairment often affects individuals differently. A critical aspect of accommodations is flexibility.[105]

Feldblum argues that:

> The basic characteristic of a reasonable accommodation is that it is designed to address the unique needs of a person with a particular disability.... The underlying goal is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job, and then to determine if there are any modifications or adjustments to the job environment or structure that will enable the person to perform the job.[106]

The legislative history of the ADA 1990 makes it clear that the search for reasonable accommodation should result from a dialogue or consultation between employee and employer.[107] Congress suggested a four step procedure and this is now reflected in regulations.[108]

First, in order to identify the barriers to equal opportunity, the essential and non-essential elements of the job and the abilities and limitations of the worker must be determined. Second, by consulting the employee and then external sources of expertise, the employer should identify possible accommodations. Third, the employer must assess the "reasonableness" of the possible accommodations, weighing both how effective the accommodation might be and whether it will promote equality of employment opportunity for the individual. Fourth, the employer must select and implement the most appropriate accommodation, subject to the "undue hardship" considerations. Mayerson writes:

> In the light of this structure, the governing principle in determining an appropriate reasonable accommodation is whether it provides the person with the disability an opportunity to attain the same level of achievement as a person with comparable ability and without a disability.[109]

Of course, disabled persons can refuse a proffered reasonable accommodation, but might thereby disqualify themselves from protection under the Act.[110] Equally, an employer cannot be expected to make reasonable accommodation for disabilities of which the employer is unaware. If an accommodation is necessary, the disabled person must draw this to the

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[105] West, 1991b: 8-9.

[106] Feldblum, 1991c: 93-4.

[107] US Senate, 1989: 34-35; US House of Representatives, 1990a: 66; US House of Representatives, 1990b. See the EEOC regulations to the same effect: 29 CFR §1630.2(o)(3).

[108] 29 CFR §1630.9 Appendix.

[109] Mayerson, 1991b: 516.

[110] 29 CFR §1630.2(o) Appendix.

employer's attention; alternatively, the employer may ask whether reasonable accommodation is required.[111] In this latter situation, the employer walks a tightrope because such an inquiry needs to be framed without reference to disability in order not to fall foul of the general prohibitions on disability-related questions.[112]

Extent and experience of reasonable accommodation

Undoubtedly, employers' willingness to make reasonable accommodations increases a disabled person's chances of working.[113] In the US, the evidence suggests that 35 per cent of disabled workers with employment experience had encountered employers who were prepared to make some accommodation in the workplace.[114] LaPlante projects that some 23 per cent of disabled persons, who report being unable to work, would be able to work if employers were amenable to accommodating them in the workplace environment.[115] He also forecasts that up to 44 per cent of disabled persons, limited in the kind or amount of work that they can do, would enjoy increased employment opportunity if the working environment was to be more adaptable. However, research points to a clear correlation between size of employer, propensity to recruit disabled employees and likelihood of undertaking expensive accommodations. One survey found that the participation of disabled workers in the respondents' labour forces was 2.5 per cent, but for larger firms this participation rate was 3.5 per cent.[116] This leads Collignon to observe that:

> efforts to expand the employment of disabled individuals, especially those requiring accommodation, might wisely be focused on larger firms, rather than on the small business sector.[117]

That observation is borne out by a survey of accommodations in the small business sector. It found few examples of expensive accommodations and that employers made appeals to constraints on management time as an explanation for lack of action.[118]

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[111] 29 CFR §1630.9. An employer might request documentary evidence of the need for the accommodation.

[112] Frierson, 1992b.

[113] Nagi, 1975.

[114] LaPlante, 1991: 71.

[115] LaPlante, 1991: 71.

[116] US Department of Labor, 1982.

[117] Collignon, 1986: 217.

[118] Premus and Carnes, 1982.

American employers' fears that reasonable accommodation requirements would entail frequent and costly actions is not borne out by the evidence.[119] In one US study of the placement of severely disabled persons in federal government employment, less than 16 per cent of such persons required accommodation and, in the main, such accommodations as were required were incidental.[120] This finding was also corroborated by an investigation into compliance with section 504 of the RA 1973 by public agencies.[121] A further large scale study was undertaken of private sector employers contracting with the US federal government and, therefore, subject to section 503 of the RA 1973.[122] About 55 per cent of respondent employers had experienced the need to make reasonable accommodation for disabled workers, 17 per cent employed disabled workers without accommodation, and 28 per cent had no record of employing disabled persons. As to costliness, the consistent finding of detailed surveys of employers has been that expensive job modification or accommodation is rarely needed by disabled workers.[123] In one survey, just over half of reported accommodations cost nothing, a further fifth cost less than $100 (at 1982 prices), while four-fifths of accommodations cost less than $500.[124] A 1987 study found that 50 per cent of accommodations cost less than $50 and 69 per cent cost less than $500.[125]

The types of accommodations reported by federal contractors were manifold and no particular example emerged as commonplace. Most workers required more than one accommodation, and there was a tendency for the more expensive accommodations to be targeted at the more skilled workers and at those whose disability was particularly handicapping (blind workers and

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[119] See generally: Combs and Omvig, 1986.

[120] O'Neill, 1976.

[121] Johnson and Associates, 1980.

[122] US Department of Labor, 1982.

[123] Collignon, 1986: 211. Burkhauser (1990), however, has argued that the costs of reasonable accommodation will be sizeable, but he argues in this way because he believes that the ADA 1990 cannot be made to work unless the federal government is willing to finance the implementation of the legislation from public expenditure. His position can be expected to be bolstered by the arguments of Chirikos (1991) referred to in footnote 81 above.

[124] US Department of Labor, 1982: Vol 1, 29; Collignon, 1986: Table 8.1.

[125] Job Accommodation Network, 1987. Less than 1 per cent of accommodations cost over $5,000. The JAN was established in 1984 by the President's Committee on Employment of Persons with Disabilities. It provides a national data bank of over 20,000 examples of successful accommodations and its expertise is available to employers seeking advice about possible accommodations (Hearne, 1991: 126).

wheelchair-users). Provision of special equipment or adaptations to the workplace tended not to be aimed at less skilled workers, for whom job redesign, retraining and selective placement were more usual accommodations.[126] The chance of a worker being accommodated for disability would be greater if the worker became disabled on the job or while in employment rather than being disabled already at the time of recruitment. Interestingly, one-fifth of disabled employees in firms covered by the survey reported unmet needs for accommodation. The same percentage (although not necessarily the same respondents) reported that accommodations made had improved their career potential. Thirty per cent of employers thought that accommodations had improved disabled workers' career mobility and advancement. Exactly one half of respondent employers concluded that making accommodations had increased productivity, while 39 per cent felt that the costs of accommodation had been more than covered by the benefits of accommodation.[127]

A limitation of many of these surveys (apart from the usual socio-methodological ones) is the difficulty in judging how accurate the data responses are. Information about the costs of accommodations may not be stored or collated methodically. Respondents may be unaware of many inexpensive or marginal adjustments made to working practices or the workplace.[128] This under-reporting can be exacerbated by the fact that many workers do not identify themselves as disabled and thus the making of accommodations cannot be linked with them. Furthermore, management respondents tend to measure the costs of accommodations only in terms of direct expense. Little, if any, account is taken of indirect costs (or opportunity costs), such as management time, internal labour costs involved in constructing or adapting accommodations, or materials costs where these are subsumed within existing maintenance budgets. The true costs of reasonable accommodations must account for these items.

BRITISH EMPLOYERS AND REASONABLE ACCOMMODATION

Reasonable accommodation of disabled applicants and employees is not a legal requirement in Britain. If law reform were to make it so, one might expect an outcry from employers, arguing that it imposes upon them undue regulation and a further burden on business. The arguments that greet disability rights legislation elsewhere would be rehearsed. Nonetheless, the evidence suggests that many British employers already practise elective reasonable accommodation and that compulsion would cause many businesses little concern.

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[126] US Department of Labor, 1982: Vol 1, 56-57 and 66; Collignon, 1986: 217-27.

[127] Collignon, 1986: 228-9.

[128] Collignon, 1986: 214.

For example, in research carried out in the late 1980s, about 30 per cent of British employers had experienced an employee becoming disabled while in their employment in the previous 2 years. In about two-fifths of cases, the newly-disabled employee had been retained in employment, with or without retraining or accommodation, via shorter hours or modified workload. However, about one-fifth were absent on long term sick leave and, in the remaining two-fifths of cases, the employee had left or retired or could not be accounted for.[129] Among employers who were employing disabled workers generally, approximately 20 per cent of establishments reported undertaking job restructuring to accommodate disability. Special training or retraining was mentioned by about 15 per cent of establishments, and the same percentage of employers made changes to existing equipment or furniture. Superficial adaptations of premises were necessary in 16 per cent of cases, and structural adaptations to premises were attempted in about 12 per cent of cases. Granting extra time off or instituting a shorter working day for the disabled worker was mentioned in about 11 per cent of instances, with flexible working hours being a feature of about 10 per cent of examples of accommodations.[130]

The SCPR survey found that 10 per cent of economically active, occupationally handicapped respondents had a need for special equipment or aids. Such need was greatest among those in professional and related occupational groups, and for those respondents with sight disabilities, hearing impairment or mental handicaps.[131] Some 8 per cent of respondents presently in work indicated that there was special equipment that they did not possess, but that would help in their job. Again, this report was highest among those in the professional and related occupational groups, and among those with the disabilities involving sight, hearing or mental handicaps (including, on this occasion, mental illness or nervous disorder).[132] Table XV shows the specific needs for aids and equipment that were mentioned by respondents. It is difficult to draw statistical conclusions from this table because, as Prescott-Clarke remarks:

> the range of items mentioned was wide, and this, coupled with the fact that the number naming *any* of them was small, makes it not very useful to break the results down very far.[133]

Nevertheless, it shows the type of needs that disabled workers might ask employers to

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[129] Morrell, 1990: Table 22.

[130] Morrell, 1990: Table 23.

[131] Prescott-Clarke, 1990: Tables 12.1 and 12.2.

[132] Prescott-Clarke, 1990: Tables 12.3 and 12.4.

[133] Prescott-Clarke, 1990: 139 (emphasis in original).

	All needs	Needs of those in work	Unmet needs of those in work
	%	*Numbers*	*Numbers*
Special glasses (not job specific)	1	7	-
Special glasses (job specific)	1	9	2
Hearing aids	1	16	8
Respiratory aids	1	13	4
Tilted desk	*	2	3
Special chair	1	4	12
Back support, brace, corset	1	9	4
Foot support	*	3	2
Special car	*	6	1
Special gloves	1	7	1
Lift in building	*	-	-
Lifting devices	*	4	12
Carrying barrow	*	2	2
Telephone aids	*	2	1
Special computers/fax	*	1	7
Other	1	11	13

Source: Adapted from Prescott-Clarke, 1990: Table 12.5

Table XV: Specific aids and equipment needed

accommodate and demonstrates that such needs are not overwhelming. In fact, it was calculated recently that the average cost of equipment supplied under the DE's Special Aids to Employment Scheme was £906 at 1993 prices.[134] Table XVI illustrates the extent and type of special needs of disabled persons in the SCPR survey in respect of access to and accommodation within the workplace. It shows that about 10 per cent of disabled workers would require accommodation in this area and that the most commonly mentioned accommodations were lifts and hand rails, followed by access ramps and special washroom facilities.

What percentage of disabled workers reported any accommodation of their disabilities by their employers? Using evidence from the OPCS surveys, Table XVII demonstrates that only slightly more than one quarter of disabled workers reported any accommodation of their disabilities by their employers, although 15 per cent thought that no provisions were necessary in any event. The most frequently reported accommodation was to allow a disabled worker time off or keeping the job open. Other examples of accommodation cited included job modification, provision of specially designed jobs, allowance of different hours, provision of special aids or equipment, arrangement of adaptations, modification of conditions, and provision of special training. Interestingly, among disabled workers reporting that their disability did not affect their current job, only 8 per cent replied that their employer had made provision for their disability and 24 per cent that no provisions were necessary.[135] Of those who said that their disability did affect the current job, 42 per cent said that their employer had made provisions for them and 8 per cent that provisions were unnecessary. The nature of the research data, however, means that it is impossible to explore the underlying causes of this finding or to draw broad conclusions from it.

As we saw in Chapter IV above, grants are available to British employers for adaptations to premises or equipment in order that disabled employees, who would otherwise have no chance of finding alternative work in the near future, might enjoy equal terms and conditions with able-bodied employees doing the same work. In addition, registered disabled employees may be lent special tools or equipment other than would be needed ordinarily by non-disabled co-workers. The employment of certain visually-handicapped workers is also encouraged by meeting in part the costs of providing part-time readers to assist them at work. The Job Introduction Scheme may also be seen as a measure of reasonable accommodation. This allows an employer to employ a disabled worker on a trial basis for up to 6 weeks with a

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[134] *Employment Gazette* Vol 101 N° 8 at 434 (September 1993).

[135] Martin, White and Meltzer, 1989: 84.

	Activity status					
	All	In work	Employee	Self-employed	Wanting work	Anticipating wanting work
	%	%	%	%	%	%
Access ramps	2	1	1	4	4	3
Lifts	5	3	4	3	8	6
Widened doorways	1	1	*	3	2	1
Height adjustment to equipment	1	1	1	3	2	1
Special washroom facilities	2	1	1	3	4	1
Hand rails	5	4	4	3	9	7
No special needs for access	91	92	93	90	88	86

Source: Adapted from Prescott-Clarke, 1990: Table 12.6

Table XVI: Special access and building needs

Whether employer has done anything to make it easier to work	Men	Women	All disabled employees under pension age
	%	%	%
Provisions made	30	23	27
No provisions needed	13	16	15
Nothing done	57	61	58
Total	100	100	100

Source: Adapted from Martin, White and Meltzer, 1989: Table 7.30

Table XVII: Whether employers have made provisions to help disabled employees under pension age

subsidy against the worker's wages. This applies to an existing, newly disabled employee or a potential employee introduced by a DRO (now PACTs) where there are doubts about the individual's employability. While the scheme is intended to assist the disabled worker's integration into the employer's core work-force, the worker may be dismissed if proving unsuitable for the job. A further measure of assistance is the Fares to Work scheme under which registered disabled workers may be given financial assistance to meet commuting expenses. However, as noted in Chapter IV, from April 1994 a new, unified Access to Work scheme is to be introduced and this will place a financial ceiling on the assistance given to disabled workers in any 5 year period. Most controversially of all, employers will have to pay for many individual items of equipment under £100 and contribute up to half of the costs of more expensive accommodations. This is hardly calculated to encourage employers to make reasonable accommodations in the context of a voluntary regime.

CONCLUDING REMARKS

A mandate of reasonable accommodation is an essential feature of any effective disability discrimination law. Without a condition that employers should be required to recognise difference and accommodate it within workplace policies and practices, many (but by no means all or even a majority of) disabled persons will be denied true equality of opportunity. The idea of reasonable accommodation has often been misunderstood and mistaken as a form of preferential treatment or positive action. This has coloured the reaction of both legislators and judiciary to the original inclusion and subsequent interpretation of the reasonable accommodation ingredient in disability discrimination measures. The compromising of reasonable accommodation in Australian statute law, and its misinterpretation and misapplication in Canadian case law demonstrates this point. Instead, as in the US legislation, reasonable accommodation must be seen as an integral part of the non-discrimination standard. It should not be confused as a species of affirmative action, thereby attracting heightened scrutiny, judicial suspicion and narrow application. Attempts to introduce disability discrimination laws in Britain in the recent Civil Rights (Disabled Persons) Bills appear to have learnt these lessons and any reasonable accommodation directive that might emerge from future law reform in this country will probably be patterned after the US model. Although the introduction of mandatory reasonable accommodation for disabled workers here will undoubtedly cause practical problems for some employers, the evidence suggests that for many employers such a development will merely formalise existing voluntary practices. Reasonable accommodation as an explicit legal concept may even influence the advancement of sex and race discrimination norms, as employers come to recognise the need to acknowledge and to entertain difference.

The erroneous association of reasonable accommodation with forms of preferential treatment, however, will be a difficult perception to erase in the minds of many employers. Nevertheless, a degree of preferential treatment, in the true sense of that expression, has been tolerated for disabled workers in Britain for much of the 20th century, and without any serious suggestion that this offends any fundamental principles of justice or equality. In the next chapter we turn to consider the role of preference and the use of quotas as a response to disability discrimination and disadvantage in the workplace.

CHAPTER XIV:
DISABILITY, EMPLOYMENT QUOTAS AND PREFERENTIAL TREATMENT

INTRODUCTION

In Britain, the orthodox position in discrimination law holds that all sex-conscious or race-conscious discrimination is unlawful. Formal justice requires that like cases should be treated alike and that the characteristics of gender or race are irrelevant factors in employment decisions. This orthodoxy militates against the use of the law to permit preferential treatment in favour of women and racial minorities. Thus "reverse" or "benign" or "inclusive" discrimination is prohibited.[1] The very term "reverse discrimination" is value-laden and commentators have sought to adopt expressions with less negative connotations.[2] In this chapter, the term "preferential treatment" is used where "reverse discrimination" might otherwise be the phrase of choice. Preferential treatment (or reverse discrimination) describes the process by which applicants or employees are given priority over equally-qualified or better-qualified candidates for employment opportunities, and where the preference is informed by the distinguishing characteristics of a disadvantaged group.[3]

The application of the anti-discrimination principle to disability would seem to produce a similar conclusion to that obtaining in discrimination law at large. Disability-conscious employment decisions in favour of disabled persons would be proscribed, even though such decisions might be said to be "benign" rather than "malign". Yet, for the best part of 50 years in Britain, the primary legal strategy for protecting disabled workers in the labour market has been a statutory quota scheme, supported by reserved occupations, in which, in theory at least, disabled persons have been accorded some preferential treatment in employment competition. The continued role of the quota scheme, if any, is a central feature of the analysis in this chapter. We commence that analysis by looking at how employment quotas fit into discrimination theory.

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[1] See, for example: *London Borough of Lambeth v Commission for Racial Equality* [1990] IRLR (CA). In the US, a similar position was taken by the Supreme Court in *City of Richmond v J A Croson Co* (1989) 109 SCt 706 under the Fourteenth Amendment. Reverse discrimination in private employment is permissible to a limited extent in the US under Title VII of the Civil Rights Act 1964: *United Steelworkers v Weber* (1979) 443 US 193.

[2] See the discussion of the various terms "positive discrimination", "reverse discrimination", "preferential hiring", "compensatory discrimination", "protective discrimination" and "preferential treatment" in Pitt, 1992: 282.

[3] Such as sex, race, age or disability.

Quotas, preferences and discrimination theory

The arguments in favour of preferential treatment or reverse discrimination have been recently reviewed by Pitt.[4] She points out that reverse discrimination is often justified by appealing to the argument that "it is intended to make up for past systemic discrimination against" disadvantaged groups or minorities, and "is a kind of remedy for past deprivation of opportunity.[5] The weakness of this compensation argument, however, is that it fails to compensate the actual victims of past discrimination, but benefits only their descendants. Nonetheless, in the case of disabled persons (and racial groups), where disadvantage has passed from generation to generation and where present-day discrimination persists, the weakness of the argument becomes its strength. In spite of that, Pitt argues that reverse discrimination only compensates some members of the disadvantaged group, and that these members are likely to be those who have suffered least from the legacy of past discrimination.[6] Furthermore, it is not the original perpetrators of discrimination who are made to compensate subsequent generations, nor even those who have inherited the wealth which past discrimination helped to amass. It is the disadvantaged individual's fellow competitors in the labour market who pay the price in lost job opportunity, rather than employers or the business community in general.

Appeals to the compensation argument to justify preferential treatment of disabled persons in the labour market are ill-founded. Like Pitt, the present writer believes that reverse discrimination in favour of disabled persons must be viewed as "a counter-balancing measure, attempting to compensate for the inherent bias in the system".[7] An alternative approach is to seek comfort in arguments based upon social utility. Increasing the representation of disadvantaged and minority groups in employment brings a number of potential benefits in its wake. The removal of disabled claimants from unemployment and social security benefit programmes will result in savings in public expenditure. Their employment in turn leads to increased revenues from direct taxes, increased consumer spending and consequent additional revenues from indirect taxation. In addition, the employment of a previously marginalised group will add to productivity and to the gross national product. Furthermore,

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[4] Pitt, 1992. Pitt's concerns are with women and ethnic minorities, but her analysis is recruited to the present discussion of disabled persons. See generally: Fullinwider, 1980; Greenwalt, 1983; Rosenfeld, 1991.

[5] Pitt, 1992: 284.

[6] Pitt, 1992: 285.

[7] Pitt, 1992: 286. Of course, Pitt did not have disabled people in mind in the context of this quotation.

disabled employees would gain access to promotion opportunities and would provide role models for other disabled individuals to emulate. The social and vocational integration of preferred disabled persons would break down the barriers of misunderstanding between the disabled and non-disabled worlds, which in turn would reduce the prospects of continuing disability-based discrimination. In short, immeasurable social benefits might accrue from reverse discrimination in favour of persons with disabilities.

The social utility argument is one based upon expediency rather than principle, but might be expected to be the more successful for that. However, the social utility argument is not without flaws. Without necessarily associating herself with the counter-arguments, Pitt puts the opposing view in the following terms:

> The policy might reinforce feelings of inferiority in those who benefit from it, and cause others to assume that they must be second rate... There might be an increase in social tension because the dominant group would feel a strong sense of grievance if they were themselves victims of discrimination. And far from healing divisions in society, reverse discrimination would actually make people more aware of [disability]... In a similar vein, it is suggested that not to choose the best person for the job regardless of [disability] would lead to overall inefficiency.[8]

While there might be some merit in the counter-argument based on reinforcement of the perception of inferiority, the risk of increased social tension were reverse discrimination to be applied to disability seems unlikely. It has not been suggested that existing disabled quota schemes, for example, have been anything but accepted or welcomed by the "able-bodied" community. Making society more aware of disability might cause discomfiture, uneasiness or embarrassment for some, but would be an attractive by-product of preferential treatment. Finally, the contention that abandoning the merit principle would produce greater inefficiency misstates the preferential treatment argument. It is not suggested that disabled persons preferred for employment should not be "otherwise qualified" for the work in question. In any event, any loss of efficiency could be outweighed by gains in other dimensions, as was noted during the discussion of reasonable accommodation in the previous chapter. In short, discrimination theory could easily withstand the concession of preferential treatment based upon disability status. In the following section, the operation of disability preferences in practice is discussed.

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[8] Pitt, 1992: 289. In the original, Pitt is referring to race and gender where the term "disability" appears in square brackets, but the quotation has been adapted to fit the present context. Pitt also points out that the utility argument could be used to justify malign discrimination (1992: 290).

Year	Average total number on register
1946	482,221
1950	936,196
1955	827,102
1960	691,724
1965	658,925
1970	634,336
1975	557,217
1980	470,588
1985	404,170
1990	355,591
1993	371,734

Source: DE, 1973: Table 1; MSC, 1979: Table 2; MSC, 1985: Table 1; *Employment Gazette* (various issues 1985-1993)

Table XIX: Numbers of registered disabled persons

Whether registered as disabled	Men	Women	All disabled adults under pension age
	%	%	%
Registered	20	8	14
Not registered	77	90	83
Do not know	3	2	3
Total	100	100	100

Source: Adapted from Martin, White and Meltzer, 1989: Table 7.32

Table XX: Whether disabled men and women under pension age are registered as disabled

to look for work (but temporarily ill), or available for work but not looking, the proportions for registration were 21 per cent, 12 per cent and 17 per cent respectively.[75] Significantly, 16 per cent of those who regarded themselves as permanently unable to work and 13 per cent of those assessing themselves as retired (but under pension age) had registered under the legislation. In a separate survey for the SCPR, Prescott-Clarke found that only 13 per cent had a valid "Green Card" (*ie*, had registered under the Act).[76] Extrapolation from these data suggests that there should be a total of 175,000 registered disabled persons who are economically active or anticipate being so in the next 12 months. In contrast, at the time of the survey, the DE had approximately 367,000 registrations.[77] Therefore, both the OPCS and the SCPR surveys imply a much lower figure of registrations under the Act than are actually recorded. Prescott-Clarke suggests that the discrepancy might be partly explained by registrants who were no longer economically active or who were simply confused about the terminology of registration. It is also interesting to note that 84 per cent of the disabled respondents to the SCPR survey were separately assessed by DROs as *registrable* under the 1944 legislation.[78] Of these, 80 per cent were in work, suggesting an estimated population of 854,000 persons registrable as disabled and in employment.

These data call for some explanation of disabled persons' attitudes towards registration. There are various possible reasons for the reluctance of disabled people to register under the 1944 Act, although the relative importance of each is difficult to judge.[79] First, many disabled persons may not have heard of the scheme. Second, many disabled persons may not require the forms of protection and assistance that are a by-product of registration. Third, once in employment, a disabled employee may see little purpose in registering or in renewing registration, especially as, after minimum periods of service, employees enjoy greater protection under the general provisions of employment law as opposed to the 1944 Act. Fourth, there is a perceived stigma of inferiority in the status of "registered disabled person". Fifth, many individuals with less visible disabilities are unwilling to declare their disability. Sixth, some medical advisers may counsel against registration as disabled if by doing so a person's self-esteem were to be devalued and their rehabilitation thereby hampered. Seventh, many disabled people do not recognise or regard themselves as disabled. Eighth, registration

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[75] Martin, White and Meltzer, 1989: Table 7.33.

[76] Prescott-Clarke, 1990: 74 and Table 8.1.

[77] Prescott-Clarke, 1990: 74.

[78] Prescott-Clarke, 1990: 79.

[79] MSC, 1979: para 58; MSC, 1981: para 4.4; MSC, 1985: para 2:4.

is not seen as being essential, either because the quota scheme is regarded as ineffectual or because disabled employment services are open to all regardless of registration. Ninth, many disabled persons do not wish to be separately identified in a way which might hamper their social acceptance and integration into the workforce. Tenth, disabled people may simply see no advantage in registration.

Many of these possible reasons for non-registration are borne out by the evidence. Many "disabled persons" simply do not regard themselves as "disabled", regardless of medical or legal classification.[80] In research among disabled persons who had not registered under the 1944 Act, 36 per cent did not consider themselves disabled, 19 per cent said registration was not necessary, 16 per cent reported that their disability was only minor and 11 per cent did not know about registration.[81] Prescott-Clarke found that most economically-active disabled persons had not heard of the register. Only 59 per cent of disabled respondents had heard of the disabled persons' register.[82] Awareness of the register was highest among disabled employees and lowest among disabled persons who anticipated wanting to work in the near future. Overall, men were more likely than women to be registered as disabled with the DE. For example, Prescott-Clarke found that 64 per cent of economically-active disabled males and 53 per cent of economically-active disabled females had heard of the register, while 18 per cent and 7 per cent respectively had a valid "Green Card".[83]

These latter figures are comparable with the OPCS survey findings, as Table XX shows. The proportion of disabled adults registered as disabled also appears to increase with the severity of disability, except in the highest severity categories where severely disabled persons are less likely to be economically active. Disabled men were also more likely to register as disabled where their occupational status fell in the lower reaches of the socio-economic hierarchy (junior non-manual, semi-skilled manual and unskilled), but no pattern emerged in

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[80] Research in 1979 suggest that in a sample of disabled people, only 28 per cent of non-registered disabled persons regarded themselves as "disabled" compared with 72 per cent of registered disabled persons: MSC, 1979: para 59.

[81] RSGB, 1978: Table 1.2.1. The remainder either were uncertain whether they were entitled to register (4 per cent) or did not like being classified as disabled (3 per cent) or had never thought about registration (6 per cent) or saw no advantages in it (4 per cent). Significantly, 72 per cent of this sample of "disabled persons" did not consider themselves disabled: Table 2.1.

[82] Prescott-Clarke, 1990: 74 and Table 8.1.

[83] Prescott-Clarke, 1990: 75 and Table 8.2.

respect of disabled women.[84] Overall, it is gender, disability severity and employment status that seem to influence registration. Age is an uncertain variable, as Prescott-Clarke found that knowledge of the register increased with age, but actual registration was more likely in the 25-34 and 35-44 years age groups than for younger or older disabled workers.[85]

The SCPR survey demonstrates that, of those who had registered as disabled, 29 per cent did so in order to assist themselves in getting a job, but a surprising 18 per cent had no conscious motive in deciding to register.[86] Some 37 per cent had registered upon the advice of third parties (such as DROs) and a further 8 per cent had registered on the advice of an employer. Among disabled persons who had not registered (but who were aware of the scheme), nearly half regarded registration as inapplicable to them, a quarter had never thought about registration and a fifth averred that they had never needed a "Green Card".[87] In fact, registration was thought of as a disadvantage by 5 per cent of this group. Prescott-Clarke's analysis makes the following points:

> Not surprisingly, those having a card were more likely to see advantages than those without a card, particularly in respect of getting work. Two-thirds of those without a card who were economically active thought that there were no advantages, or could not think of any. Around two-thirds of those with a card could think of no disadvantage to being on the Register - the majority saying positively there were no disadvantages. Similar proportions of those not on the Register knew of no disadvantages.[88]

Nevertheless, about a quarter of all respondents believed that registration as disabled was a positive handicap to entering employment and about 10 per cent felt that registration compounded the process of being labelled as "disabled" and "abnormal".[89] Indeed, the evidence suggests that registered disabled persons fare no better, and often worse, than unregistered disabled persons in the incidence and duration of unemployment or in successful placement into employment.[90]

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[84] Martin, White and Meltzer, 1989: Table 7.36.

[85] Prescott-Clarke, 1990: 75 and Table 8.2.

[86] Prescott-Clarke, 1990: 75-76 and Table 8.3.

[87] Prescott-Clarke, 1990: Table 8.4.

[88] Prescott-Clarke, 1990: 78.

[89] In a survey of employers' attitudes towards the quota scheme, Morrell found that 50 per cent of respondents thought that disabled persons did not register because they did not want to be labelled as "disabled": Morrell, 1990: Table 4.

[90] DE, 1973: para 55 and Table 4.

Enforcement of the quota

The enforcement of the quota scheme is perhaps most controversial. Employers must keep records, open to inspection, relating to the employment of registered disabled persons and quota compliance, and ought to make annual returns to Job Centres, whose staff regularly draw the quota obligation to employers' attention. DRO and DAS teams, the forerunners to PACT teams, used to carry out some 2,000 inspections per year and infringing employers could expect follow-up visits.[91] Up to half of these inspections reveal infringements and an identifiable number of infringements remain uncorrected even after a follow-up visit. However, only 10 prosecutions (8 successful) have been brought during the history of the scheme.[92] The two unsuccessful prosecutions concerned a failure to keep records (February 1948) and a dismissal of a registered disabled person while below quota (February 1974). Six of the successful prosecutions (January 1948, April 1949, October 1949, February 1975 and twice in October 1975) concerned engagements without permit while below quota and resulted in an admonishment, a £20 fine, a £4 fine, a £10 fine, a £50 fine (two charges) and a £200 fine (two charges) respectively. Two cases (December 1964 and February 1973) concerned dismissals without reasonable cause and resulted in a £50 fine plus costs and a £100 fine plus costs.[93]

The authorities are believed to receive legal advice that counsels against prosecution in cases where employers are already employing *unregistered* disabled employees.[94] In any event, the penalties for breach of the quota may be of little deterrence to employers ignoring their statutory obligations, as was recognised by an unsuccessful attempt to raise them in the Companies (Disabled Employees Quota) Bill 1986, referred to in Chapter IV above. Undoubtedly, the inability of employers to meet the quota in principle, consequent upon the decline in the numbers of registered disabled persons, makes enforcement academic. Previous attempts to enforce the quota more rigorously only resulted in employers putting pressure on

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[91] MSC, 1985: 15-16; NAO, 1987: para 5.8. More recently, Mr M Forsyth (Minister of State, Department of Employment) has revealed that the 1944 Act is currently "monitored" by a rolling programme of inspections of employers' quota records, an annual postal survey into the quota position of employers, reminders to employers of their duties and obligations, and local monitoring of the records of employers who are subject to quota and their quota position: HC Deb Vol 217 col *839*.

[92] MSC, 1979: para 33; MSC, 1985: Table 3.

[93] A small number of s 9(5) dismissal complaints are received by the DE each year, but precise figures are not available and since 1975 none have led to prosecution: HC Deb Vol 217 col *839* (28 January 1993) Mr M Forsyth, Minister of State, Department of Employment.

[94] MSC, 1985: para 2:11.

existing employees to register rather than leading to new engagements.[95] In 1975, for example, a campaign of strict enforcement of the quota scheme was conducted as a 6 month experiment in 6 towns. This resulted in an increased number of applications from disabled persons to be placed upon the register, some increases in the number of applications for exemption permits, and a small increase in the number of notified vacancies for disabled workers.[96] Two prosecutions also resulted, producing fines of £25 and £200 respectively. However, there was no noticeable change in the employment position of disabled persons as a consequence. Zealous enforcement of the law is thus seen to be counterproductive to the coterminous strategies for placement of disabled persons into employment. Emphasis is upon education, advice and encouragement rather than prosecution. The existence of the quota scheme appears to have had little impact upon the outlook or actions of employers who are below quota. Where employers are reminded that they are below quotas, it is often the case that their first response will be to persuade existing employees with disabilities to register under the 1944 Act.[97] The majority of employers in compliance with the scheme comply primarily out of a sense of social responsibility.[98]

It is highly unlikely that the approach to enforcing the disabled workers' quota will change in the near future. In 1992, judicial review proceedings were brought by a disabled individual against the Department of Employment, challenging the Government's apparent policy of not enforcing the 1944 legislation.[99] The plaintiff, a registered disabled person with multiple sclerosis, was concerned that the Department had failed to prosecute her former employer following her dismissal as a secretary "without reasonable cause" contrary to section 9 of the Act. The Department's defence was that it had no such policy of non-enforcement, but that it attempted to resolve cases of statutory breach by negotiation and advice before consideration would be given to prosecution. In practice, however, the prosecuting authorities are unlikely to recommend a decision to prosecute unless there is a high probability of success on the evidence. It is also suggested that prosecutions may not be in the interests of disabled persons and would thus not be in keeping with public policy generally. The case

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[95] NAO, 1987: para 5.11.

[96] MSC, 1979: para 34; MSC, 1981: para 4.9. The exercise is explained in more detail by Mr B Swindell (Head of Resettlement, MSC) in evidence to a parliamentary committee: HCEC, 1981: Q2.

[97] DE, 1973: para 54.

[98] MSC, 1981: para 4.6.

[99] *R v Secretary of State for Employment, ex parte Pirie* reported in brief in *Equal Opportunities Review* N° 45 (September/October 1992) at 9-10.

was withdrawn before the matter came to trial.

Abuse of exemption permits

While the proportion of employers fulfilling quota has been in free fall, the number of employers below quota but holding permits has risen inexorably. Table XXI shows that just over half of all employers subject to the scheme have been issued with exemption permits. Bulk permits now represent 98 per cent of all permits issued.[100] The issuing of bulk permits is designed to reduce the amount of time spent upon routine administration of the scheme. Consequently, the DE admits that it is difficult to ensure that the issue of a permit is justified by an employer's individual circumstances.[101] The Department suspects that many below-quota employers recruit non-disabled persons without first obtaining a permit and that many employers issued with bulk permits do not notify vacancies as they are supposed to do.[102] In view of the fact that the DE cannot withhold permission for an employer to recruit an able-bodied worker unless it is satisfied that a suitable registered disabled person is available for the position, and that the employer's view of suitability is likely to be decisive, the issuing of permits is often a formality.[103] There is also evidence that:

> the process of permit application has become a matter of routine for many below quota firms - a twice yearly exercise which has only a minimal impact on their policies and practices.[104]

Research carried out in 1978 showed that many employers regard the provision of permits as a right rather than a discretionary concession, enhancing their view that permits provided automatic exemption from the law.[105]

REFORM OF THE QUOTA SCHEME

Fifty-six per cent of disabled persons strongly favoured special legislation to help disabled people find and keep work and a further 38 per cent favoured such laws.[106] About 9 in

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[100] NAO, 1987: 20. There are no centralised records of the number of permits issued, but the number of employers to whom permits are issued is known. Between 1987 and 1991, for example, about 18,000 employers were issued with permits each year: HC Deb Vol 214 cols *706-8*.

[101] DE, 1973: para 54.

[102] DE, 1973: para 54.

[103] DE, 1973: para 56; MSC, 1981: para 4.8.

[104] MSC, 1979: para 32.

[105] MSC, 1981: para 4.6.

[106] RSGB, 1978: Table 7.1.

Year	Employers subject to quota but not complying (figures in brackets = % of all employers subject to quota)	
	Issued with permits (%)	Not issued with permits (%)
1965	59.6 (27.9)	40.4 (18.9)
1970	60.9 (34.9)	39.1 (22.4)
1975	66.8 (40.7)	33.2 (20.2)
1980	71.6 (46.5)	28.4 (18.4)
1981	71.7 (47.6)	28.3 (18.8)
1982	67.9 (46.3)	32.1 (21.9)
1983	70.6 (48.4)	29.4 (20.2)
1984	71.6 (49.9)	28.4 (19.8)
1985	N/A	N/A
1986	75.8 (55.5)	24.2 (17.7)
1987	75.1 (56.1)	24.9 (18.6)
1988	74.5 (56.7)	25.5 (19.4)
1989	74.0 (57.1)	26.0 (20.1)
1990	74.4 (58.2)	25.6 (20.0)
1991	69.2 (55.1)	30.8 (24.5)
1992	N/A	N/A

Source: Extrapolated from MSC, 1979: Table 2;
HC Deb Vol 212 Col *119-20* (19 October 1992)

Table XXI: The issue of permits and quota compliance

every 10 disabled persons favoured or strongly favoured quota legislation.[107] On the other side of the fence, there is strong evidence that employers would favour changes being made to the quota scheme. Research in 1979 indicated that employers were generally happy with the quota scheme. They believed that special statutory protection was essential, but opposed strict enforcement or extra legislative obligations.[108] However, just over half the employers interviewed in the IFF Research survey thought that the scheme should be changed, with this opinion being the strongest held among large employers.[109] Less than one-third of employers would vote for the *status quo*. At least half of the employers interviewed thought that the quota scheme could be usefully amended by increasing awareness of the scheme, having different levels of quota for different employers, including all disabled persons within its scope, or providing incentives to disabled people to register. There was little support for making registration compulsory. Less than one-third of employers favoured changing the 3 per cent level, altering the definition of disability, making different permit arrangements, or altering enforcement procedures.[110]

It may be that any reform of the quota will be doomed from the start, as any successor scheme would be tainted by the failure of its predecessor.[111] Nevertheless, the arguments for retaining a statutory system imposing obligations upon employers were summarised by the MSC in its 1979 review of the quota scheme:

> [1] Clearly expresses society's concern for the protected group; [2] Can set minimum standards which, if achieved, will offer some real protection to the group; [3] Can keep the issue before employers and the public by requiring procedures, submission of records or accountability to an enforcing authority; [4] Can be used, if appropriate, to force people to take action.[112]

The Commission considered five possible arguments for doing away with statutory protection.[113] First, the minimal impact of existing statutory measures suggests that non-statutory methods might achieve equally adequate protection for disabled workers. Second,

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[107] RSGB, 1978: Tables 8.1.1. and 8.2.1. Sixty-five per cent favoured the use of criminal sanctions against employers who did not comply with their quota obligations, but about 80 per cent opposed imprisonment (as opposed to a fine) as the appropriate sanction: Table 8.3.1 and 8.4.1.

[108] MSC, 1979: para 68.

[109] Morrell, 1990: Table 10.

[110] Morrell, 1990: Table 3.

[111] MSC, 1979: para 73.4

[112] MSC, 1979: para 65 (sub-paragraph numbering in the original omitted).

[113] MSC, 1979: para 67.

the bureaucracy associated with a flawed scheme diverts resources and staff time that might be better employed in helping persons with disabilities in other ways. Third, a statutory scheme that lacks credibility can be counter-productive. In order to make the scheme work, more rigorous enforcement would be necessary. This might antagonise employers and undermine efforts to encourage disabled employment opportunities through voluntary action. Fourth, the decline in registration might suggest that some disabled persons no longer require the protection of a statutory scheme. Fifth, the statutory scheme singles out disabled persons for special treatment. This conflicts with the merit principle and the right of disabled persons to full integration. To these arguments can be added a sixth objection. The quota scheme is an unambitious way of helping disabled workers, for it extends its influence only marginally beyond recruitment and says little about the quality of disabled employment opportunities once in work.[114] However, before we examine the possible abolition of the quota legislation, we shall first assess various proposals for its root and branch reform.

Disabled persons covered by the quota

Whether the quota scheme is retained and amended or whether it is replaced, for example, by anti-discrimination legislation, some means of identifying disabled persons for statutory purposes will need to be devised.[115] One possibility would be to devise a multi-purpose system of identification, so that recognition as disabled for one purpose would count as recognition for all purposes. So, for example, receipt of certain social security benefits or assistance from social welfare services would also designate the individual as being a disabled person for the purpose of employment law. Another possibility would be to insist upon registration under the 1944 Act as a precondition to access to other rehabilitation, training and employment services. A third suggestion would be to provide inducements to register. Giving disabled persons incentives to register has been considered and rejected on more than one occasion.[116] In its 1981 review of the quota scheme, the MSC considered whether disabled people might be given incentives to register in the form of tax relief.[117] The Commission doubted whether any additional incentives would overcome disabled persons' existing reluctance to register and feared that it might simply lead to disabled *employees* moving onto the register, with a consequent artificial boost to quota compliance. Incentives based upon tax relief were also seen as costly options, as well as placing disabled people in

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[114] MSC, 1981: para 8.19.

[115] MSC, 1979: para 60; MSC, 1979: para 73.1.

[116] See, for example: MSC, 1985: 28.

[117] MSC, 1981: para 8.2.

a preferential position *vis-à-vis* other disadvantaged individuals.[118]

Allowing employers to count *unregistered* disabled persons towards quota compliance would seem superficially to be a more attractive option. It might be regarded as more equitable, might encourage a greater willingness to comply with the law, could improve the chances of pursuing employers in breach, and would result in a more easily administered permit system.[119] This solution, however, also brings its own difficulties. First, it would be difficult to identify those employees who would count as disabled for this purpose. Registration resolves that problem. It might be that this reform would still require some degree of certification (perhaps by DROs or their successors in the PACTs, employers themselves, occupational medical officers or general practitioners), but this presents problems for uniformity in treatment.[120] Second, why should employees who have not voluntarily chosen to identify themselves as disabled be labelled in this way, perhaps against their will and in contravention of medical confidentiality? Third, such a reform hardly improves the employment position of disabled people, but merely makes life easier for employers (although identifying disabled employees would create new problems for employers too). Fourth, logically an increase in the percentage of the labour force that is recognised as disabled should lead to an increase in the level of the quota; but to what level and with what further consequences for attainment and compliance? This latter difficulty, however, might be illusory now that there are better statistics on the numbers of disabled persons who are or seek to be economically active.

Despite these problems, survey evidence suggests that nearly 6 out of 10 disabled people would favour the inclusion of unregistered disabled persons in the quota count, and the large majority of these held to their opinion even when it was pointed out that this would mean that employers would need to know who was disabled.[121] Less than half the respondents could suggest alternatives to the voluntary registration system. Of these, 51 per cent suggested that disabled individuals could be identified from medical records, 13 per cent through hospitals, 11 per cent through social welfare services and 13 per cent through other

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[118] MSC, 1981: para 8.3.

[119] DE, 1973: para 68; MSC, 1979: para 77.1; MSC, 1981: para 8.10.

[120] MSC, 1979: para 77.1(i). The MSC reported that few employers spontaneously suggested extending the scheme to unregistered disabled persons and that most could see difficulties in the identification process. However, a small majority of disabled persons in 1979 supported this reform.

[121] RSGB, 1978: Tables 9.1.1 and 9.1.2.

public agencies holding such information.[122] These suggestions do not appear very appealing. In any case, and by whatever means, the inclusion of unregistered disabled people within the scope of the quota system would obviously create problems for enforcement and verification. Employers suggest that these problems could be overcome by keeping records for inspection, instituting check-ups on employers or requiring medical evidence of disability.[123] Employers were confident that they could correctly identify those members of their workforces who would be counted for this purpose, although there was recognition that some workers might conceal disability or that disabilities that did not affect working ability might be overlooked.

Stricter enforcement

Could the statutory scheme be more strictly enforced? A number of stricter enforcement strategies might be contemplated, including tighter permit procedures, more rigorous inspection, and prosecution of employers below quota.[124] It can be argued that stricter enforcement of the quota scheme would lead to more registered disabled persons obtaining a foothold in employment. In turn, this would encourage more disabled people to register and thus employers would find it easier to fulfil the quota obligation. A further consequence might be that more employers would be encouraged to attempt to meet the quota and this would create a virtuous circle of registration, employment and quota compliance.[125]

On the other hand, a number of objections have been raised to stricter enforcement.[126] First, it would be a futile exercise where the quota is not mathematically achievable because of the insufficient numbers of registered disabled persons. Second, it has been suggested that a lack of skills and experience among unemployed disabled persons means that there is a mismatch between disabled workers in the labour market and available vacancies.[127] Third, stricter enforcement would ensure that the scheme is compulsory, but this would be viewed as incompatible with a system of registration that is voluntary. Fourth, stricter enforcement might only lead to disabled employees being cajoled by employers into registration and this could undermine the employment security and prospects of unregistered disabled persons,

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[122] RSGB, 1978: Tables 9.2.1.

[123] Morrell, 1990: 7.

[124] DE, 1973: para 62.

[125] MSC, 1985: para 3:4.

[126] DE, 1973: para 62; MSC, 1981: para 4.8. See also: MSC, 1979: para 73.2.

[127] MSC, 1985: paras 2:6 and 2:7.

whether employed or unemployed. Fifth, it follows that stricter enforcement of the scheme would not necessarily lead to any improvement in the employment position of disabled persons. Sixth, given the numbers of *registrable* disabled persons already in employment, it is probable that some employers are already in compliance with the spirit of the scheme and yet could be penalised by stricter enforcement of it. Seventh, stricter enforcement might overlook the need to resettle disabled workers in the right job and lead to unsuitable workers being forced upon unwilling employers. Eighth, stricter enforcement would challenge the goodwill of employers and thus represent a diminishing of disabled employment prospects. Ninth, there are opportunity costs in stricter enforcement. Stricter enforcement would be bureaucratic and would lead to a diversion of administrative resources in a way that might not prove to be the best use of time and staff.

Reduced quota

Reduction of the quota has been frequently advocated, especially in tandem with stricter enforcement of the scheme.[128] If a more realistic target were to be set, compliance would be more easily achieved and enforcement strategies would be more readily accepted by employers. The level of the quota might be set to take a more accurate account of the size of the target population.[129] In 1973, by way of illustration, the DE considered that a realistic quota would be of the order of 2.0 to 2.5 per cent, at a time when average quota compliance was at a maximum possible level of 2.75 per cent.[130] Although this is a superficially attractive reform, it would mean that government had sanctioned a lower target by which employers were to measure their commitment to disabled employment opportunity. This might force quota compliance down even further and represent "retrospective approval of an unsatisfactory situation".[131] An alternative proposal might be to calculate the quota as a percentage of new hirings each year rather than as a percentage of the employer's workforce. This addresses the anomalous position that disabled employees who are settled in employment continue to count towards the quota. However, this proposal has been rejected in the past on the grounds that it would bear unevenly upon employers with a large staff turnover and consequent greater number of new engagements, as well as being

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[128] DE, 1973: para 63; MSC, 1979: para 76; MSC, 1981: para 8.5.

[129] MSC, 1979: para 76.1; MSC, 1981: para 5.5. Bolderson (1991: 117) records that the quota percentage was originally set at 2 per cent in 1946 and raised to 3 per cent in 1947. She indicates that the quota was fixed at a level which it was hoped would obviate the need for large scale applications for exemption permits.

[130] DE, 1973: para 64.

[131] DE, 1973: para 65; MSC, 1981: para 8.8. See also MSC, 1979: para 76.1 (extolling the virtue of setting a target that is difficult to achieve).

administratively difficult to enforce.[132] A further alternative would be to count *severely* disabled persons with more weighting for quota purposes. Again, this has been considered and rejected, on the ground of difficulty in classifying and identifying such persons.[133]

The views of disabled persons on the level of the quota are quite instructive. In a 1978 survey, 14 per cent favoured keeping the current percentage level. Only 5 per cent favoured reducing it. Not surprisingly, just over half the respondents championed a raised quota level, with a level of 5 per cent or 10 per cent commanding observable support.[134] About 8 in 10 respondents would accept a proposal to vary the quota size between different firms or different industries.[135] This idea was also supported by an influential parliamentary committee.[136]

Abolition of the permit system

It has been suggested that the issuing of bulk permits should be restricted.[137] About 1 in 5 disabled persons are opposed to the permit system.[138] Given the abuses of the permit system, a worthwhile reform might be to introduce an unqualified obligation on employers to fulfil the quota and achieve that by abolishing permits.[139] One problem with this suggestion is that it takes no account of the geographical distribution of disabled persons or the distribution of employment skills in the disabled population. Some employers would always have difficulties in meeting the quota because of insufficient or unsuitable disabled workers in a local labour market. The abolition of permits could only be made to work if regional or local variations in the quota percentage were to be permitted and that does not seem to be a practicable proposal.[140] An alternative solution might be to provide employers with a

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[132] MSC, 1979: para 77.1(iii).

[133] MSC, 1979: para 77.1(iv).

[134] RSGB, 1978: Table 9.3.1.

[135] RSGB, 1978: Tables 9.4.1 and 9.4.2.

[136] HCEC, 1981: para 8.

[137] MSC, 1985: paras 3:9 and 3:10.

[138] RSGB, 1978: Tables 8.1.1. and 8.2.1.

[139] DE, 1973: para 70; MSC, 1981: para 8.16.

[140] MSC, 1985: 49-51. Although this idea was supported by disabled respondents in a 1979 survey, it was rejected as being too difficult and costly to administer: MSC, 1979: para 76.2.

defence of reasonable cause where they are below quota.[141] This would switch the emphasis away from permits and onto enforcement and inspection. It does not, however, deal with the existing problem of how to challenge an employer's contention that certain jobs are unsuitable for disabled persons or that an available disabled person is not suitable for the vacancy in question. The DE is unlikely to be any more willing to second guess employers' judgements that it is in respect of permit applications. The only alternative would be to leave the issue to arbitration or to an industrial tribunal.

Financial sanctions

More radically, the enforcement of the quota via levies against recalcitrant employers has been urged, an approach favoured in a number of European models.[142] The DE's view that prosecution of firms for quota non-compliance is counter-productive leads to suggestions that there should be instead financial sanctions available against recalcitrant employers.[143] Employers would effectively be given a choice of fulfilling the quota or making a payment to a special fund for each unfilled quota place. Such a levy system could have a number of potential advantages.[144] First, it would be administratively convenient. Second, it would produce revenue that could be used in pursuit of other disabled employment strategies. Third, it would ensure a degree of equity in employers' contributions to disabled employment opportunities either directly, by fulfilling quota, or indirectly, by contributing to the financing of other policies. Fourth, it would retain a compulsory, but flexible, system and would take account of the different circumstances of different employers.

However, opponents of a levy scheme point out that, given the maldistribution of disabled persons geographically and in terms of skills and qualifications, financial sanctions would bear unevenly on some employers who would be penalised for local labour market conditions beyond their control.[145] The ability of employers to buy out their obligations to disabled workers is also hardly calculated to lead to an increase in disabled employment opportunities.[146] The MSC cited evidence that many German employers opt to pay the levy as a way out of their obligations to disabled people and then pass the costs on to their

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[141] DE, 1973: para 72.

[142] Brooke-Ross, 1984; Floyd and North, 1986.

[143] DE, 1973: para 74; MSC, 1979: para 77.2(ii); MSC, 1981: para 8.14.

[144] DE, 1973: para 75.

[145] DE, 1973: para 76.

[146] HCEC, 1981: para 11.

customers,[147] and there is equivalent evidence that French employers prefer to pay a contribution into a national development fund rather than attempt to attain quota.[148] Thus, the level at which the levy is fixed becomes crucial. Too low a level of levy will encourage employers to pay to avoid recruiting disabled individuals; too high a levy could lead to employers recruiting unsuitable disabled persons into unsuitable positions or bringing pressure to bear on unregistered disabled persons in the workforce to register. A levy system also over-emphasises the burdensome aspects of employing disabled persons and could retrench the negative attitudes of employers.[149] Furthermore, it is another form of preferential treatment of disabled persons and, unlike the German scheme of levies, could not be defended on the ground that it targeted protection upon a small group of *severely* disabled persons.[150]

Nevertheless, just over half (52 per cent) of disabled persons indicated support for the idea of making employers pay a levy while they remain below quota.[151] In contrast, support for the idea of placing a levy on employers who failed to engage sufficient numbers of disabled employees was not strong among employers. About two-thirds believed such reform to be inappropriate and only about one-fifth supported the idea.[152]

Abolition of the quota

It may be that the political and legislative rationale for the statutory scheme has been irredeemably undermined,[153] leaving abolition inevitable. A further argument is that retention of a quota for disabled workers is unjustifiable so long as similar special treatment of other disadvantaged or minority groups does not exist.[154] However, the idea that the quota should be extended to cover other individuals facing difficulties or "handicaps" in

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[147] MSC, 1981: para 8.15.

[148] Reported in *European Industrial Relations Review* N° 207 (April 1991) at 5.

[149] DE, 1973: para 77.

[150] MSC, 1981: para 8.15

[151] RSGB, 1978: Table 9.5.1.

[152] Morrell, 1990: Table 9.

[153] McDonnell and Weale, 1984; Jones and Cullis, 1988.

[154] MSC, 1979: para 73.3. The use of quotas as a means of regulating age discrimination has been considered by at least one writer, although rejected on the basis of the ineffectiveness of the disabled persons' quota. See Buck (1992: 254) and further research footnoted there.

obtaining employment has never seriously been considered.[155] As far as a disabled quota is concerned, a Gallup Poll commissioned by *New Society* and the BBC in 1980 tested the attitude of the electorate to the quota scheme.[156] Sixty-nine per cent of voters supported the strengthening of the quota scheme to make it work, while only 4 per cent would have abolished the scheme. There appeared to be little variation between supporters of the then three main political parties on this point.

Nonetheless, there are some who see the abolition of the quota scheme as desirable or inevitable. Of these, a number would not replace the quota scheme, no doubt viewing it as an example of burdens upon business or unnecessary regulation of a free labour market. A second group would replace the quota by concentrating on improved employment and training services for disabled persons, as well as greater efforts in persuading and educating employers to employ disabled people.[157] A third view, is that employers should be given temporary or permanent subsidies to encourage the recruitment and retention of workers with disabilities.[158] An alternative version of this proposal would be to provide incentives to employers who fulfil their quota but continue to recruit disabled workers.[159] One person's subsidy is usually another person's levy (see immediately above). Both Tomlinson and Piercy rejected the subsidisation of disabled employment as objectionable in principle.[160] Subsidies would validate the erroneous view that disabled workers are less capable than non-disabled workers, and would reinforce the prejudice that disabled employees are a burden on business.[161] Wage subsidisation is unlikely to meet the approval of the trade union movement, which in the past has objected to the use of disabled workers as a form of cheap labour.[162] The Piercy Committee also feared that subsidies would be an expensive way of promoting disabled employment, would be difficult to administer, and that difficulties in

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[155] MSC, 1979: para 77.1(ii).

[156] Cited in MSC, 1985: 32.

[157] DE, 1973: paras 88-95.

[158] MSC, 1985: 38-9.

[159] MSC, 1979: para 77.2(ii). The MSC found that, in an employer survey, employers opposed levies as leading to greater interference and administrative burdens, as well as providing some firms with an excuse to ignore their social responsibilities. Levies appeared also to meet with little support among disabled people.

[160] See in particular Piercy, 1956: para 197.

[161] DE, 1973: para 83.

[162] DE, 1973: para 84.

determining who should be subsidised could lead to such a scheme growing out of control.[163]

CONCLUDING REMARKS

Despite the catalogue of weaknesses that has been exposed in this chapter, the quota has shown remarkable durability and has survived largely because of the symbolic significance attached to it.[164] The quota has even been shown to be an attainable goal, albeit not without difficulties, given requisite political and managerial will.[165] Moreover, the SCPR survey concluded that there was an estimated 844,000 occupationally handicapped persons in employment. It further estimated that the proportion of all employees in employment who might be assessed as registrable under the 1944 Act would be approximately 4 per cent.[166] This suggests that the quota scheme could be made to work. It is remarkable too that the British and other European disabled quota systems continue to excite the interest of other countries and, in particular, the US,[167] although the advent of comprehensive disability discrimination laws elsewhere might stifle that interest for the foreseeable future.

Nevertheless, Britain's official attitude towards the quota has always been at best ambivalent. At the time of the 1973 review, the DE commented:

> It cannot be gainsaid that the existence of the quota scheme may act as a constant suggestion that the employment of disabled people constitutes a burden which needs to be shared and that they are not as productive as able-bodied workers.[168]

On the other hand, the Piercy Committee regarded the quota scheme as providing a "sound basis for publicity" and as demonstrating the "industrial value of disabled persons".[169] The DE once thought that there was some merit in that view.[170] The scheme was seen as

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[163] Piercy, 1956: para 197; DE, 1973: paras 85-6.

[164] Bolderson, 1980.

[165] *Equal Opportunities Review*, 1989.

[166] Prescott-Clarke, 1990: 115.

[167] See for example: Stubbins, 1982; Kulkarni, 1983. A number of respected disability scholars take a positive view of quota systems, despite their flaws, and regard them as part and parcel of any disability rights regime. See for example: Cornes, 1984; Hahn, 1984. However, the introduction of disabled quotas into a country such as the US would require major changes in disability policy and civil rights thinking: Bordieri and Comninel, 1987: 55.

[168] DE, 1973: para 39.

[169] Piercy, 1956: para 154.

[170] DE, 1973: para 38.

emphasising employers' responsibilities towards disabled persons, encouraging and reinforcing the good employer. Furthermore, the quota could act as a spur to employers who might be tempted to ignore the problems of disabled employment and could furnish DROs (now PACTs) with vital opportunities to visit employers to discuss ways of improving employment opportunities for disabled workers. However, the bureaucratic and compulsory nature of the scheme is increasingly seen as objectionable, while policing the quota has not been easily accommodated alongside the public sector agencies' role in advising employers on placing and resettling disabled employees.

More recently, the DE's 1990 consultative document contains the results of the latest in a series of government reviews of disabled employment policy and legislation.[171] The consultative document proposes a number of improvements in the services offered to disabled persons and their employers, some of which are being implemented in 1993. Of central importance is the government's view that the statutory quota scheme of the 1944 Act has become unsatisfactory in operation and that the arrangements for registering the status of disabled persons have encouraged stereotyping. Although the document considers a number of legislative alternatives to the statutory quota scheme, it appears to signal that in the future there may be less reliance upon statutory regulation of disabled employment. More emphasis is likely to be placed upon education of employers, together with improved training and employment services to disabled persons. This is evidenced by the introduction of a new disability symbol that employers may use on their letterheads, documents and recruitment literature to indicate their commitment to good practice in the employment of disabled persons.

The voluntary approach will be returned to in the penultimate chapter below. As this chapter has sought to demonstrate, the prognosis for the future of statutory regulation of disabled employment rights is not good, and even the long-standing commitment to a limited form of preferential treatment is under threat, if not from repeal then at least from decay by neglect. If the disabled workers' quota were to replaced or supplemented by anti-discrimination legislation, would the record of enforcement and the armoury of remedies be any more satisfactory than at present? This is the issue to addressed in the next chapter.

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[171] DE, 1990.

CHAPTER XV:
ENFORCEMENT AND REMEDIES IN DISABILITY DISCRIMINATION LEGISLATION

INTRODUCTION

It will be apparent from the discussion in the previous chapter that the reputation and authority of disability discrimination laws will rest very much upon how the law is enforced and what effective remedies are available for transgressions of its letter. The ultimate failure of the British disabled quota scheme might be largely explained by the inability of the authorities adequately to police and enforce the legislation, and the paltriness of such penalties as have been exacted from employers in breach. The failure to provide disabled people with an individual right of action to enforce their rights, such as they are, under the existing law, and the choice of the criminal justice system as the forum for executing the law, have both contributed to the resulting futility of the legislation. The setting of a new agenda for disability employment rights in Britain must also address the manner in which and the means by which any new discrimination or equal opportunity legislation is to be enforced. This will in turn raise questions concerning institutional and individual enforcement strategies, the role of judicial enforcement and the appropriateness of remedies. In this chapter we look at the possibility of the establishment of a Disablement Commission with institutional powers to enforce, administer and implement new legal objectives. We also look at what lessons might be learned from existing laws here and comparable laws abroad in respect of the justiciability of disability-related employment issues and the remedying of individual acts or broader patterns of disability discrimination.

INSTITUTIONAL ENFORCEMENT

From time to time, it has been suggested that the Equal Opportunities Commission (EOC) and Commission for Racial Equality (CRE) should be merged to produce one body responsible for the overview and enforcement of equal opportunities legislation.[1] The obvious parallels are with the Equal Employment Opportunities Commission (EEOC) in the US, or the human rights commissions and councils in Canada, or the anti-discrimination or equal opportunity boards, commissions and commissioners in Australia. Merger has been rightly resisted on the suspicion that it is merely a pretext for public expenditure cuts in the financing of anti-discrimination initiatives. Furthermore, both the EOC and CRE have been lukewarm to any proposals that disability discrimination law, if enacted in Britain, would become part of their

[1] See for example: HCEC, 1991: Q627.

individual portfolios.[2] Subsequently, disability rights activists themselves have seen the dangers that such recommendations would hold and that, in particular, disability would have to compete for attention and resources with other prohibited grounds in any grand anti-discrimination enforcement agency.[3] Attention has thus switched to the establishment of a Disablement Commission.

Proposed Disablement Commission

A central feature of proposals in Britain for disability discrimination legislation has been the mooted establishment of a Disablement Commission.[4] Such a Commission would be charged with a number of functions. First, it would work towards the elimination of disability-informed discrimination. Second, it would have powers to carry out general investigations to ensure that the new law was being complied with. Third, the Disablement Commission would investigate individual complaints of non-compliance with the law and provide a conciliation service in respect of such complaints. Fourth, it could provide assistance, including legal and financial assistance, to disabled persons seeking to enforce their new rights under the legislation. Fifth, the operation of the legislation would be kept under review and the Commission would be responsible for submitting proposals for statutory amendments. Sixth, the Disablement Commission would be responsible for publishing codes of practice directed at the requirements of the legislation.

The Disablement Commission, if established, would be made up of a number of Commissioners (8-15 has been suggested as the appropriate number) under a full-time chairman, who would be a person with disabilities. It is proposed that 75 per cent of the seats on the Commission should be filled by disabled persons or their authorised representatives, and that Commissioners should hold office for up to 5 years, subject to reappointment. The Commission would be founded as a body corporate but would not be an

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[2] See for example: HCEC, 1990b: QQ87-92.

[3] See in particular oral evidence given to the HCEC (1990a: 57-8). Prior to the enactment of the (Northern Ireland) Fair Employment Act 1989, it was suggested that omnibus discrimination legislation, encompassing race, sex, religious conviction and disability, might be adopted in the province, necessitating a merged enforcement agency: Department of Economic Development, 1986. This did not meet with universal approval and did not subsequently feature in the pre-legislative proposals: EOC for Northern Ireland, 1986; Fair Employment Agency, 1987. See the slightly more sympathetic response of the Standing Advisory Commission on Human Rights (1990: 74-5).

[4] This has been an essential part of many of the private members' bills discussed in Chapter IV above and, in particular, of the recent CRDP Bills. The account below draws, in particular, from the latest versions of those bills without citing individual clauses, so as to avoid confusing references to what is only draft legislation.

emanation of the Crown. It would not be subject to Crown immunity nor would its staff be civil servants. However, the Commission would rely upon public funding for its activities, expenses and payroll. Furthermore, the Secretary of State would have to promulgate regulations to address the powers and procedures of the Commission when carrying out individual or general investigations, including the power to issue non-discrimination notices or to take cases of discrimination to the tribunals or courts. The Commission would be expected to report annually to the Secretary of State and to Parliament.

It will be readily recognised that the template for the suggested Disablement Commission is that provided by the EOC and the CRE.[5] However, there are two noticeable differences between the proposed model and its progenitors. First, unlike the CRE and EOC,[6] the proposed Disablement Commission would not be given express research and education functions. This omission might be more than purely accidental. The 1980s have seen the calls for disability discrimination law met with the political response that more research is required to identify the incidence and experience of disability, while the preferred governmental approach to disability discrimination is a policy of education and persuasion. Disability rights activists would be understandably suspicious of enshrining this strategy in law and could be rightly concerned that the justiciability of these issues might be down-graded. It is worth recalling that in the original 1976 Anti-Discrimination Bill in New South Wales, physical disability and condition were included as "other grounds" of discrimination. However, disability was subsequently relegated within the statute that emerged as an issue solely for research (rather than regulation) by the newly-formed Anti-Discrimination Board.[7] However, not to give any new Commission here a research and education mandate appears short-sighted, whatever the tactical reasons for not so doing.

Second, and more significantly, there is no explicit legal requirement that the CRE and EOC should be constituted so as to represent an appropriate racial or gender mix of Commissioners, whereas disabled Commissioners are to be in the majority on a Disablement Commission.[8] Given the symmetry of race and sex discrimination legislation, it would

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[5] See generally SDA 1975 Part VI and Sch 3; RRA 1976 Part VII and Sch 1.

[6] See SDA 1975 s 54; RRA 1976 s 45.

[7] See Chapter IX above.

[8] This proposal does not appear to be modelled upon any similar provision in comparative disability discrimination laws elsewhere. In Australia and Canada, disability is part of omnibus discrimination legislation and the human rights commissions and anti-discrimination boards in these countries are not legally required to be representative of the groups for whose protection the law operates. The recent establishment of a federal Disability Commissioner

obviously send an undesired signal to employers if the EOC and CRE were to practice racial or sexual quotas or set-asides in their own constitutions. Disability discrimination law, on the other hand, would be asymmetrical and the same objection in principle could not be taken to the reservation of commissionerships for a pre-determined proportion of disabled persons. Furthermore, disabled persons, perhaps more keenly than women and ethnic minorities, have felt themselves to be commandeered by others (primarily the disability professions, charities, and organisations *for*, rather than *of*, disabled people) who have purported to speak on their behalf, and they would now seek a clear voice of their own. Moreover, it can be argued that first hand knowledge and experience of disability and disability discrimination are important qualifications for those who would shape the destiny of any new disability discrimination law.[9]

Role of institutional enforcement

Whatever body is charged with responsibility for disability discrimination law, one of its central functions will involve it in investigations of compliance and non-compliance with the legislation. The power to conduct formal investigations into suspected discriminatory activities of individuals or enterprises has been, at least on paper, an important weapon in the armoury of institutional enforcement.[10] However, in practice, both the EOC and CRE have been hidebound in the pursuit of formal investigations and subjected to judicial control that has blunted the edge of this weapon.[11] In turn, this has diminished the role of non-discrimination notices, issued as a result of a formal investigation, addressed to named parties, and requiring them to discontinue identified discriminatory acts or practices.[12] Moreover, little (if any) use has been made of the Commissions' powers to seek injunctive

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in the Australian Commonwealth does not include disability as part of the job specification: (Cth) DDA 1992 Part 6. In the US, although disability legislation is separately enacted, it is enforced by the EEOC, which is simultaneously charged with responsibility for civil rights law generally.

[9] This argument, as applicable to race and sex, is implicitly recognised in the actual make-up of the CRE and EOC.

[10] SDA 1975 ss 57-61; RRA 1976 ss 48-52.

[11] See, in particular: *R v CRE, ex parte Cottrell and Rothon* [1980] IRLR 279 Div Crt (CRE is discharging a quasi-judicial function and must observe natural justice and fair process); *Hillingdon London Borough Council v CRE* [1982] AC 779 HL (CRE may not carry out a formal investigation unless it has genuine belief, and not mere suspicion, that the party subject to investigation has committed discriminatory acts); *CRE v Prestige Group plc* [1983] IRLR 408 QBD (CRE must inform the party to be investigated so that representations can be made before any investigation commences). See also: *Science Research Council v Nassé* [1979] 3 All ER 673 HL.

[12] SDA 1975 ss 67-70; RRA 1976 ss 58-61.

relief against persistent discrimination.[13] Consequently, the burden of the EOC and CRE's main efforts in the enforcement area has been limited to assisting individual complainants (although, importantly, including advice and legal representation).[14] When empowering a new Disablement Commission, account must be taken of the experience of the CRE and EOC and of the limitations placed upon their authority by judicial control.

COMPARATIVE PERSPECTIVES ON ENFORCEMENT

Canada

Under the Canadian federal jurisdiction, where it is believed that an employer is discriminating on the grounds of disability, an individual or group of individuals may complain to the Canadian Human Rights Commission under Part III of the Human Rights Act.[15] The Commission may deal with the complaint provided that there are reasonable grounds for suspecting discriminatory practices and it is within the Commission's jurisdiction. The Commission might take the view that internal grievance or review procedures should be exhausted first, but otherwise the Commission will designate a person to investigate the complaint.[16] The investigator is vested with powers of entry and inspection while carrying out the investigation. At the conclusion of the investigation, a report is made to the Commission, which may request the appointment of a Human Rights Tribunal if an inquiry into the complaint is warranted.[17] Conciliation of the complaint may be attempted at this point if it has not already been so.[18] The Canadian Human Rights Tribunal, acting as a superior court of record, will inquire into the complaint and give the parties a hearing.[19] If a complaint was heard by the Canadian Human Rights Tribunal consisting of less than three

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[13] SDA 1975 ss 71-73; RRA 1976 ss 62-64.

[14] SDA 1975 ss 74-75; RRA 1976 ss 65-66.

[15] (Can) HRA s 40. Disability discrimination complaints make up about one-third of the Commission's caseload: Bhatia, 1990: 108. A member of the Commission's staff, Bhatia acknowledges that these complaints only scratch the surface of disability-related discrimination and that many more complaints would be forthcoming if the complaints procedure was more widely known about and more efficient.

[16] (Can) HRA ss 41 and 43.

[17] (Can) HRA s 44.

[18] (Can) HRA s 47. The Commission must approve the terms of any settlement of the complaint: s 48. Failure to comply with the terms of an approved settlement is a criminal offence: s 60.

[19] (Can) HRA ss 49-50. The Tribunal is appointed from a panel established under ss 48.1-48.5. The Commission is a party to the action and may appear and be represented before the Tribunal: s 51.

members, an appeal on a question of law or fact may be made to a Review Tribunal of three members established from the Human Rights Tribunal Panel.[20]

The administration, enforcement and overview of human rights laws in the Canadian provinces is placed in the hands of Human Rights Commissions or, in the case of British Columbia, a Human Rights Council, and, in the case of Québec, the *Commission des Droits de la Personne*.[21] The Commissions are usually charged with advancing the principle of equality and non-discrimination, promoting an understanding of and compliance with the legislation, researching and developing educational programmes designed to eliminate discriminatory practices, and encouraging and coordinating human rights programmes and activities.[22] Although the procedure for handling discrimination complaints varies from province to province only in respect of fine detail, the Alberta practice is not untypical. An individual complaint of discrimination is made to the Alberta Human Rights Commission, which will investigate the complaint and attempt to effect a settlement.[23] If a settlement is not reached, and if the complaint is not without merit, a board of inquiry is appointed with plenipotentiary authority.[24] The complainant has the initial burden of proving a *prima facie* case, but then the evidentiary burden moves to the employer to show a legitimate, non-discriminatory reason for the actions which form the basis of the complaint. An appeal from a decision of the board of inquiry is heard by the Court of Queen's Bench and may involve a question of law or of fact.[25] The procedure in the other provinces is very similar.[26] In Manitoba, for example, mediation is employed to attempt a settlement between the

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[20] (Can) HRA ss 55-56.

[21] (Alb) IRPA ss 14-15; (BC) HRA s 10; (Man) HRC ss 2-8; (NB) HRA ss 10-19; (NS) HRA ss 22-26A; (Ont) HRC ss 27-31; (PEI) HRA ss 16-19; (Queb) CHR&F ss 58-68; (Sask) HRC ss 21-25 (and the Human Rights Commission Act 1972); (YT) HRA ss 15-18.

[22] (Alb) IRPA s 16. See also: Alberta Human Rights Commission Procedure Regulations 1980 (Alb Reg 263/80); Commission Procedure Regulation 1990 (Alb Reg 150/90).

[23] (Alb) IRPA ss 19-20. Protection is afforded against complainants being victimised: s 11. The Commission has powers of investigation, entry and inspection: ss 21-26.

[24] (Alb) IRPA ss 27-30.

[25] (Alb) IRPA s 33.

[26] (BC) HRA ss 11-16 (and the Human Rights Code Board of Inquiry Regulations 1975 BC Reg 151/75, as amended by 137/82); (Man) HRC ss 22-27; (NB) HRA s 20; (NS) HRA ss 27-37; (Ont) HRC s 32-42; (PEI) HRA ss 21-28; (Queb) CHR&F ss 69-80; (Sask) HRC ss 27-30; (YT) HRA ss 19-23.

parties,[27] and any subsequent inquiry into the complaint is conducted by an adjudicator rather than a board of inquiry.[28] At the request of any person, the Manitoba Human Rights Commission is empowered to give an "advisory opinion" as to whether the Code has been contravened. Unless this opinion is revised or revoked, the person to whom it is issued is entitled to rely upon it as conclusive of the issue of whether they were acting in accordance with the Code.[29]

United States

Under the (US) RA 1973, sections 501 and 503 were largely enforced through administrative mechanisms overseen by the EEOC and the OFCCP. Individual complaints of discrimination would only be heard in the federal courts via a challenge for judicial review of an administrative law decision. The potential lack of a private right of action for disabled plaintiffs also dogged the early years of section 504, although the right of the federal courts to entertain individual complaints was subsequently established.[30] The same problems are not anticipated under the (US) ADA 1990. The enforcement of the ADA 1990 is ultimately in the hands of the EEOC and is discharged primarily by the investigation of individual claims of discrimination. The ADA 1990 adopts the administrative and judicial enforcement mechanisms and remedies available under Title VII of the Civil Rights Act 1964. Accordingly, disabled litigants in employment discrimination cases have the same rights and remedies as ethnic and racial minorities, women, and religious adherents. The first stage is to submit the discrimination complaint to the administrative processes of the EEOC.[31] This will include attempts to resolve the complaint by conciliated agreement. The second stage, if the complaint is not disposed of at the first stage, is to bring a private action in court.[32] The primary remedy available in a successful case will be injunctive relief, including an order for reinstatement and/or an order that the plaintiff be employed in a specific job and/or an order for monetary compensation for lost wages.[33] Compensatory or punitive damages would not

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[27] (Man) HRC ss 28-31.

[28] (Man) HRC ss 32-42.

[29] (Man) HRC s 21.

[30] *Consolidated Rail Corporation v Darrone* (1984) 465 US 624. The problem of a private right of action under the RA 1973 is discussed in Chapter VI above and is returned to in Chapter XVI below. See generally: Paolicelli, 1979; Schoon, 1979; Boller, 1982.

[31] 42 USC §2000e-5.

[32] 42 USC §2000e-5(f). Actions might also be brought by the EEOC or the Attorney General.

[33] 42 USC §2000e-5(g); *Shah v Mount Zion Hospital & Medical Center* (1981) 642 F2d

normally have been available.[34] However, section 102 of the Civil Rights Act 1991 now allows compensatory damages to be awarded in Title VII or ADA 1990 or RA 1973 litigation where *intentional* discrimination is found, and punitive damages in cases of malicious or reckless discrimination.[35] Nevertheless, claims for compensatory damages in disability discrimination cases might now be met with a defence that the employer has made "good faith" attempts, in consultation with the plaintiff, to make reasonable accommodation for disability.

It has been estimated that the EEOC will need an annual budget of $15 million in order to carry out its enforcement functions under the ADA 1990.[36] Furthermore, the EEOC anticipated a caseload under the ADA 1990 of approximately 12,000 complaints per year. By the end of April 1993, 9 months after the Act first came into force, some 8,505 complaints had been received, comprising 15 per cent of the EEOC's caseload.[37] The EEOC data reveal that 48 per cent of complaints concerned disability-related dismissals, 21 per cent related to a failure to accommodate disability and 14 per cent went to alleged discriminatory recruitment and selection decisions. Nearly 10 per cent of filed complaints allege harassment, 7 per cent are derived from disciplinary decisions, 5 per cent from lay-offs and nearly 4 per cent go to employee benefits (the ADA's impact upon occupational health insurance and benefits, in particular, appears to be exercising employers). In what is believed to be the first case to be tried under the ADA regime, an executive director, dismissed by his employer when it was learnt that he had developed terminal brain cancer, was awarded $577,000.[38] The award was made up of $22,000 back pay, $55,000 compensatory damages and

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268 at 272 (9th Cir).

[34] Because of restrictions under Title VII of the Civil Rights Act 1964: *Mosley v Clarksville Memorial Hospital* (1983) 574 FSupp 224 (MD Tenn); *DeGrace v Rumsfeld* (1980) 614 F2d 796 (1st Cir). *Cf* the opposite position under 42 USC §1981 (Civil Rights Act 1866), although see *Patterson v McLean Credit Union* (1989) 491 US 164 (restricting §1981 compensatory and punitive damages to recruitment and selection discrimination). See now §101 Civil Rights Act 1991. Compensatory or punitive damages might have been available under state fair employment laws.

[35] 42 USC §1977A. However, a cap is put upon compensatory and punitive damages (not including back pay or past pecuniary losses or possibly future loss of earnings) in sex, religion and disability suits depending upon the size of the employer: 15-100 employees ($50,000), 101-200 employees ($100,000), 201-500 employees ($200,000) and over 500 employees ($300,000).

[36] US Senate, 1989: 90-91; Yelin, 1991: 141.

[37] *HR Focus* (July 1993) at 3. See also Dolatly, 1993: 544.

[38] *EEOC v AIC Security Investigations Ltd* (1993) unreported (but see footnote 37).

$500,000 punitive damages. The case is an early example of the EEOC's reinvigorated approach to discrimination damages after the reforms under the Civil Rights Act 1991 and prefaced in a policy statement issued by the EEOC in July 1992.[39]

Australia

In New South Wales, complaints and allegations of discrimination are initially put to the Anti-Discrimination Board for investigation.[40] If the complaint is not dismissed at this early stage, an attempt will be made to resolve the issue by conciliation,[41] failing which the complaint will be referred to the Equal Opportunity Tribunal (EOT).[42] After an inquiry by the EOT, the complaint may be dismissed or upheld and, if upheld, the EOT may declare the parties' rights, award damages, order that discriminatory conduct should not be repeated, require that the plaintiff be employed, reinstated or promoted (as befits the nature of the complaint), and/or declare void any contract or agreement made in contravention of the legislation.[43] An order of the EOT is enforceable in the ordinary courts, while its decisions are appealable to the NSW Supreme Court on a question of law. The position in Queensland is little different, except that original complaints are handled by the Anti-Discrimination Commission and adjudicated upon by the Anti-Discrimination Tribunal.[44] In South Australia and in Western Australia, the roles of investigation and adjudication are filled respectively by the Equal Opportunity Commission and the Equal Opportunity Tribunal,[45] while in Victoria the relevant bodies are the Equal Opportunity Commission and the Equal Opportunity Board.[46] The recently enacted Commonwealth disability discrimination law provides for complaints of disability discrimination to be referred to the Human Rights and Equal Opportunity Commission.[47] At the first stage, an inquiry will be held by the Disability Discrimination

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[39] *Enforcement Guidance: Compensation and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (reprinted in *Daily Labor Reporter* N° 131, E-1, 7 August 1992).

[40] (NSW) ADA 1977 s 89.

[41] (NSW) ADA 1977 s 92.

[42] (NSW) ADA 1977 s 94.

[43] (NSW) ADA 1977 s 113.

[44] See generally: (Qld) ADA 1991 ss 134 *et seq.*

[45] See generally: (SA) EOA 1984 ss 93 *et seq*; (WA) EOA 1984 ss 75 *et seq.*

[46] (Vic) EOA 1984 ss 44 *et seq.*

[47] (Cth) DDA 1992 s 69.

Commissioner,[48] who will endeavour to settle the matter by conciliation, before referring the matter back to the Commission.[49] The Commission will hold a formal inquiry into the complaint and the parties will enjoy rights of appearance and legal representation.[50] Again, conciliation plays a role in the inquiry and the Commission must take all reasonable steps to attempt an amicable settlement.[51] If the complaint is not dismissed by the Commission, it may make a declaration of the parties' rights and may make positive orders and/or award compensation.[52]

JUDICIAL ENFORCEMENT

It will be clear from the foregoing account that disability discrimination is a justiciable issue, but that in Canada and Australia disability discrimination complaints tend to be handled within the machinery of institutional enforcement, albeit with quasi-judicial overtones. The emphasis upon inquiry and alternative dispute resolution, particularly the use of conciliation, is noteworthy. The issue is also dealt with in an environment, exemplified by the use of special boards of inquiry or anti-discrimination and equal opportunity tribunals, that allows expertise in discrimination questions to come to the fore in adjudication. In contrast, in the US, disability-related litigation takes place in the mainstream federal courts or administrative law courts and is treated as just another example of litigious matter. This raises the question of the appropriate forum for disposing of disability discrimination complaints if discrimination law in Britain were to be extended to cover this forbidden ground.

Earlier proposals for disability discrimination legislation envisaged that the county courts would hear assertions that the law had been breached. However, the Civil Rights (Disabled Persons) Bills of recent parliamentary sessions have pointed to the industrial tribunals as the appropriate arena for disputes concerning disability in employment. This follows the pattern adopted for sex and race discrimination applications.[53] Clearly, the industrial tribunals are a more fitting medium for the resolution of disability-related actions for *employment* discrimination, and certainly preferable to the ordinary courts, on the one hand, or the other specialist administrative tribunals, on the other hand. It might be argued, for instance, that

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[48] Established under Part 6 of the Act.

[49] (Cth) DDA 1992 ss 71-76.

[50] (Cth) DDA 1992 ss 77-102.

[51] (Cth) DDA 1992 s 93.

[52] (Cth) DDA 1992 s 103. The declarations or orders are enforceable in the federal courts.

[53] SDA 1975 s 63; RRA 1976 s 54.

bodies such as the Medical Appeal Tribunal or Social Security Appeal Tribunal already have "expertise" in disability issues. However, these bodies might be expected to take a welfarism approach to disability discrimination law, would have little experience of discrimination or employment concepts, and would be associated with the medical model of disability which new rights would set out to challenge. Nevertheless, the industrial tribunal system might not be the perfect solution to the problem of adjudication.

The evidence suggests that the industrial tribunals and those involved in their jurisdictions already lack understanding of discrimination and of the law that attempts to confront it.[54] It has been suggested that discrimination cases should be assigned to a specialist division of the industrial tribunal system,[55] allowing tribunal members to establish expertise by continuous contact with a discrimination caseload. Furthermore, the importance of ensuring that at least one member of the tribunal has experience of disability, whether personal or otherwise acquired, is essential if disabled plaintiffs are to have confidence in the system. Although it was intended that in sex or race discrimination claims at least one member of the tribunal would be a woman or a person with special knowledge of race relations, in practice this has not been achieved, and this failure does not provide grounds for appeal.[56] It is suggested that, assuming employment-related disability discrimination complaints will be assigned to industrial tribunals, a special panel of disabled persons or persons with knowledge of disability may need to be established by regulation and that one member of the tribunal should be drawn from that panel to hear such complaints. Whether or not a specialist division of tribunals is established to deal with disability discrimination cases, the training of tribunal members will have to take on board comprehension of the nature and experience of disability and the subtle forms in which disabled people encounter discrimination.

Although, in the view of the present writer, the industrial tribunals are, in the absence of a practical alternative, the best forum for hearing disability-related complaints, the system as a whole remains flawed. It is not intended to rehearse here the arguments in the debate about the efficacy of industrial tribunals,[57] but a few summary points should be made. There is the problem of access to the tribunal system. For disabled litigants that means *physical*

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[54] Leonard, 1987b.

[55] See the arguments and counter-arguments weighed in Justice, 1987.

[56] *Habib v Elkington & Co Ltd* [1981] ICR 435 EAT.

[57] A good account of the problems inherent in assigning discrimination cases to industrial tribunals may be found in the context of sex discrimination law in Morris and Nott, 1991: Chapter 8.

access to and within the buildings housing the industrial tribunals, but it also refers to the difficulties of enforcing rights in an adversarial system. Access to legal advice and representation will be a crucial aspect of any meaningful rights to be protected from prohibited actions in the workplace. Given complex questions about the definition of disability, fitness or qualification for work and the requirements of reasonable accommodation, disabled plaintiffs will require not only legal expert assistance, but also access to sources of information and expert witnesses who can attest to those issues. The potential cost of pursuing these new rights may also be prohibitive, especially in the early cases where fundamental principles will need to be established. The role of the proposed Disablement Commission will be pivotal here. Once before the tribunal, questions concerning the burden of proof, discovery of documents and legal procedure generally will determine the chances of success, just as they do in discrimination and employment protection cases generally. Disability rights activists should not be seduced into believing that the enactment of a disability discrimination statute will produce readily enforceable rights and remedies.

REMEDIES

In the nature of things, concern to establish the shape and scope of the principle that discrimination is unlawful has often led to the question of available remedies being overlooked or given second order priority. However, as Morris and Nott observe in the context of gender discrimination:

> The remedies available to a successful complainant should not only be aimed at compensating the victim in a way commensurate with the injury suffered but should also deter a repetition of the unlawful act. One way to achieve deterrence is to ensure a level of compensation which is more than nominal and a system of enforcement which provides for further significant sanctions against non-compliance.[68]

Unfortunately, in British discrimination law, the available remedies have neither compensated adequately not deterred sufficiently.[69] Recent developments in the US under the Civil Rights Act 1991 suggest that disability discrimination litigation in that jurisdiction will begin to produce effective and compensatory remedies (see discussion at page 394 above). In this section, we look at the availability of remedies under existing British legislation and compare and contrast it with the position in Canada.

Compensatory damages

In Britain, discrimination compensation is calculated as if it were an award of damages for a

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[68] Morris and Nott, 1991: 161.

[69] Evidence for this can be found in Leonard, 1987a.

statutory tort.[60] In principle, this means that in employment cases a successful plaintiff should be entitled to lost wages, both up to the date of the hearing and as to the future. However, in complaints of discrimination in appointment or promotion (as opposed to dismissal), the essence of the case is one of lost opportunity rather than denied benefits. Accordingly, the British courts have been reluctant to allow the recovery of such financial loss predicated upon a speculation as to the outcome of a non-discriminatory process. In practice, therefore, the plaintiff's redress will usually be limited to compensation for out-of-pocket expenses and injury to feelings.[61] Nevertheless, even then, damages for injury to feelings have been comparatively small (usually of the order of £100), although in isolated cases a court has been minded to make a more generous award,[62] and more recently it has been suggested that £500 is now the more appropriate figure.[63] But even when pecuniary damages are accounted for, discrimination awards are not generous. In a study of sex discrimination cases in the early 1980s, it was found that the average award in recruitment complaints was just under £300.[64] Although over the last decade, this bench-mark has improved, the most recent tribunal statistics covering the period 1990-91 show that the average award in race discrimination cases is £1,749, while in sex discrimination cases the median award is £1,142. It is only in rare cases that a plaintiff manages to breast the £2,000 mark.[65]

The picture is probably coloured by the fact that the British legislation places a ceiling upon the amount of compensation that can be awarded in an individual case. The current maximum limit is £11,000 from 1 June 1993.[66] This is bound to force down the average level of awards as the tribunals will be naturally unwilling to make awards at the upper end of the

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[60] SDA 1975 s 65(1)(b); RRA 1976 s 56(1)(b). The award of compensation must be regarded as just and equitable in the first place, although thereafter the award is calculated upon common law principles: *Hurley v Mustoe (N° 2)* [1983] ICR 422 (EAT).

[61] SDA 1975 s 66(4); RRA 1976 s 57(4). For the principles of assessment of general damages in discrimination cases see: *Alexander v Home Office* [1988] ICR 685 CA.

[62] See, for example: *Noone v North West Thames Regional Health Authority* [1988] ICR 813 CA (£3,000 for severe injury to feelings in a race discrimination case); *cf Coleman v Skyrail Oceanic Ltd (t/a Goodmos Tours)* [1981] ICR 864 CA.

[63] *Sharifi v Strathclyde Regional Council* [1992] IRLR 259 EAT.

[64] Leonard, 1987a: 14.

[65] *Employment Gazette* Vol 99 N° 12 (December 1991).

[66] SDA 1975 s 65(2) and RRA 1976 s 56(2) by reference to EP(C)A 1978 s 75. The current limit is set by the Unfair Dismissal (Increase of Compensation Limit) Order 1993 SI 1993/1348.

scale for discrimination claims that they might regard as run-of-the-mill. However, it does seem at best ambivalent towards the objectives of the law to design a discrimination remedy akin to a statutory tort, but then put a cap upon the amount of compensation that might be recovered. Placing an upper limit upon compensation (inclusive of *pecuniary* damages) is not a feature of the discrimination laws of the three common law jurisdictions that have been used as the basis of this comparative study. Pecuniary damages are at large and the only ceiling placed upon awards might be that element relating to non-pecuniary compensation. For example, Canadian federal legislation sets out to compensate the plaintiff for lost wages and expenses without limitation but, in the case of wilful or reckless discrimination or discrimination resulting in injury to feelings or self-respect, the payment of special compensation may be made only up to $5,000.[67] British Columbia allows an award of special additional compensation of up to $2,000.[68] In cases of wilful or reckless discrimination contrary to Ontario human rights law, a defendant may be ordered to pay damages for mental anguish of up to $10,000.[69] In cases of wilful contravention of the Saskatchewan Code involving injury to feelings or self-esteem, an award of additional compensation of up to $5,000 may result.[70] Strictly speaking, these provisions establish an unassailable right to this head of damages, where such a right might not otherwise exist at common law, rather than represent an artificial restraint upon the calculation of the award.

By pointing to the analogue of sex and race discrimination statutes as the basis of proposals for disability discrimination law, British disability rights activists risk inviting a similarly imposed ceiling of £11,000 (or its up-rated equivalent) on compensation. However, the recent European Court of Justice decision in *Marshall v Southampton and South-West Hampshire Area Health Authority (N° 2)* is likely to prove pivotal.[71] The Court rules that the British SDA 1975 is contrary to Article 6 of the EC Equal Treatment Directive 76/207 in setting an upper limit to recoverable compensation in sex discrimination complaints. European Community law requires that a plaintiff be made whole where true equality of opportunity has been denied.

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[67] (Can) HRA s 53. It is within the Commission's jurisdiction to award interest upon any compensation to be paid: *Attorney-General of Canada v Rosin* (1991) 91 CLLC ¶17,011 (Can) FCA.

[68] (BC) HRA s 17. The (BC) Human Rights Amendment Act 1992 (SBC 1992 c 43) has subsequently lifted this limit on damages and provides a general power to award compensation for injury to dignity, feelings and self-respect.

[69] (Ont) HRC s 41.

[70] (Sask) HRC ss 29-31.

[71] [1993] IRLR 445 (ECJ). See the commentary on the decision by Napier (1993).

If monetary compensation is the instrument of remedial action, then damages must be adequate and the loss sustained by the plaintiff must be made good in full. No distinction is made between pecuniary and non-pecuniary losses. The immediate effect of the decision directly assists only employees of public bodies and organs of the state, but it is clear that British law will have to be amended so as to allow private sector employees to enjoy a remedy without constraint.[72] Although this does not naturally follow from the decision itself, it is probable that the Government would have to amend the RRA 1976 simultaneously, in order to avoid invidious comparisons between the scope of remedies for sex and race discrimination. This would redound to the benefit of any proposed disability discrimination reforms.

Compensation and intentional discrimination

Where there is a complaint of indirect sex or race discrimination, and the complaint is successfully made out, the plaintiff is not entitled to any monetary compensation unless the indirect discrimination was intentional.[73] As *indirect* discrimination is almost invariably *unintentional* by its very nature, this exception would appear to bear very hard upon those whose exclusion from equal opportunities is the result of the erection of unjustifiable barriers to employment. On its face, this provision would appear to allow recovery of compensation for indirect discrimination only where an employer has used facially neutral but deliberately exclusionary criteria calculated to disadvantage women or minorities as a pretext for actual discrimination. The blurring of the distinction between direct and indirect discrimination by the House of Lords judgment in *James v Eastleigh Borough Council* [74] might be seen as having pulled the sting of the exception, but the ramifications of the decision have yet to be worked through. The denial of damages for unintentional indirect discrimination does not seem defensible and a change in the law has been suggested.[75] Moreover, it is questionable whether the denial of an adequate remedy in such cases withstands the robust view of the ECJ on the deterrent effect of national remedies for sex discrimination delivered in *Marshall (N° 2)* above.

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[72] In the meanwhile, private sector plaintiffs might have a cause of action against the Government for inadequate implementation of the Directive under the principle of state compensation enunciated in *Francovich v Italian Republic* [1992] IRLR 84 ECJ.

[73] SDA 1975 s 66(3); RRA 1976 s 57(3).

[74] [1990] ICR HL.

[75] EOC, 1988.

Exemplary damages

While compensatory damages, if used imaginatively, can make a plaintiff whole, such an award might not act as a sufficient punishment of the discriminator or as an adequate deterrent to other employers. Exemplary or punitive damages may be more appropriate.[76] At common law, exemplary damages may be awarded where there has been oppressive, arbitrary or unconstitutional action by government servants or where the defendant's conduct has been calculated to accrue a profit that exceeds any compensation paid to the defendant. The leading case in discrimination law relies upon the first of these grounds. In *Bradford Metropolitan City Council v Arora*,[77] a race discrimination case, exemplary damages were awarded against a local authority for the actions of its senior officers. The tribunal awarded the sum of £1,000 in this respect and this was upheld by the Court of Appeal. Nevertheless, in Britain the award of compensation under this head has and will continue to be rare, possibly because a claim for exemplary damages should be specifically pleaded. By way of comparison, discrimination contrary to the Québec Charter entitles the victim to obtain "the cessation of [such discrimination] and compensation for the moral or material prejudice resulting therefrom".[78] In the case of intentional interference, exemplary damages may be awarded. Also in a case of a malicious contravention of the Yukon Territory Act, exemplary damages may be awarded. Unusually, if the complainant has acted frivolously or vexatiously, the board of adjudication can award the defendant party its costs against the complainant and order the complainant to pay damages for injury to reputation.[79] In Manitoba, where there is evidence of malice or recklessness, an employer might be ordered to pay a penalty or exemplary damages of up to $2,000 in an individual case and up to $10,000 in any other case.[80]

Positive remedies

There has been a tendency in discrimination law, as in employment law generally, to regard monetary compensation as being the primary remedy. This is undoubtedly due to the

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[76] The general principles for the award of exemplary damages are set out in *Rookes v Barnard* [1964] AC 1129 (HL); *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL); and *AB v South West Water Services Ltd* [1993] 1 All ER 609 (CA).

[77] [1991] ICR 226 (CA).

[78] (Queb) CHR&F s.49.

[79] (YT) HRA ss 24-24.1.

[80] (Man) HRC s 43. An order may not have the effect of removing a person from an employment position accepted in good faith: s 44. The parties usually bear their own costs, unless either party has acted frivolously or vexatiously: s 45. An order is enforceable as a court judgment: s 48.

reluctance of the tribunals and courts to fashion a remedy that has the effect of creating specific performance of a contract for personal services. This must also be especially so in cases where no contract has yet been formed because of the intervening discrimination. However, both the SDA 1975 and the RRA 1976 contemplate that a tribunal or court might grant positive remedies to a successful plaintiff. First, an order may be made declaring the rights of the parties in relation to the complained of act.[81] Second, the judicial body may make a recommendation that the employer take action to obviate or reduce the adverse effect upon the plaintiff of the discrimination in question. A failure to comply with such a recommendation without reasonable justification entitles the plaintiff to original or increased compensation.[82] The British tribunals and courts have resiled from an interpretation of these positive remedies that would lead to judicial approval of positive discrimination. So, for example, the tribunal cannot recommend that the successful plaintiff be appointed to next available suitable vacancy.[83] Similarly, a recommendation may not be made that the plaintiff should be promoted forthwith, for such an action may transgress the merit principle and cause counter-discrimination affecting other employees.[84] Such timidity is not to be found in other jurisdictions.

In Canada, the Canadian Human Rights Tribunal may order a defendant to cease a discriminatory practice, to take measures to prevent future discrimination (including adopting an affirmative action plan), or to provide the plaintiff with the rights, opportunities or privileges which have been denied (such as engagement or reinstatement).[85] In addition, if the Tribunal finds the complaint to be substantiated:

> but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such disability, the Tribunal shall (a) make such order... for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or (b) if the Tribunal considers that no such order can be made, make such recommendations as it considers appropriate...[86]

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[81] SDA 1975 s 65(1)(a); RRA 1976 s 56(1)(a).

[82] SDA 1975 s 65(1)(c),(3); RRA s 56(1)(c),(3) (subject to the statutory maximum).

[83] *Noone v North West Thames Regional Health Authority (N° 2)* [1988] IRLR 530 CA.

[84] *British Gas plc v Sharma* [1991] ICR 19 EAT.

[85] (Can) HRA s 53. It is within the Commission's jurisdiction to award interest upon any compensation to be paid: *Attorney-General of Canada v Rosin* (1991) 91 CLLC ¶17,011 (Can) FCA.

[86] (Can) HRA s 53(4).

Thus the Tribunal may also order an employer to adapt its premises or facilities to accommodate a disabled plaintiff, subject to avoiding costs or business inconvenience constituting undue hardship.

In the Canadian provinces, a board of inquiry may order that the discrimination should cease, that future contraventions should be avoided, that the complainant be extended the rights which have been violated by the discriminatory act, or that lost income and expenses for up to two years prior to the complaint be compensated for by the defendant. Alternatively, a board of inquiry may order any other action which it deems proper, so as to put the complainant in the position that would have prevailed but for the discrimination.[87] In cases of disability-based discrimination in Saskatchewan, a board of inquiry may order additionally that facilities be arranged to ensure that physical access is not impeded and that proper amenities are provided for disabled persons. However, this is subject to the defendant showing that the cost and business inconvenience involved in meeting such an order would cause undue hardship. This presently means:

> intolerable financial cost or disruption to business occasioning such costs in the circumstances, but does not include, *inter alia*, the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for physically disabled persons of a kind that must be provided by law for persons of both sexes.[88]

However, an amendment, which is not yet in force, would allow regard to be had to the effect of the order upon the financial stability and profitability of the business, the value of existing amenities, structures and premises in comparison with the cost of providing proper amenities or physical access, the essence or purpose of the business, and (disregarding personal preferences) its workforce, clients and customers.[89] In Manitoba, an unsuccessful defendant may be required to adopt and implement an affirmative action programme or other special programme, if there has been a pattern or practice of contravention.[90] In a case of disability-based discrimination where the contravention of the Code involves the impeding of access of physically disabled persons or the failing to provide them with proper amenities in a building or facility, the adjudicator may *recommend* that this state of affairs be remedied. The adjudicator shall not make such an order if it is established that cost or business

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[87] See for example the Alberta model: (Alb) IRPA ss 31-31.1. An order for costs may also be made. An order of the board of inquiry is enforceable as an order of the court: s 32.

[88] (Sask) HRCReg s 1(d).

[89] (Sask) Reg 144/91 s 3.

[90] The adjudicator has jurisdiction to supervise or vary such an order, with the Commission's assistance, until there is full compliance: (Man) HRC s 47.

inconvenience would result and undue hardship would be caused.[91] Once a complaint has been lodged and remains to be disposed of, the Commission can seek an interlocutory order of the court to restrain conduct which is alleged to contravene the Code.[92]

The Canadian approach is illustrated by the sex discrimination case of *Canadian National Railway Company v Canadian Human Rights Commission*.[93] The Human Rights Tribunal ordered the employer to cease discriminatory recruitment practices on terms that would require the employer to hire a quota of women until their participation in blue collar jobs in the employer's undertaking was equal to the proportion of women in blue collar jobs in Canada as a whole. It was argued that the Tribunal had exceeded its jurisdiction in attempting to remedy past discrimination rather than preventing future recurrence of discriminatory practices. However, that argument was rejected on the ground that, to prevent discrimination against the identified groups protected by the Act, the statute must be given a fair, large and liberal interpretation. The Tribunal's order had been designed to tackle systematic discrimination and to prevent similar discriminatory practices reoccurring, rather than to compensate past victims of discrimination or to provide fresh opportunities for individuals previously refused employment. It was permissible to seek out and to destroy past patterns of discrimination in order to ensure that future applicants did not face the same discriminatory barriers which had blocked the employment opportunities of earlier generations. The application of this philosophy is demonstrated in a disability discrimination case also. In *Cameron v Nel-Gor Castle Nursing Home*,[94] a successful plaintiff was awarded compensation for lost wages and damages for injured feelings. Moreover, the employer was also directed to cease and desist discriminatory hiring practices, and ordered to offer the disabled plaintiff the next available vacancy. Furthermore, in a number of provincial decisions at first instance, boards of inquiry have ordered employers to adopt an affirmative action programme to prevent future contraventions of human rights codes.

Criminal sanctions

The use of criminal sanctions as a means of enforcing special legislation on behalf of disabled persons is, of course, a particular feature of the law in Britain and in continental Europe. The quota provisions of the DP(E)A 1944 are in principle enforceable within the criminal justice

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[91] (Man) HRC s 43(4). Such a decision of an adjudicator is subject to judicial review: (Man) HRC s 50.

[92] (Man) HRC s 54. See also s 55.

[93] (1985) 20 DLR (4th) 668 (Can) FCA; (1987) 40 DLR (4th) 193 (Can) SC.

[94] (1984) 84 CLLC ¶17,008 (Ont) HRC.

system. The use of the criminal law and criminal penalties might also be a limited feature of anti-discrimination laws in general: for example, in respect of discriminatory advertisements or persistent discriminatory practices.[95] In the Canadian provinces, however, more extensive use (or potential for use) of the criminal process exists. For example, a failure to comply with a provision of the New Brunswick Human Rights Act is also a criminal offence and a fine of $100-5,000 may be levied.[96] Breach of the Nova Scotia legislation is also a criminal offence for which a fine of up to $1,000 is payable.[97] In Ontario, with the consent of the Attorney-General, a criminal prosecution may also be pursued, as an infringement of any right under the Code is a criminal offence punishable by a fine of up to $25,000.[98] In Prince Edward Island, an infringement of the Act or a non-compliance with a ministerial order is a criminal offence punishable with a fine of $100-500 or 30 days imprisonment, in the case of an individual, and a fine of $200-2,000 in any other case. The burden of proof in this instance is the civil one. The appropriate Minister may also seek a court order to injunct a convicted party from further offences.[99] Failure to comply with a recommendation of the Québec Commission can result in an injunction being sought.[100] Moreover, employment discrimination is a criminal offence under this province's Charter.[101] In Saskatchewan, a failure to comply with an order of a board of inquiry or interference with the rights of a person under the Code is a criminal offence. In the case of an individual, this may result in a fine of $500-2,000; in any other case, the fine is $2,000-3,000.[102] Where an employer has been convicted of suspending, transferring, laying-off or dismissing an employee contrary to the Code, the court may order reinstatement with compensation.[103] A prosecution may

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[95] See generally: SDA 1975 Part IV; RRA 1976 Part IV.

[96] (NB) HRA s 23. A prosecution requires ministerial consent: s 24. In such criminal proceedings arising from employment discrimination, the court may order reinstatement and/or lost wages up to the date of conviction: s 25. An order enjoining further violations may be issued and enforced as an order of the Supreme Court: s 27.

[97] (NS) HRA s 29. A prosecution requires ministerial consent: s 30. An order may also be made to injunct further offences: s 32.

[98] (Ont) HRC s 44.

[99] (PEI) HRA ss 29-32.

[100] (Queb) CHR&F ss 81-83.

[101] (Queb) CHR&F ss 87-89.

[102] (Sask) HRC s 35.

[103] (Sask) HRC s 40.

be instituted by a trade union, occupational association or employers' organization.[104] In addition, the Commission may seek a court injunction to prevent a person convicted of an offence under the Code from continuing or repeating the offence, and the court may also issue such an injunction in private proceedings under the Code.[105] In limited circumstances, infringement of the Yukon Territory Act is a criminal offence punishable by a fine of up to $2,000.[106] Following the commencement of either civil or criminal proceedings, the Supreme Court may grant a temporary injunction to restrain allegedly discriminatory conduct or to require compliance with the Act, pending the completion of the proceedings. Finally, in Manitoba, in a serious case of the Code being contravened, the Minister may consent to a criminal prosecution.[107] A fine of up to $10,000 may be imposed. Despite these many examples of the use of criminal law to address disability discrimination, however, little is known or understood about the impact of the criminal justice process upon employers and disabled people.[108]

CONCLUDING REMARKS

In the final analysis, carefully drafted discrimination statutes are often only as good as their procedural and remedial frameworks allow them to be, however far-sighted their substantive provisions might be. The ability of disabled persons to challenge incidents and patterns of disability-informed discrimination rests entirely upon those parts of discrimination legislation that provide a cause of action, a route to litigation and an array of enforceable responses to identified unlawful actions, policies or practices. The law's emphasis upon the individual-based complaint process of the British SDA 1975 and RRA 1976 is often blamed for the alleged failure of the legislation to root out systematic and institutionalised discrimination. The want of formal class action procedures in this country also leads to a failure to learn the lessons of discriminatory episodes beyond the confines of the individual case. The treatment of discrimination complaints in isolation, and as being limited to their peculiar circumstances, frequently results in the repetition of unlawful behaviour and the consolidation, rather than demolition, of discriminatory policies and practices. With these limitations of the traditional anti-discrimination legal model in mind, we turn in the following penultimate chapter to look

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[104] (Sask) HRC s 36.

[105] (Sask) HRC s 38.

[106] (YT) HRA ss 27-29.

[107] (Man) HRC s 51.

[108] The question appears to be entirely ignored in the literature and would seem to warrant empirical research.

at legal strategies that go beyond enforcement and that seek to provide lasting solutions to disability disadvantage.

CHAPTER XVI:
BEYOND ENFORCEMENT: POSITIVE ACTION, CONTRACT COMPLIANCE AND EQUAL OPPORTUNITY PLANNING

INTRODUCTION

The weaknesses of the individual complaint-based anti-discrimination law and the alleged failure of institutional enforcement in the field of gender and race discrimination have led many commentators to argue for a fresh approach. It is noteworthy, for example, that at the same time as US disability rights activists were pressing for comprehensive disability discrimination laws, in Canada - where such laws had been in place under human rights legislation for some time - Canadian disability advocates were looking to employment equity principles (involving the use of statistics, goals and timetables) to replace or supplement the reduced momentum of the non-discrimination principle as applicable to disabled persons. In Britain, too, the last decade or so has seen increasing interest in ideas of fair participation and equality of opportunity, employing methodologies that go beyond a simple proscription of direct or indirect discrimination on prohibited grounds. In this final substantive chapter, we examine some of these trends as they might apply to disabled employment rights and, in particular, we look at the role of positive action, contract compliance and equal opportunity policy-making.

POSITIVE ACTION

Meaning of positive action

As understanding of discrimination has deepened, concern over the efficacy of the individual complaint-based model of legal enforcement of anti-discrimination norms has led to consideration being given to alternative strategies of "positive action" or "affirmative action".[1] As McCrudden explains, "affirmative action" is the term used in the US:

> to refer to actions taken to identify and replace discriminatory employment practices, and to develop practices which result in the greater inclusion and participation in the work force of women and minorities.[2]

In Britain, the term "positive action" is usually preferred. Positive action can play a role in the range of judicial remedies available to courts and tribunals to address findings of discrimination. For example, an order might be made that the successful plaintiff in a discrimination action should be promoted or that the unsuccessful employer-defendant should dismantle a discriminatory recruitment practice. In the present context, however, concern is with *voluntary* positive action or with positive action that is encouraged or required by the

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[1] McCrudden, 1986: 219.

[2] McCrudden, 1986: 220-1.

legal framework itself.

McCrudden identifies five types of possible (although not necessarily permissible) positive action.[3] First, employers might take steps to eradicate discrimination by identifying and replacing unjustifiably discriminatory practices bearing upon one group rather than another. Close scrutiny of selection tests for inherent bias would illustrate this approach. This is not only permitted in existing discrimination law, but is an implicit legal duty. Second, enterprises might adopt "facially neutral but purposefully inclusionary policies" in order to increase the representation in the work force of minority group members without directly using a prohibited ground to do so. McCrudden gives the example of recruiting from among the unemployed or within a certain local catchment area to demonstrate this point. The problem with this form of positive action is that it will usually amount to direct or indirect reverse discrimination.[4] Third, employers might institute an outreach programme to ensure that groups that have suffered discrimination in the past are made aware of employment opportunities and encouraged to apply for them. If necessary, minority group members might be extended the assistance of training programmes designed to qualify or re-skill these groups to compete for those opportunities. Outreach, however, does not extend into the selection or promotion process itself, and there the minority group members must compete on merit. With that limitation in mind, outreach appears to be permitted by existing discrimination legislation.[5] Fourth, positive action might involve a degree of reverse discrimination, where employers address the under-representation of a disadvantaged group by according group members preferential treatment in recruitment, selection, promotion or employment security. The adoption of a quota of jobs for particular minorities is the manifest example of this type of positive action. As we have seen in an earlier chapter, this transgresses existing sex and race discrimination law. Fifth and finally, employers might redefine "merit" by including membership of a group or group characteristics as a relevant qualification for a job. The classic example is the recruitment of Afro-Caribbean applicants for positions as social workers providing welfare services to the Afro-Caribbean community. This form of positive action is permitted within narrow terms by the "genuine occupational qualification" exceptions under the Sex Discrimination and Race Relations Acts.[6]

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[3] McCrudden, 1986: 223-5.

[4] Despite McCrudden's arguments (1986: 230-2), this form of positive action is fraught with difficulty and unlikely to meet with the approval of the British legal system.

[5] SDA 1975 ss 47-47; RRA 1976 ss 37-38.

[6] SDA 1975 s 7(2)(e); RRA 1976 s 5(2)(d).

Positive action and disability

In Britain, the absence of a symmetrical (or even an asymmetrical) disability discrimination law has permitted by default, although not required, employers to utilise any or all of the above five forms of positive action in respect of disabled workers. The use of outreach techniques is in fact recommended by the Code of Good Practice on the Employment of Disabled People.[7] Employers are also encouraged there to review job descriptions and requirements, and application and selection procedures, to ensure that disabled applicants are not inadvertently excluded from employment opportunities.[8] Disabled workers may also have benefitted through some local authorities' policies that direct new job opportunities towards applicants on the unemployment register or within a narrowly defined local labour market. The use of "reverse discrimination" is mandated, of course, by the quota scheme under the 1944 Act, and some public sector employers have used the quota, in tandem with a redefinition of merit, so as to increase the representation of disabled people in their workforce.[9]

Nevertheless, positive action, in general, and towards disabled workers, in particular, remains in the realms of voluntarism in Britain. While the enactment of a disability discrimination statute would undoubtedly encourage some employers to take positive action towards disabled persons, the experience of other countries suggests that a positive action mandate, to be effective and universal, has to be enshrined in law. One way in which this might be done is through statutory contract compliance techniques.

A ROLE FOR CONTRACT COMPLIANCE?

In the US during the 1970s and 1980s, the message that hiring disabled workers was good for business was often heard.[10] Appeals to the commercial instincts of employers as a tactic for promoting the employment opportunities of minorities are frequently seen as a signal of weak or non-existent legislation regulating social discrimination in the labour market. Indeed, market forces have recently been recruited to demonstrate the futility of anti-discrimination laws in the first place and to argue the case for allowing a micro-economic solution to the problem of employment discrimination.[11] However, harnessing commercial energy to the

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[7] Para 5.3. See also paras 5.4-5.5.

[8] Paras 5.2 and 5.6-5.19.

[9] For an account of the efforts of the London Borough of Lambeth in this respect, see: *Equal Opportunities Review*, 1989. See also the experience of Manchester City Council recounted in *Equal Opportunities Review*, 1992: 15-18.

[10] See, for example: Williams, 1972; Pati and Adkins, 1980.

[11] Epstein, 1992: *passim*.

cause of equal opportunity and the anti-discrimination principle is not necessarily incompatible with the role of legal regulation. Contract compliance techniques have been a feature of ensuring fair labour standards for many decades.

Meaning and use of contract compliance

Contract compliance has been described in the following terms:

> With contract compliance the public sector insists that the firms from which it buys goods or services meet certain minimum employment standards. Rather than leaving it to other agencies to ensure that those standards are honoured, the purchasing body itself, or an agency acting directly on its behalf, seeks to ensure that they are met or that they will be met within a reasonable time. If the purchasing body cannot satisfy itself, at least on this latter point, then the firm forfeits the right to tender for public sector contracts.[12]

In other words, unless contractors meet specified employment standards for their workforce, they will lose the right to compete for or retain business contracts with the public sector. Contract compliance ensures that the purchasing power of the public sector is employed in the pursuit of social policy.[13] Although contract compliance is often thought of as a fairly modern phenomenon, a form of contract compliance was practised in government contracting in Britain since 1891 by virtue of the House of Commons Fair Wages Resolutions.[14] In essence, a fair wages clause in government contracts insisted that contractors should observe minimum wage and labour standards, enforceable through compulsory arbitration, and subject to the ultimate sanctions of contract termination and removal from the lists of approved tenderers.[15] However, central government fair wages clauses did not address discrimination other than anti-union policies and practices, although government contracts since 1969 required contractors to conform with the Race Relations Act 1976.[16] Furthermore, the last Fair Wages Resolution (of 1945) was rescinded by the Government with effect from 1983 and, with the advent of compulsory competitive tendering, other public sector

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[12] Carr, 1987: 2.

[13] In principle, there is nothing to prevent the private sector using contract compliance but, altruism apart, there are few motives for doing so. In practice, therefore, contract compliance techniques are almost invariably used by central and local government or by organs of the state. However, one exceptional illustration of a form of "contract compliance" is the monitoring of suppliers by Marks and Spencer plc. Evidence cited in Institute of Personnel Management, 1987: 5.

[14] The use of fair wages clauses in local government pre-dates this development by two years: Carr, 1987: 9.

[15] See Bercusson, 1978.

[16] Institute of Personnel Management, 1987: 4, where it is doubted whether these clauses are effectively monitored or enforced.

employers resiled from including non-commercial considerations in their contractual arrangements.[17]

The use of contract compliance as a tool of equal opportunity policy developed in the US during the early 1940s to combat racial discrimination in the defence industries.[18] Since 1965, moreover, with the signing of Executive Order N° 11246 and the establishment of the Office of Federal Contract Compliance (OFCCP), contract compliance and affirmative action were placed upon a firmer footing and extended to embrace discrimination on the grounds of race, colour, religion, gender and national origin.[19] In Britain, nevertheless, fair wages resolutions aside, *statutory* contract compliance has not been a feature of the anti-discrimination and equal opportunity battery. Instead, such experiments with contract compliance as there were occurred in local government on a *voluntary* basis, although undoubtedly inspired by the specific duty of local authorities under race discrimination law to promote equality of opportunity.[20] This encouraged a small number of councils to utilise their tendering procedures and commercial contracts to attempt to project the effects of their commitment to equal employment opportunity to third parties with whom they did business.[21] The brave new world of contract compliance was short lived, however, as the Local Government Act 1988 effectively outlawed the inclusion of non-commercial conditions in local authority contracts and restricted the ability of local government entities to vet contractors during the tendering stage.[22]

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[17] Fredman and Morris, 1989: 460-1.

[18] See Carr, 1987: 3 for an account of this initiative.

[19] 3 CFR §339 and 42 USC §2000e.

[20] RRA 1976 s 71. There is no parallel provision in the SDA 1975. The use of s 71 as a plank for the pursuit of socio-political activity by local authorities has been fraught with difficulty. See, for example: *Wheeler v Leicester City Council* [1985] AC 1054 HL and *R v Lewisham London Borough Council, ex parte Shell UK Ltd* [1988] 1 All ER 938 Div Crt.

[21] The leading proponent of this strategy was the now defunct Greater London Council. See: *Industrial Relations Review and Report*, 1986: 3-5; Carr, 1987: 10-16. Other examples of contract compliance practitioners are detailed in Institute of Personnel Management, 1987: *passim*. For an analysis of the legal basis, if any, upon which contract compliance has been practised in the public sector, see: Fredman and Morris, 1989: Chapter 12.

[22] Local Government Act 1988 ss 17-18 and 25 and see subsequently *R v London Borough of Islington, ex parte Building Employers' Confederation* [1989] IRLR 382 Div Crt. For an account of the impact of the 1988 legislation upon contract compliance, see Fredman and Morris, 1989: 464-9.

Contract compliance and disabled persons

In Britain, the primary emphasis in the use of contract compliance methods has been in fostering improved employment opportunities and conditions for ethnic minority workers. Women and other disadvantaged social groups have tended to take second place in the order of priorities. Nevertheless, disability has featured as an issue in voluntary contract compliance programmes. For example, the Greater London Council's pre-contract procedures took account of the percentage of disabled employees engaged by any firm tendering for a contract. Successful tenderers would be expected to liaise with the appropriate authorities to attempt the fulfilment of statutory and extra-statutory obligations towards this group.[23] In spite of this, there is little, if any, evidence of the effect of such programmes upon disabled employment. Now the Local Government Act 1988 surely prevents any further use of local authorities' purchasing power to advantage disabled workers.[24]

If a comparative perspective is adopted, it is clear that disabled persons in other countries do enjoy the formal protection of *statutory* contract compliance programmes. In Canada, the Federal Contractors Programme applies to employers with over 100 employees bidding for federal contracts for the supply of goods and services valued at at least $200,000.[25] Such employers must observe the principle of employment equity in their workforce and this extends to disabled persons. The sanctions available where the principle is being ignored include the eventual exclusion of employers from tendering for federal contracts. The federal government has the right to review employers' records in order to assess efforts being made, levels of compliance and results achieved. Among the Canadian provinces, Ontario also uses contract compliance to address employment discrimination by providing that it is an implied term of every Ontario government contract and sub-contract that the right to equal treatment in employment without discrimination on the ground of disability shall not be infringed during the performance of that contract.[26] A similar provision applies in respect of government

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[23] *Industrial Relations Review and Report*, 1986: 5; Carr, 1987: 15.

[24] By virtue of s 17(5)(a). An attempt was made during the passage of the draft legislation to include a clause that would allow local authorities to ask tenderers and contractors questions relevant to the Code of Good Practice on the Employment of Disabled People. See for example: HC Bill 54 (1987-88) cl 19 (as amended on Report). This clause did not survive the further scrutiny of the Bill.

[25] The programme is a government initiative taken under employment equity legislation. See Chapter VIII above.

[26] (Ont) HRC s 26(1). See also Manitoba's contract compliance measures: (Man) HRC s 56(1).

grants and loans.[27] Breach of the implied term shall be grounds for the cancellation of the contract (or grant or loan) and may justify a refusal to enter into further contracts with the discriminator (or make further grants or loans thereto).[28]

In the US, a form of contract compliance is implicit in section 504 of the RA 1973. As discussed in Chapter VI above, section 504 insists that disabled persons shall not be excluded from participation in any programme or activity receiving federal financial assistance or conducted by an arm of the federal government. This mandates equal employment opportunity and prohibits disability-based discrimination where employers are the beneficiaries of federal funding. However, as this gives the individual directly enforceable rights against the employer and does not strictly involve the medium of *commercial* contracting, it is not a true example of contract compliance techniques in practice. Such an example is provided by section 503 of the Act, which makes separate provision for disabled persons to benefit from contract compliance theory. This is such an important illustration of the genre that it deserves separate treatment.

DISABILITY AND CONTRACT COMPLIANCE IN THE UNITED STATES

Section 503 of the Rehabilitation Act 1973

In the US, section 503 of the federal RA 1973 introduced statutory contract compliance as a means of promoting equal employment opportunities for disabled workers.[29] Its basic provisions have been set out and reproduced in Chapter VI above. Any employer contracting with the federal government is required to take affirmative action to employ and advance disabled persons if the value of the contract exceeds $2,500. This provision covers procurement contracts for goods or services and construction contracts. It also applies to any similar sub-contracts which exceed $2,500 and which are entered into by a federal contractor in order to carry out the main contract.[30] Every relevant contract with the federal government must incorporate a provision requiring the federal contractor, when employing persons to carry out the contract, to take affirmative action to employ and advance in

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[27] (Ont) HRC s 26(2).

[28] (Ont) HRC s 26(3).

[29] 29 USC §793(a). Authority under this section was delegated to the Secretary of Labor by Executive Order N° 11758, 15 January 1974 (39 *Federal Regulations* 2075) as amended. Regulations implementing s 503 have been enacted by the OFCCP: 41 CFR Part 60-741.

[30] 41 CFR §60-741.2. The prime contractor and sub-contractor must include an affirmative action clause in the sub-contract either expressly or by reference: 41 CFR §60-741.20.

employment qualified disabled persons.[31] The terms of the model affirmative action clause are reproduced in Text Box 21.

Federal contractors holding contracts in excess of $50,000 and employing over 50 employees are subject to additional obligations. Within 120 days of the relevant contract commencing, such employers must prepare and maintain an affirmative action programme at each of their establishments.[32] The programme must set out the employer-contractor's policies, practices and procedures regarding affirmative action in respect of all employment practices and in respect of all levels of employment.[33] It must be available for inspection upon request by any employee or applicant and, for this purpose, information about the availability and accessibility of the programme has to be posted at each workplace.[34] The programme must be kept under review and up-dated annually, provided that any significant changes that result are communicated to employees and would-be employees.[35] The contractor-employer must invite individuals who may be covered by the legislation to come forward if they wish to take advantage of the affirmative action programme. A model form of invitation is reproduced in Text Box 22. Such action on the part of a disabled person has to be voluntary and treated as confidential and in accordance with the legislation. A refusal by disabled persons to identify themselves as potential beneficiaries of an employer-contractor's affirmative action programme is not to be the subject of adverse treatment.[36] Compliance with the particular requirement to develop an affirmative action programme does not relieve the employer of any obligation to take affirmative action in respect of a person of whose disability the employer already has knowledge, but equally the employer is not obliged to search its medical files to identify disabled persons who are not otherwise known or who have not come forward

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[31] 41 CFR §60-741.4. The language of the clause may be adapted if necessary to identify properly the parties and their undertakings: 41 CFR §60-741.21. The clause may be incorporated by reference: 41 CFR §60-741.22; but, in any event, is deemed to be part of the contract whether or not it is an express term and whether or not the contract is in writing: 41 CFR §60-741.23.

[32] 41 CFR §60-741.5(a). This may be integrated with any other affirmative action programmes. Originally, affirmative action plans had to be filed with the Department of Labor, but the evidence suggested that the Department found it impracticable to process and review the submitted plans, so this requirement was dropped in 1976: Percy, 1989: 204.

[33] 41 CFR §60-741.6(a). The policies, practices and procedures must accord with the standards set in 41 CFR §60-741.6, which are discussed below.

[34] 41 CFR §60-741.5(d).

[35] 41 CFR §60-741.5(b).

[36] 41 CFR §60-741.5(c)(1). An employee is not precluded from coming forward under the affirmative action programme on some later occasion: 41 CFR §60-741.5(c)(2).

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligations under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

Source: 41 CFR §60-741.4

Text Box 21: Affirmative action clause under section 503 Rehabilitation Act 1973

1. This employer is a government contractor subject to section 503 of the Rehabilitation Act of 1973, which requires government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. If you have such a handicap and would like to be considered under the affirmative action program, please tell us. Submission of this information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals, and regarding necessary accommodations, (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment, and (iii) government officials investigating compliance with the Act shall be informed.

2. If you are handicapped, we would like to include you under the affirmative action program. It would assist us if you tell us about (1) any special methods, skills and procedures which qualify you for positions that you might not otherwise be able to do because of your handicap, so that you will be considered for any positions of that kind, and (2) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.

Source: Appendix B to 41 CFR Part 60-741

Text Box 22: Invitation to participate as beneficiary of affirmative action programme

voluntarily.[37]

Affirmative action programmes

Whether or not a government contractor is required to devise a *formal* affirmative action *programme*, all employers subject to section 503 must consider the effect of the affirmative action mandate upon their policies, practices and procedures. Personnel processes call for review to decide whether:

> present procedures assure careful, thorough and systematic consideration of the job qualifications of known handicapped applicants for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available.[38]

If necessary, the personnel procedures must be modified and, in any event, must be designed so as to allow compliance with the affirmative action obligation to be monitored. The OFCCP suggests, but does not require, that employers adopt model procedures contained in the section 503 regulations.[39] Application or personnel forms might be annotated so as to identify vacancies for which a known disabled applicant was considered. Such forms should be easily retrievable for internal and external review in investigations and compliance activities. Disabled employees' personnel or application records might identify each promotion and training programme for which the individual was considered. Where a disabled employee or applicant is turned down for any employment opportunity, the form should contain a statement of the reason for that outcome, including a comparison with the qualifications of the successful and unsuccessful candidates, and a description of any accommodations considered.[40] The application form or personnel record should also describe any accommodation undertaken by the employer to place a disabled individual in a job where the individual was successful in being hired, promoted or trained for that position.

As part of an affirmative action programme, contractors must provide and adhere to a schedule for the review of job qualification requirements.[41] Insofar as such requirements tend to screen out qualified disabled persons, the employer must ensure that they are job-related, consistent with business necessity and essential for the safe performance of the job.

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[37] 41 CFR §60-741.5(c)(3). It follows also that compliance with this requirement does not absolve the employer from disability-based discrimination under the legislation at large: 41 CFR §60-741.5(c)(4).

[38] 41 CFR §60-741.6(b).

[39] Appendix C to Part 60-741. For an insiders' view of the role of the OFCCP under s 503 see: DeLury, 1975.

[40] The statement should be available to the disabled person on request.

[41] 41 CFR §60-741.6(c)(1).

Affirmative action generally dictates that the application of job qualification requirements in the employment process should accord with these principles and the burden of so proving is upon the contractor.[42] However, the section 503 regulations allow federal contractors to conduct pre-employment medical examinations of applicants "provided that the results of such an examination shall be used only in accordance with the requirements of" these provisions.[43] Any inquiry or medical examination relating to an individual's physical or mental condition must lead to the information thus gleaned being treated as confidential.[44] Naturally, section 503 requires federal contractors to make reasonable accommodation to the limitations of a disabled applicant or employee.[45] If applicants or employees identify themselves as disabled persons desirous of benefitting under the contractor's affirmative action programme, where the contractor is obliged to invite such identification, the contractor must seek the advice of the applicants or employees in question regarding their proper placement and appropriate accommodation.[46] The extent of the obligation to accommodate can take account of business necessity and financial cost and expenses, and reasonable accommodation need not be made if it can be shown that it would impose an undue hardship on the conduct of the business.

Affirmative action in practice

By requiring federal contractors to review their employment policies and practices, the OFCCP causes these employers to question whether their personnel procedures provide the required affirmative action necessary for the proper employment and advancement of disabled workers. The law requires that contractors must act upon the findings of such internal review. Accordingly, if the evidence shows that affirmative action is absent or deficient, contractors:

> shall undertake appropriate outreach and positive recruitment activities... [and] the scope of a contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment

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[42] 41 CFR §60-741.6(c)(2).

[43] 41 CFR §60-741.6(c)(3); *cf* 45 CFR §84.14.

[44] 41 CFR §60-741.6(c)(3). Supervisors and managers may be informed of any work or duty restrictions and of any accommodations necessary. First aid and safety personnel may be informed (where and to the extent appropriate) if the disabled person might require emergency treatment. Government officials investigating compliance with the law must also be informed. Confidentiality is thus subject to practical exceptions.

[45] 41 CFR §60-741.6(d).

[46] 41 CFR §60-741.5(c)(1).

practices are adequate.[47]

The OFCCP regulations suggest a number of types of activities which might be undertaken, but the list is merely illustrative and not designed to be prescriptive or exhaustive.

The OFCCP suggests that contractors might develop effective internal communication of its affirmative action obligations.[48] The intention is to foster understanding, acceptance and support among all levels of management and the workforce, and to encourage the taking of necessary steps to aid the contractor in complying with the affirmative action obligation. In the OFCCP's words:

> A strong outreach program will be ineffective without internal support from supervisory and management personnel and other employees, who may have had limited contact with handicapped persons in the past.[49]

This policy dissemination within the workplace is crucial. This might be achieved via inclusion in the contractor's policy manual or by publication in any in-house media (such as company newspapers and annual reports).[50] The policy statement should be posted on bulletin boards. Alternatively or in addition, special meetings with managers and supervisors could be conducted to explain the policy's intent and the individual responsibility for implementing it. Similar meetings could be arranged for other employees, but in both cases the commitment and positive attitude of senior management towards the policy must be manifest. Affirmative action policy can also be the subject of employee orientation or induction programmes and management training sessions. Trade union officials should be made aware of the policy, their co-operation secured, and non-discrimination clauses written into collective agreements.[51] Existing contractual provisions should be tested to ensure that they are non-discriminatory. It should be made clear that disabled workers will not face harassment or victimisation for seeking to exercise their rights to equal opportunity.

It is further recommended by the OFCCP that internal procedures need to be in place to

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[47] 41 CFR §60-741.6(f).

[48] 41 CFR §60-741.6(f)(1).

[49] 41 CFR §60-741.6(g).

[50] Company publications might also assist the establishing of disabled role models: for example, by including articles on the achievements of disabled employees or by ensuring the proper visual representation of disabled persons in employee handbooks and recruitment literature.

[51] See also 41 CFR §60-741.9 as to the OFCCP's role in facilitating the co-operation of trade unions, recruitment agencies and training organisations in furthering the affirmative action goal.

ensure that the policy is being implemented and is made operational.[52] The employer's commitment to increase disabled employment opportunities should be reiterated and reinforced periodically.[53] The assistance and support of recruiting sources might be enlisted as an additional means of underpinning that commitment.[54] Recruitment through disabled educational and training institutions might be attempted and contacts forged with social services agencies, disability organisations and so on as a conduit for advice, technical assistance and referral of potential employees.[55] A further approach to policy implementation is to review employment records to discover whether the employment skills of existing disabled employees in the organisation are being fully utilized and developed, and whether such employees are available for promotion and transfer.[56] Written dissemination of the company's policy on disabled employment opportunities should be made to sub-contractors, customers and suppliers, requesting appropriate action on their part.[57] A supplementary course of action, and the clearest example of outreach, is the taking of positive steps to attract qualified disabled workers outside the workforce who have the required skills and who could be recruited with affirmative action. Such workers can be located through local branches of disabled organisations and organisations of disabled people.[58] Finally, to repeat a point already made above in another context, employers might include disabled workers when employees are pictured in consumer, promotional and recruitment advertising.[59]

The responsibility for implementing an affirmative action policy is a matter which should be identified at all stages of espousing a policy and attempting to make it operational. The OFCCP recommends that an executive manager should be designated to manage the

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[52] 41 CFR §60-741.6(f)(2).

[53] 41 CFR §60-741.6(f)(3).

[54] 41 CFR §60-741.6(f)(4): *eg* employment and rehabilitation agencies, sheltered workshops, trade unions, organisations of and for disabled people, colleges and educational agencies, etc.

[55] 41 CFR §60-741.6(f)(5)-(6).

[56] 41 CFR §60-741.6(f)(7).

[57] 41 CFR §60-741.6(f)(9).

[58] 41 CFR §60-741.6(f)(10).

[59] 41 CFR §60-741.6(f)(8).

employer's affirmative action activities.[60] He or she should be clearly identified with the policy and associated programmes, and must be given the necessary support and staff to implement the policy. The section 503 regulations pinpoint seven key implementation activities for the responsible director or manager of an employer's affirmative action policy:

(1) development of policy statements, affirmative action programmes and internal and external communication techniques;

(2) identification of problem areas in the implementation of the affirmative action programme, in conjunction with line management and disabled employees, and development of solutions;

(3) design and implementation of auditing and reporting systems;

(4) liaison between the contractor and the OFCCP;

(5) liaison between the contractor and disability organisations, and arrangement of active corporate involvement in community service programmes for disabled people;

(6) informing management of latest developments in affirmative action;

(7) arranging career counselling for disabled employees.

The latter four activities do not require further explication for the purpose of this study, but the former three points warrant expansion. First, the responsibility for implementing an affirmative action policy requires the development of techniques of policy communication. The OFCCP advocates including regular discussions with managers, supervisors and employees in order to check policy compliance.[61] Supervisors should be made aware that, among the criteria by which their performance is being judged, their efforts and achievements in affirmative action are being evaluated. Second, identifying problems and developing solutions is particularly important in respect of the employer's reasonable accommodation obligations.[62] Third, the design and implementation of audit and reporting systems should ensure that the effectiveness of the programme is being measured and that the need for any remedial action is being indicated. The degree to which the company's affirmative action objectives are being attained should be determinable, while whether each workplace or location under the employer's control is complying with the relevant law must be confirmed.[63] Such systems should also ascertain whether disabled employees have had the opportunity to participate in all the employer's educational, training, recreational and social

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[60] 41 CFR §60-741.6(h).

[61] 41 CFR §60-741.6(h)(1).

[62] 41 CFR §60-741.6(h)(2).

[63] 41 CFR §60-741.6(h)(3).

activities.

Once affirmative action policies and procedures are in place, contractors might be careful to ensure that good practice is being observed in the development and execution of their programmes. The OFCCP lists a number of *desiderata*.[64] Job qualification requirements, once reviewed to eliminate adverse impact upon disabled workers, should be made available to all employees and managers involved in recruitment, screening, selection and promotion. The selection process should be free of stereotyping disabled persons in a way which limits their employment opportunities. Personnel involved in employment processes (including the disciplinary process) should be carefully selected and trained in order to safeguard the integrity of the affirmative action policy or programme. Employers should ensure that representatives from recruiting sources are formally briefed so that the effects of the company's affirmative action policy are not dissipated beyond its boundaries.[65] Ideally, disabled employees should be part of the personnel staff or team and should be generally available as role models in community activities, such as career days. Recruitment in schools should incorporate special efforts to make contact with disabled pupils, while companies should consider work placement and work study connections with rehabilitation facilities and specialist schools so as to encourage disabled persons to enter the workplace. The OFCCP encourages contractors to "use all available resources to continue or establish on the job training programs".[66] Contractors should request state employment security agencies to refer disabled workers for consideration under an affirmative action programme.[67]

Breach of contract compliance obligations

Two practices which could run counter to the spirit of affirmative action are given special consideration in the section 503 regulations. First, in employing or promoting a disabled individual, a federal contractor may not offer a reduced rate of pay to take account of any disability income, pension or benefit received from another source.[68] Second, contracts

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[64] 41 CFR §60-741.6(i).

[65] The OFCCP recommends plant tours, explanations of current and future vacancies, job descriptions and worker specifications. Explanations of selection processes and recruitment literature should be an integral part of these briefings, and formal arrangements should be made for referral of applicants, follow-up with sources, and feedback on disposition of applicants: 41 CFR §60-741.6(i)(4).

[66] 41 CFR §60-741.6(i)(9).

[67] 41 CFR §60-741.8.

[68] 41 CFR §60-741.6(e).

between the contractor-employer and a sheltered workshop do not count as affirmative action as a substitute for the employment and advancement of disabled individuals within the employer's direct workforce.[69] However, such contracts might be part of an affirmative action policy where the sheltered workshop undertakes training of disabled persons and the contractor has undertaken to place the newly qualified trainees in its workforce at full rates of pay.

A disabled person who contends that a federal contractor is in breach of the affirmative action clause of a contract covered by section 503 may complaint to the federal Department of Labour:

> If any individual with handicaps believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with handicaps, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.[70]

This leads to an investigation of the complaint by the OFCCP.[71] First, however, it is envisaged that normally the complaint will be pursued through the contractor's internal review procedures. If the complaint is not resolved within 60 days, the matter must be resolved by the OFCCP, if necessary using alternative dispute resolution methods. Compliance with section 503 obligations does not necessarily determine that the contractor is in compliance with other disability discrimination laws, and the reverse proposition is also true.[72] However, where there is a clear breach of section 503, and the matter cannot be resolved by informal means, the section 503 regulations allow for judicial enforcement proceedings to enforce the contractor's affirmative action obligations.[73] Furthermore, the Department of Labor, through the OFCCP, may then take such action as the facts and circumstances warrant,[74] consistent with the terms of such contract and the applicable laws and regulations.[75] In particular, the

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[69] 41 CFR §60-741.6(j).

[70] 29 USC §793(b). The s 503 regulations lay down procedures for handling complaints: 41 CFR §§60-741.24-.26.

[71] 41 CFR §60-741.26.

[72] 41 CFR §60-741.1.

[73] 41 CFR §60-741.28.

[74] 41 CFR §60-741.27.

[75] Note the following national interest defence:
> The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set

federal government contracting party may withhold progress payments under the contract, or cancel or terminate the contract, or debar the contractor from future federal contracting opportunities. In such cases, the contractor is entitled to a formal hearing before an administrative law judge.[76]

A future role for contract compliance?

At first blush, the US model of affirmative action for disabled persons under contract compliance appears quite an attractive option for those advocates of disability rights legislation. However, some points and limitations should be borne in mind. Although the section 503 regulations require contractors to keep records appertaining to compliance with the statutory provisions, and these are available for inspection by OFCCP compliance officers, in reality scrutiny of contractors' policies and practices is random and thinly spread. Testimony suggests that only about 10 per cent of contractors subject to section 503 are troubled by compliance reviews.[77] An earlier audit of the OFCCP in 1977 had been critical of the OFCCP's implementation of section 503 and had pointed up the lack of a procedure for conducting comprehensive compliance reviews.[78] The agency had adopted a reactive response, triggered by complaints, rather than a proactive approach to compliance. The result was that a survey of federal contractors conducted in 1978 found that 90 per cent were not complying with the regulations in some way, 25 per cent had not adopted an affirmative action plan, 44 per cent had no outreach programme, and 17 per cent did not practise reasonable accommodation.[79] Legal commentators were justly critical of the OFCCP's lack of aggressiveness and patent weakness in enforcing section 503 and protecting disabled employment expectations.[80] However, less than a decade later, these same criticisms were once again being voiced.[81]

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forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination:

contained in 29 USC §793(c).

[76] 41 CFR §60-741.29.

[77] Brigham, 1985: 118-9. At the time of this testimony, David Brigham was Deputy Director and Handicapped Employment Officer with the US Department of Labor, Veterans and Handicapped Division, OFCCP.

[78] Evidence cited by Percy, 1989: 205-6.

[79] Reported in Percy, 1989: 206.

[80] See for example: O'Dea, 1980.

[81] Percy, 1989: 209.

Moreover, although there is evidence that contract compliance techniques have had a positive effect upon the employment chances of women and racial minorities,[82] there is little or no comparable evidence assessing the impact of section 503 upon disabled persons.[83] Intuition suggests that there must be some effect, but the measure of that effect and its quality is unknown.[84] Furthermore, notwithstanding the fact that section 503 has been interpreted judicially as importing a non-discrimination requirement, there has been much confusion and doubt about whether the section affords a disabled complainant a private right of action in the federal courts or whether enforcement is limited to proceedings before and by the OFCCP.[85] Federal appellate authority determines that section 503 does not create a private cause of action and that complainants are limited to the invocation of the OFCCP enforcement mechanisms.[86] Attempts to argue that disabled individuals have *locus standi* to sue a contractor on the basis that it is in general breach of its duty to take affirmative action towards disabled people, or that a disabled employee is a third party beneficiary of the commercial contract in question, have also failed.[87] The only other course of action available to a disabled plaintiff is to seek judicial review of an OFCCP decision with which he or she disagrees.[88]

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[82] See, for example, the review of the relevant evidence in Leonard, 1984.

[83] In contrast, there is research into the economic impact of s 503 on businesses and, in particular, the ability of small firms to compete for government contracts in the face of contract compliance regulations: Premus and Carnes, 1982.

[84] Some evidence of positive effects can be gleaned from a report of the US Department of Labour (1982). This source demonstrated that federal contractors had begun to change their attitudes and policies towards disabled workers, especially in respect of making reasonable accommodation. That study is referred to in more detail in Chapter XIII above.

[85] This question has dominated the legal literature on s 503. See, for example: Paolicelli, 1979; Schoon, 1979; *Michigan Law Review*, 1981; Boller, 1982.

[86] See, for example: *Beam v Sun Shipbuilding & Dry Dock Co* (1982) 679 F2d 1077 (3rd Cir); *Davis v United Airlines* (1981) 662 F2d 120 (2nd Cir), *certiorari denied* (1982) 456 US 965; *Simpson v Reynolds Metals Co* (1980) 629 F2d 1226 (7th Cir); *Simon v St Louis County* (1981) 656 F2d 316 (8th Cir), *certiorari denied* (1982) 455 US 976; *Fisher v City of Tucson* (1981) 663 F2d 861 (9th Cir), *certiorari denied* (1982) 459 US 881; *Rogers v Frito-Lay* (1979) 611 F2d 1074 (5th Cir), *certiorari denied* (1980) 449 US 889; *Hoopes v Equifax Inc* (1979) 611 F2d 134 (6th Cir).

[87] See, for example: *Simpson v Reynolds Metals Co* (1980) 629 F2d 1226 (7th Cir); *Hodges v Atchison, Topeka and Santa Fe Railway* (1984) 728 F2d 414 (10th Cir), *certiorari denied* (1984) 104 SCt 97. These limitations in s 503 will be of no surprise to British employment lawyers familiar with the similar drawbacks to individual enforcement of fair wages clauses: *Simpson v Kodak Ltd* [1948] 2 KB 184.

[88] See, for example: *Moon v US Department of Labor* (1984) 747 F2d 599 (11th Cir), *certiorari denied* (1985) 105 SCt 2117.

In spite of these reservations, contract compliance undoubtedly has a role to play in the enfranchisement of disabled persons' employment rights. By going beyond the simple anti-discrimination principle and by mandating a degree of positive action on behalf of disabled workers, contract compliance provides a detailed framework within which employers can develop policies and practices with the prior approval of the state. Businesses contracting with the public sector will know that their commitment to good practice and fair employment standards will not disadvantage them in the tendering process and besides will even give them an edge over competitors who compete on the basis of low labour costs resulting from poor labour standards. On the other hand, governments subscribing to neo-classical economic theory will view contract compliance schemes as an unwarranted interference with the free play of the market and as an undue burden upon business, although a libertarian view might suggest that the elimination of morally abhorrent discrimination through the use of commercial pressures is more desirable than direct interference in business via social regulations such as anti-discrimination laws.[89]

EQUAL OPPORTUNITY POLICIES AND PLANNING

Statutory contract compliance lies at the crossroads between positive or affirmative action in one direction and equal opportunity plans and policies in the other direction. While contract compliance legislation is neither a necessary nor sufficient condition for equal opportunity planning, it is clear that there must be some form of legal imperative if employers are to be encouraged to include disabled persons in corporate personnel policy.

Legal spurs to policy formulation: the view from abroad

In the US, section 503 of the RA 1973 has encouraged and required the development of equal opportunity policy-making. Without equal opportunity plans and policies, employers lack the foundations upon which to build such positive action practices as the law permits or demands. Section 501 also requires the executive branch of the federal government - in its role as an employer - to develop and implement affirmative action plans for the hiring, placement and advancement of disabled persons.[90] This section has been much neglected

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[89] This is essentially the position of Epstein (1992) on the place of legal controls of labour market inequalities. He believes that only the public sector labour market should be regulated and that both negative and positive discrimination should be otherwise permitted in the private sector. His thesis is that market forces should determine which private sector enterprises survive and that it will be those businesses which make the best use of *all* available skills and talents, without regard to race, gender, age or disability, that will eventually prosper. Rule-making to harness public sector spending power to promote equality of opportunity is unobjectionable in Epstein's world of repealed discrimination laws.

[90] 29 USC §791(b). This is discussed in more detail in Chapter VI above.

in the literature on disability rights in the US.[91] Although subsequently disability rights activists would be critical of the RA 1973 for its failure to address disability discrimination in the private sector, section 501 was crucial in the establishment of the credentials of the non-discrimination principle as it applies to disability. In remarkable contrast to the position in Britain, where such law as applies to disabled employment is directed at the private sector and is adopted in the public sector only by concession, section 501 required the federal government and its agencies to become model employers and to show the way towards disabled employment opportunities.

Percy notes that in the early years of section 501, visible change was generated in the employment practices of federal agencies, which began to devise and implement affirmative action plans covering disabled workers.[92] The US Civil Service Commission, upon whom responsibility for section 501 was originally bestowed, recorded that:

> Overall, we have observed a considerable increase in the interest and commitment to the program among agencies. One major accomplishment has been the development of an awareness by non[-]handicapped persons toward the capabilities, employment problems, and needs of handicapped individuals...
>
> [However], we found a wide range of quality in the plans. Some agencies displayed a keen interest in developing and implementing strong programs with ideas and methods that went beyond the suggested model. Other agencies submitted plans that can be classified as barely meeting minimum requirements.[93]

Despite this initial success, "[t]he evidence to date suggests mixed ratings for the federal government in implementing affirmative action in federal employment of persons with disabilities".[94] The overview of section 501 was transferred to the EEOC in 1978 and in its 1986 annual report, for example, the Commission estimated that while 5.9 per cent of the US labour force were classifiable by reference to "targeted" disabilities (including blindness, deafness, paralysis and mental disabilities), less than 1 per cent of federal government employees represented this group. The EEOC also reported that, as a result of on-site reviews of federal agency affirmative action programmes covering disabled persons, 93 per cent had appointed a disabled programme coordinator of seniority,[95] 37 per cent of sites were found

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[91] An honourable exception is Percy (1989: 196-202) on whom this portion of the chapter draws.

[92] Percy, 1989: 196-7.

[93] US Civil Service Commission, 1975: 13 and 27, cited by Percy, 1989: 197.

[94] Percy, 1989: 201.

[95] Although most spent only 10 per cent of their time on disability issues, only 14 per cent had been adequately trained and only 25 per cent had their disabled employment responsibilities written into their job descriptions.

to be accessible to disabled persons to some degree and 55 per cent of the reviewed installations had clearly defined disabled recruitment goals.[96]

Equal opportunity planning and the role of statistics

McCrudden observes that the role of statistics in discrimination and equal opportunity laws has been a controversial one.[97] He notes that statistics might be used in any of three ways. First, statistical information is an important ingredient of monitoring by employers for indirect discrimination resulting from their policies and practices. In this sense, statistics are used as a "diagnostic tool". Second, such information might be used as a "benchmark of success". Employers need to take a periodic snapshot of the work force in order to be able to judge whether discrimination is being eliminated and whether minority members are being properly represented in the numbers of job applicants, interviewees, appointments, promotions, and so on. In this sense, statistics might inform the setting of goals and timetables; that is, the employer sets a target by which the success of equal opportunity policies or positive action programmes will be assessed. For example, there might be an expectation (but no more than an expectation) that a certain percentage of a disadvantaged group will be encouraged to apply for jobs and/or be engaged in the next 12 months. Third, statistics could be used "as ends in themselves".[98] In this case, an employer decides to achieve as an objective the hiring or promotion of a specified percentage of minority group members, either absolutely or as a proportion of the existing workforce. This third use of statistics draws a distinction between goals or targets and timetables, on the one hand, and quotas, on the other hand. Confusion over this distinction and the means by which it is maintained is at the heart of the controversy about the use of statistics in equal opportunity policy and practice. McCrudden recommends that, for the avoidance of doubt about the legitimacy of using statistics in the first and second senses outlined here, statutory authority for statistics collection and analysis should be provided.[99]

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[96] US Equal Employment Opportunity Commission, 1986: 148-51, cited in Percy, 1989: 201-2.

[97] McCrudden, 1986: 225.

[98] McCrudden, 1986: 226.

[99] McCrudden, 1986: 236. He also opines that there should be a legal *requirement* on employers to monitor the composition of their work force. The model of the (Northern Ireland) Fair Employment Act 1989 might prove an interesting exemplar for disability discrimination law. Consideration of that Act's provisions on positive action, fair participation and equality of opportunity are beyond the scope of the present study. See generally: McCrudden, 1992. In particular, the statute's requirement that employers should monitor the work force for its religious composition might be usefully studied by disability rights reformers.

Affirmative action planning in the US under section 503 deliberately eschewed the setting of numerical goals because of the difficulties in determining disabled characteristics and numbers.[100] The setting of goals and timetables, and the collection of data to analyze disabled employment levels, is nevertheless encouraged under section 501.[101] In Canada, however, the use of statistics, goals and timetables is more overtly favoured. The federal Employment Equity Act 1985 requires federal employers of size to set annual goals for the implementation of employment equity. A timetable within which these goals are to be achieved must be laid down.[102] The law requires employers to publish annual statistics showing the total workforce and the number of disabled persons employed. Furthermore, a statistical breakdown must be provided, showing what occupational groups the employer has and the degree of representation of disabled persons in each occupational group. Information about salary ranges in the employer's work force and the degree of representation of disabled persons in each range must also be highlighted. The statistical report must detail the number of employees hired or engaged, promoted and terminated (whether retired, resigned or dismissed, but not including temporarily laid off or absent by reason of illness, injury or labour dispute), with the degree of representation of disabled persons in those numbers.[103] The use of statistics is also a feature in selected provincial legislation in Canada,[104] and in the Australian Commonwealth in respect of public sector employment.[105] In the final analysis, however, there is still little evidence that the use of statistics, goals and timetables has radically improved the employment position of disabled persons in those sectors of the economy to which these examples apply. By way of illustration, in Canada it has been estimated that disabled persons constitute 9-17 per cent of the population, but that on 1990

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[100] Percy, 1989: 207.

[101] Percy, 1989: 199 referring to EEOC instructions to federal agencies for the implementation of s 501.

[102] EEA 1985 s 5. See Chapter VIII for further detail.

[103] EEA 1985 s 6 and the Employment Equity Regulations 1986. A failure to comply with this reporting requirement is a criminal offence punishable under s 7 by a fine of up to $50,000. See further: Employment and Immigration Canada, 1986 (containing the detailed guidance to Canadian employers on their obligations under the EEA 1985).

[104] See, for example, the use of statistics under Québec's Charter of Human Rights and Freedoms and its Affirmative Action Programme Regulations. See Chapter VIII for further detail. The (BC) Human Rights Amendment Act 1992 (SBC c 43) now also provides for affirmative action and employment equity programmes. See also Ontario's Employment Equity Bill 1992.

[105] Under the (Cth) Equal Employment Opportunity (Commonwealth Authorities) Act 1987, discussed in Chapter IX above. See also the mandating of equal opportunity management plans in the Australian states.

figures approximately 19 per cent of employers subject to the (Can) EEA 1985 did not employ any disabled persons at all. The same source reveals that, whereas Canadians with disabilities make up 5.4 per cent of the Canadian work force, only 2.4 per cent of the work force is covered by the EEA regime.[106]

VIEW FROM BRITAIN

It is appropriate that in this final substantive section of the final substantive chapter we should return to Britain. The agenda set by this study has been to learn the lessons from abroad for the development of a new legal model of disabled employment rights in this country. The Conservative Government since 1979 (and, indeed, previous governments by default) has argued that the case for legislation to combat disability discrimination can be countered with a more effective case for a policy of education and persuasion. The evidence presented in Chapter III above concerning the labour market status of disabled persons and the continued incidence of discrimination might be sufficient to suggest that this non-interventionist tactic has failed. However, such evidence is necessarily historic, and it might be said that employers are learning to put their own house in order. What proof is there that the voluntarist approach is working?

Disability and equal opportunity policies

The enactment of sex and race discrimination laws have undoubtedly fostered the development of equal opportunity policies among employers. There is little hard data to suggest how widespread such policies are or what percentage of the labour market is covered by them.[107] Neither the SDA 1975 nor the RRA 1976 require employers to devise, adopt and implement such policies,[108] although undoubtedly employers who wish to avoid or

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[106] Employment and Immigration Canada, 1991a. This source also reveals that disabled persons' share of public sector employment opportunities has barely improved since the introduction of the EEA 1985 requirements. The latest statistics show that disabled persons have increased their representation with EEA employers from 2.4 per cent to 2.50 per cent over the space of 12 months: Employment and Immigration Canada, 1992. This is an increase from 1.6 per cent in 1987 just before the EEA came into force. The Act is currently under review: Employment and Immigration Canada, 1991b.

[107] Much, if not all, of the relevant literature in sex and race discrimination law is concerned with the examination of equal opportunity policies based upon a small number of case studies or a non-random sample of employers. These accounts tell us much about the *quality* of such policies but little about their *quantity* or distribution.

[108] Both the EOC and the CRE recommend that employers should adopt, implement and monitor an equal opportunity policy to obviate unlawful discrimination and promote equality of opportunity. See: *Code of Practice for the Elimination of Discrimination on the Grounds of Sex and Marriage and the Promotion of Equality of Opportunity in Employment* (1985) paras 33-40; *Code of Practice for the Elimination of Racial Discrimination and the Promotion of*

alleviate challenges of discrimination would be well advised to do so. Personal observation suggests that many large, well-known employers have put such policies in place, but for most small and medium-sized British businesses an equal opportunity policy is a luxury or a matter of no concern and priority. Even among those enterprises that designate themselves as "equal opportunity employers", the suspicion remains that this is a cosmetic title, without the underpinning of a written policy or the back-up of detailed practices and procedures.[109]

When it comes to the issue of disability and employment, the absence of an anti-discrimination command in law deprives employers of any real incentive to make policy in this area. On its own, the 1944 Act contains little that would cause employers voluntarily to regulate their internal procedures. Although companies legislation requires employment policy in respect of disabled people to be recorded in the directors' annual report, this applies only to larger, incorporated businesses and hardly sets a challenging agenda.[110] The statement must describe *any* policy applied by the company for giving full and fair consideration to job applications from disabled people (having regard to their particular aptitudes and abilities), for continuing the employment of (and arranging appropriate training for) employees who become disabled during employment with the company, and for training, career development and promotion of disabled persons employed by the company. Unless the directors have taken all reasonable steps to ensure that such a statement is included in the annual report, a failure to publish a corporate disability employment policy is an offence. While formal compliance with this provision is widely observed, the measure has produced some pretty anodyne statements and little proof that the policy, once adopted, is either acted upon or periodically reviewed.[111]

It is suspected that many, but not all, equal opportunity employers tend to add additional disadvantaged groups to policies dealing with women and ethnic minorities, despite the lack of legal compulsion to do so. Cursory examination of recruitment advertisements, for example, indicates that disability is frequently added to the catalogue of grounds upon which employers disdain to discriminate. Nonetheless, research indicates that only 21 per cent of employers have a formal written policy regarding the employment of disabled persons, but

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Equality of Opportunity in Employment (1984) paras 1.1-1.4 and 1.33-1.43.

[109] See the evidence presented to HCEC, 1991: QQ697-8.

[110] CA 1985 s 234 and Sch 7 para 9. It should be noted that company law merely requires a *statement* of policy to be disclosed; it does not require there to be a written or detailed policy, let alone one that is made operational.

[111] See Doyle, 1987a.

a large proportion were unable to say how such policy was implemented.[112] Of those able to identify their policy implementation methods, about a quarter employed regular monitoring methodology. Some 14 per cent of employers implement policy through management and employee involvement, but about the same number allocate responsibility to an executive manager. Setting recruitment targets was used by 7 per cent of employers who implemented policies and 5 per cent insisted on regular reports to senior management.[113] Among employers with no formal disabled employment policy, the most commonly encountered attitude was that disabled persons would be considered on merit. Three-quarters of such employers stated that they would not discriminate against disabled workers and 4 in every 100 claimed that they would positively encourage applications from disabled job-seekers.[114] Nevertheless, 13 per cent of employers said that they would only employ disabled persons for certain types of job and 6 per cent stated that they would not employ disabled workers under any circumstances.

In spite of this, or maybe because of it, there is a groundswell of opinion that employers should be obliged to develop disabled employment policies. A large majority (80 per cent) of disabled respondents to a survey question - about attitudes to employers being obliged to publish what they have done and plan to do about employing disabled people - supported the imposition of such an obligation.[115] As to where such plans should be published, the most frequently mentioned places were the national press or newspapers, local press, and job centres, employment offices or careers offices. There was little support for the existing, limited practice of publishing disabled employment policies in company annual reports, although there was measurable support for the use of in-house company publications, notice-boards and posters.[116]

Code of Good Practice

The stimulus, such as it is, for the development of disabled equal opportunity policies is provided by the Employment Service's *Code of Good Practice on the Employment of Disabled People*, first issued in 1984 and up-dated in March 1993.[117] It suggests that companies

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[112] Morrell, 1990: 12.

[113] Morrell, 1990: Table 17.

[114] Morrell, 1990: 13.

[115] RSGB, 1978: Table 9.6.1.

[116] RSGB, 1978: Table 9.6.2.

[117] See Doyle, 1987a.

should adopt sound and effective policy objectives in the employment of persons with disabilities.[118] The Code suggests seven objectives that employers might take up. First, the company should seek to be recognised in the community as a provider of disabled employment opportunities. Second, disabled applicants should know that they will be treated fairly and on their merits. Third, it would normally be expected that the employer will retain employees who become disabled while in service. Fourth, the employer should plan the integration of disabled workers, with any necessary accommodations in the work or working environment. Fifth, disabled employees are entitled to expect that the employer will develop their skills and potential, offering them training and promotion opportunities on ability. Sixth, non-disabled co-workers should readily accept their disabled colleagues without distinction. Seventh, the company should ensure that it is meeting its legal obligations towards disabled persons.

This list of *desiderata* can only be achieved by drawing up a written policy that fits the circumstances of the individual firm, involves all staff and management, sets objectives for managers, and identifies the means by which the policy will be achieved. To be effective, policy values must be shared, so the Code stresses the importance of developing a policy by consultation with staff and communicating the resultant policy to them.[119] Coordination of policy should be placed in the hands of an executive.[120] Regular assessment or monitoring of policy is desirable and:

> Although numbers alone cannot give the whole picture, one of the best indications of the success of a policy is whether the company offers people with disabilities their full share of opportunities.[121]

Significantly, the Code makes direct reference to the statutory 3 per cent quota of registered disabled persons as a measure of achievement and states that the quota "should be regarded as a minimum for people with disabilities as a whole in any company's workforce".

Part Two of the Code deals with detailed advice on how to put policy into practice. It addresses existing legal obligations as a prelude to an account of the identification of disabled people, the range of disabilities and the effectiveness of disabled employees. The Code provides detailed guidance on recruitment of disabled persons, including dealing with

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[118] Part One of the *Code of Good Practice on the Employment of Disabled People* addressed to directors and senior managers.

[119] *Ibid* para 10.3.

[120] This is amplified in paras 9.1-9.3 of the Code, which provide a form of job description for such a role.

[121] *Ibid* Part One.

questions of safety, attendance, health, pension scheme eligibility, alterations to premises or equipment, communications, manual dexterity, and physical effort. It advises employers on how to draw-up job descriptions and job requirements without inadvertently excluding disabled applicants. Recommendations on outreach and recruitment methods are furnished. Selection procedures, the Code suggests, should be examined to ensure that disabled candidates are treated on merit and practical advice is offered on the design of application forms, as well as arrangements and procedures for interviewing disabled candidates and the pitfalls of health screening. Once in work, Part Two of the Code counsels employers to give particular attention to the needs of disabled employees in respect of induction, health and safety, workplace integration, training and promotion, and redundancy. For employees who become disabled while in employment, firm and useful guidance is given to employers on taking decisions that will affect the newly-disabled employee. A strong steer is given towards consideration of positive options that include retention in the same job or in alternative work, removal to part-time work or job-sharing, delayed return to work, other flexible working arrangements (including trial periods or working from home) and the knock-on effects of disability (for example, impact upon salary). Advice upon employment termination as a last resort is also proffered.

The Code is undoubtedly a mine of information, advice and assistance, and should not easily be dismissed. However, unlike the EOC and CRE codes of practice, the Code wants for legislative underpinning and depends upon the good sense and goodwill of employers for its implementation. Nevertheless, the penetration of the Code in both the public and private sector appears to be less than complete. Morrell found that by 1987 only 19 per cent of employers had had contact with the Code, although the chances of having knowingly received the Code increased with the size of the firm.[122] More encouragingly, however, her research shows that, where the Code has infiltrated the enterprise, it was reaching the senior decision-makers, such as managing directors, senior managers, department heads and personnel officers.[123] Among those who had read the Code, 35 per cent were of the opinion that it was very good, and a further 51 per cent that it was fairly good, as a point of reference. There were few criticisms of its content, style or readability, although its layout was not altogether welcomed.[124] Morrell comments that:

> The major benefit of the Code of Good Practice appeared to be its usefulness in increasing awareness and highlighting the issue of employing people with disabilities.

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[122] Morrell, 1990: Table 30.

[123] Morrell, 1990: 20-21 and Table 32.

[124] Morrell, 1990: 21.

> It would appear that the booklet had encouraged employers to stop and think about their current employment practices and consider the opportunities for people with disabilities in the workplace and the help that is available for employers.[125]

About two-fifths of employer respondents who had received a copy of the Code indicated that they had used or planned to use it.

It is interesting to note Morrell's finding that 80 per cent of employers purported not to have received a copy of the Code. This is surprising given the widespread publicity that the Code received at launch and subsequently, and the government agencies' perceptions that the Code had been widely disseminated. A possible explanation, apart from sheer forgetfulness, is that the Code may have reached the enterprise but had failed to filter into the different levels of management. A quarter of the employers who had not received the Code were at least aware of it, and a majority expressed an interest in obtaining a copy.[126] This group found that the sections of the Code dealing with assistance for newly-disabled employees, the recruitment of disabled persons, employers' pertinent legal obligations and the position of disabled employees at work potentially useful.[127] Significantly, however, only 3 per cent of employers who had not received the Code were interested in its provisions on drawing up a disabled employment policy. The message seems to be that there is a long way to go before voluntarism can produce a commitment to equal opportunity planning.

Voluntarism, education and persuasion

The voluntary approach nevertheless holds sway. In 1977, the Government launched a major programme to encourage and to educate employers about the employment of disabled persons ("Positive Policies"). Following a review of disabled employment services in 1982, the Disablement Advisory Service was established to promote progressive personnel policies and practices in respect of disabled people, a role now discharged by the Employment Service's Placing, Assessment and Counselling Teams (PACTs). In addition, under the "Fit for Work" award scheme, commenced in 1979, annual awards were made to employers who, by their record and performance, have promoted equal opportunities for disabled people at work.[128] That scheme has since been replaced from 1991 by the so-called "Two Ticks" initiative. This allows employers to use a disability symbol, redesigned in 1992, to show

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[125] Morrell, 1990: 21.

[126] Morrell, 1990: 22.

[127] Morrell, 1990: Table 34.

[128] Recipients of the award numbered about 100 each year and were bestowed a presentation plaque, desk ornament and a citation, as well as the right to use the award's emblem on company documents: Berthoud *et al*, 1993: 41.

commitment to good practice in the employment of disabled persons and to identify themselves to disabled workers as being positive about those workers' abilities. This scheme is the ultimate in voluntarism because, unlike the "Fit for Work" awards, the Employment Service does not assess or judge whether an employer is meeting the criteria for the use of the symbol. Employers themselves decide whether to award themselves "two ticks". All that the Employment Service asks is that employers who award themselves this distinction should make five commitments to action.[129] First, to interview all minimally qualified disabled applicants and consider them on ability. Second, to ask disabled employees on an annual basis what steps the employer might take to ensure that they develop and use their abilities in employment. Third, make every effort to retain in employment newly-disabled staff. Fourth, develop disability awareness among key employees in order to make the firm's commitments to disabled employment operational. Fifth, review those commitments on an annual basis, monitor achievements, plan improvements and communicate the results to the workforce.

The voluntary principle has been adopted by employers as well as by government. The Employers' Forum on Disability is a group of organisations that have signed an Agenda for Action.[130] The Forum is concerned with the training and employment of disabled persons and provides help and information to other employers on good practice, specialist services, legislation and other issues. The Agenda contains ten points for action to which subscribers are committed. Most significantly in the context of the present discussion, these action points include a commitment that the employment of disabled persons will form an integral part of equal opportunity policies and practices. The Agenda also deals with staff training and disability awareness, reasonable accommodations in the work environment, outreach initiatives in the recruitment process, and equality of opportunity in career development, training and work experience. Forum members pledge to give the fullest support to newly-disabled employees with a view to retaining their services in some way. A novel commitment is the promised recognition and response to disabled people as customers, suppliers, shareholders and members of the community, as well as a commitment to the participation of disabled employees in employment policy-making. Finally, a company that subscribes to the Agenda undertakes to monitor its progress in implementing these action points, audit performance annually, review progress at board level, and publish achievements and

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[129] The symbol is designed to be used on letterheads and company literature, but should not be used in connection with the provision or promotion of commercial products or services.

[130] An account of the short history of the Employers' Forum on Disability can be discovered in an interview with the Director of the organisation (Susan Scott-Parker) in *Equal Opportunities Review* N° 41 (January/February 1992) at 36-7.

objectives to employees and in the directors' annual report. Quite apart from the Employer's Forum on Disability, undoubtedly a number of employers have given attention to disabled employment policies and there numerous published examples of good practice.[131] Employing disabled people has been seen as being "good for business". However, the effect of these various initiatives to educate and encourage employers to extend equal opportunities to disabled workers is hard to gauge.

CONCLUDING REMARKS

It is ironic that in this penultimate chapter we would appear to have come around full circle and returned to the position that exists in Britain today in respect of disabled employment opportunities. Despite the evidence that points to the contrary, governments have resisted the pressures for legislative action to address disability discrimination in the labour market, while at the same time implicitly recognising that there might be a problem that is at least worthy of resolution by education and persuasion. In this chapter, it has been shown that the comparative evidence suggests that positive action, contract compliance and equal opportunity planning might have some role to play in any new legal regime of disabled employment rights in Britain. Indeed, a by-product of the received wisdom that disabled disadvantage can be addressed by voluntary action is that many of the ideas explored here are already part and parcel of the official political reaction to disabled persons and their employment. The only missing ingredient is legal compulsion. In the writer's view, contract compliance and employment equity principles, with appropriate use of statistics, goals and timetables, would require employers to develop positive attitudes, policies and practices towards disabled job-seekers and employees. However, such legal strategies must be seen as complementary to and not a substitute for effective anti-discrimination laws.

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[131] See, for example, the case studies and other accounts in: Incomes Data Services Ltd, 1981; Doyle, 1987a; Birkett and Worman, 1988; Leach, 1989; Incomes Data Services Ltd, 1992.

CHAPTER XVI:
CONCLUSION

In this study, the writer has attempted to present a case from a number of different angles or perspectives for the enactment of disability discrimination laws in Britain. The social and economic data presented paint a bleak picture of the lives and experience of disabled people. Disability produces vulnerability and marginality in all aspects of the daily tableau of persons with disabilities. It often results in multiple "handicaps", as the effects of disability are felt directly in the medical and health dimensions, and then indirectly in the spheres of education, transport, physical access and the built environment, social and welfare services, income and wealth, housing, health services, leisure activities and social interaction, and, above all in the present context, in competitive employment. We have sought to demonstrate that *disability* does not equal *inability* to work. Yet the statistical evidence shows that disabled people suffer a rate and length of unemployment that is far in excess of that visited upon any other minority group. While there are many studies that tend to confirm the employability of disabled workers, it is disappointing to note the continued expression of negative attitudes by employers towards disabled people.

Despite assertions to the contrary, the poverty and disadvantage of many disabled individuals is the product of prejudice, ignorance and sheer thoughtlessness. The research of other students of disability rights points to the crucial influence upon disabled employment opportunities of a form of social discrimination that is akin to that experienced by racial and ethnic minorities and women. If social and employment discrimination informed by gender and race has been treated as a subject fit for regulation and proscription, then the arguments for similar responses to disability discrimination are, it is suggested, equally compelling. Moreover, the passage of legislation to prohibit discrimination against disabled people would represent a fundamental change in society's attitudes towards disability and the disabled community. In short, it would constitute a shift from charity and welfarism to civil rights and integration.[1]

If this argument is accepted, which of course hitherto has not been the case in government circles, then it is tempting to see disability as being a new prohibited ground of discrimination within the framework already erected by sex and race discrimination laws. However, the experience of the US disability rights legislation (and comparable experience in Canada and Australia) suggests that existing equal opportunities laws are not necessarily the most

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[1] Burgdorf, 1991: 426

appropriate or efficacious means of addressing disability discrimination.[2] As this study has sought to show, disability discrimination throws up unique problems and issues that cannot be readily resolved within a framework erected to redress other forms of social discrimination. As a US federal district court in New Hampshire observes, "attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole".[3] In particular, it will be clear that the disability discrimination legal model must include the ingredients of reasonable accommodation and must provide means for removing structural and environmental barriers to integration and participation.[4]

In Britain, however, the case for disability discrimination legislation is often made without being heard. It is still the case that our legislators adhere to the view that the plight of disabled workers is the result of the limitations of disability and of disabled persons themselves, and the notion that disability is often a social construct and the subject of negative social forces is implicitly rejected. Even when the counter-analysis is accepted, the current political orthodoxy insists that legislation is not the best means to assist disabled persons to compete in the labour market. The present Government, in particular, subscribes to the view that regulation of disabled employment rights would be a burden upon business and damaging to the employment prospects of disabled people because it risks the withdrawal of employers' goodwill. Instead, the strategy for assisting disabled persons into work is based upon voluntarism and focuses upon the role of education and persuasion. Nevertheless, as Daunt asserts:

> The notion that government must make a choice between *compelling employers and persuading them* is simplistic. The point sometimes made by employers' organizations that if they are effectively compelled by legislation to employ disabled people, their goodwill is going to be lost and they will no longer co-operate should be seen as a negotiating position.[5]

In fact, the evidence suggests that employer goodwill towards disabled workers is quite mythical and nothing more than a talisman against the perceived evils of regulation and compulsion. In the present author's view, trust in the voluntary approach and the willingness of employers to see the equation of their own self-interests with the rights and expectations of the disabled community is sorely misplaced. The case for special legislation to enfranchise disabled workers remains a strong and persuasive one.

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[2] Burgdorf, 1991: 429-31.

[3] *Garrity v Gallen* (1981) 522 FSupp 171 at 206.

[4] See generally: Rebell, 1986.

[5] Daunt, 1991: 63 (emphasis in original).

However, before we consider the introduction of anti-discrimination legislation on behalf of disabled Britons, the failure of existing legal formulae to provide a real menu of employment rights for persons with disabilities must be accounted for. It has been rightly said that:

> [T]he positive effects of legislation, and in particular measures which impose quotas of disabled workers on employers, have been somewhat disappointing. Except in Germany, quota systems, introduced at a time of universal economic growth, have proved difficult to operate and have up till now failed as guarantees of equal opportunity in times of relative restraint.[6]

It is indeed ironic that quotas should at present hold such a fascination for those who advocate a new legal strategy for sex and race discrimination - one that would concentrate upon results rather than process - given the patent failure of disabled workers' quota schemes in many countries. Nevertheless, in the present writer's view, quota legislation should continue to play a part in special disability legislation in the short to medium term, but with emphasis and resources placed upon enforcement. The experience of the German, and to a lesser extent the French, quota models might be revisited with profit, and the linking of quota obligations with levies and subsidies is worth detailed reconsideration in the context of disabled employment. Strong laws require strong remedies and enforcement. In Britain, the failure of half a century of quota obligations can largely, albeit not entirely, be explained by a lack of commitment to and weakness in the policing of such special legislation as already existed.

It is clear, however, that even a renewed commitment to quota legislation will not adequately address the employment problems of disabled workers. We return again to the conviction that the anti-discrimination principle needs to be harnessed to the task of ensuring the equal treatment and fair participation of disabled people in the labour market. It is contended that individual and institutional disability discrimination demands a cause of action and an individual remedy. The point has been made several times in this study that increasingly disability rights advocates are looking to the US for inspiration in the campaign for achieving equal opportunity rights. Research in the US during the 1980s found that 70 per cent of disabled Americans believed that their lives had improved in the previous decade and two-thirds opined that federal legislation had provided better opportunities for disabled persons and had assisted them a great deal or somewhat.[7] Three-quarters (75 per cent) of respondents wished to see anti-discrimination laws strengthened further. Disabled Britons too are optimistic that such laws would greatly enhance their lives and status here.

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[6] Daunt, 1991: 60.

[7] Louis Harris and Associates, 1986.

This would seem to suggest that the Americans with Disabilities Act 1990, and its progenitor, the Rehabilitation Act 1973, provide a ready-made model for legislation that could be adopted in Britain. In fact, such statutes do provide a very important exemplar of how to enact new rights for a recognised minority and, in the particular context of disability, illustrate the importance of ensuring that such laws are comprehensive in their scope. Thus disability discrimination legislation must apply in both the public and the private spheres, and above all must be extend beyond the control of discrimination in the labour market by addressing the hopes of disabled people in education, housing, transport, communications and public accommodations. As has been noted in earlier chapters, the recent Civil Rights (Disabled Persons) Bills are clearly patterned after the ADA 1990 and it is to the US that disability rights activists are now looking for further instruction. In spite of this, the present writer would advocate some caution and more imagination. There is a danger, especially through the private members' bill procedure, that the language of the ADA 1990 is being adopted almost wholesale without proper regard for differences in terminology, culture and interpretation in the two jurisdictions. The lessons of the comparative method must be heeded. The experience and examples of Canadian and Australian legislation provide a deeper mine of raw materials that can be quarried in the production of any new legislation. The strengths and weaknesses of these laws elsewhere must be recorded, and the best of the comparative models should be recruited to the development of disability discrimination measures in Britain. This would require not simply the transplantation of the non-discrimination principle, but also the borrowing of techniques in affirmative action, contract compliance and equal opportunity planning.

If anti-discrimination and equal opportunity legislation is the way ahead for disabled workers' rights, the limitations of legal formulae must be recognised.[8] Legislation cannot hope completely to redress the vulnerability of disabled people in the labour market, and political and economic power must be used to enfranchise disabled workers.[9] The anti-discrimination model may only be capable of containing overt discrimination while defusing social pressure for radical change in favour of disabled persons.[10] As in the US,[11] recognition in law that disabled persons are a disadvantaged group in the employment field is a necessary, but not sufficient, condition to mandating remedial action and equal rights. Statutory commitment to

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[8] *Harvard Law Review*, 1984. See the arguments to like effect employed by Lustgarten in respect of race relations laws: Lustgarten, 1986 and 1987.

[9] Acton, 1981; Bordieri and Comninel, 1987.

[10] Oliver, 1984; 1985; 1986.

[11] Weiss, 1974.

equal opportunities and equal treatment can assist the integration of this minority group, but the limits of the law must be understood and accounted for.

In the US, many writers believe that the law has only partly succeeded in empowering disabled people, largely because of inadequate enforcement, conflicting interpretation and limited scope.[12] That is certainly a criticism that can be levelled at the RA 1973. Commenting on the ADA 1990, a statute in which so much hope is invested, Yelin notes that the legislation:

> bars discrimination against persons with disabilities in employment, but it may not convince employers that such persons will be productive or [that they should] purchase the equipment to help them do their jobs. In short, *the law cannot guarantee work*.[13]

He regards section 504 of the RA 1973, upon which the 1990 legislation was modelled, as a "bellwether for the ADA", but observes that section 504 produced mixed results for the employment of disabled persons in the federal employment sector.[14] Yelin's analysis suggests that the disability anti-discrimination legislation:

> was not successful in ensuring that persons with disabilities shared in the employment gains occurring... when government employment was expanding. Later, the legislation did not prevent workers with disabilities from bearing a disproportionate share of the retrenchment in government employment.[15]

That is borne out by the statistical data. Between 1970 and 1982, the US federal government workforce grew from 4.5 million to over 6 million strong, increasing its proportional representation in the national workforce from 5.7 to 5.8 per cent (a growth of 2 per cent in relative terms). In contrast, the number of disabled persons in government employment increased from 0.45 million to 0.62 million, increasing its proportion of the government workforce from 9.9 to 10.2 per cent (a growth of 3 per cent in relative terms). However, from 1982 to 1987, the government workforce shrank by 11 per cent in absolute terms and by 19 per cent in relative terms. The impact of this shrinkage was disproportionately felt by disabled workers. The number of disabled government employees declined by 18 per cent in absolute terms and by 8 per cent in relative terms (compared with a decline of 10 per cent in the absolute numbers of government employees without disabilities and a 2 per cent *increase* in relative terms for that group). The best that might be said is that the legislation might have had a role to play in ensuring that disabled workers in the federal employment

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[12] See for example: Flaccus, 1986a; McCluskey, 1988; Tucker, 1989a.

[13] Yelin, 1991: 130 (my emphasis).

[14] Yelin, 1991: 136.

[15] Yelin, 1991: 137.

sector fared less badly than their disabled counterparts in the economy as a whole.[16]

From an economist's viewpoint, the limits of the law must also be marked. For example Johnson, although sympathetic to the notion of disability discrimination laws, shows an economist's caution to the costs-benefits analysis of such laws. In the context of reasonable accommodation, Johnson propounds the view that:

> Case-by-case determinations of the effect of an impairment on the capacity to perform a job are difficult to generalize. Decisions must be influenced by the combined, idiosyncratic effects of an individual's qualifications and impairment compared to the workplace and job of one employer. This type of decision does not establish strong precedents that would inform employers and impaired workers of their respective rights and responsibilities... Although the question of the costs of case-by-case determinations relative to the benefits of reducing discrimination is an empirical one, it seems likely that the costs of enforcing laws relating to handicap discrimination are high relative to enforcement costs for other forms of discrimination.[17]

He argues that a concept of reasonable accommodation that would comport with efficiency would lead employers to invest in accommodations to the point where the marginal cost of the accommodations is equal to the marginal benefit as measured by the increase in the productivity of the accommodated disabled worker. However, beyond that point an employer's taste for positive discrimination (or, more accurately, fair treatment) in favour of disabled workers must in principle become sated. As a result, we might expect that disability discrimination laws will only assist those disabled workers whose profile accords most closely with "able-bodied" employees, and that severely disabled persons, or workers with unusual or radical disabilities, will be excluded from the law's protection in practice.

Nonetheless, these arguments as to the limits of disability discrimination law merely counsel us to address and scrutinise the detail and scope of any law reform that might be proposed. It is clear from the experience of the ADA 1990 that any disability rights legislation in Britain must aim for a high level of statutory specificity. The development of new legal standards should not be left to chance or to the vagaries of judicial interpretation. Burgdorf observes that:

> the impetus for statutory specificity stems from idiosyncrasies of disability discrimination, which demand more statutory guidance than general mandates not to

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[16] It the previous chapter it was also noted that Canadian employment equity laws have had only a marginal impact upon the labour market share and employment opportunities of disabled workers.

[17] Johnson, 1986: 259. Some answers to the empirical questions posed by economists like Johnson in the context of the ADA 1990 might well be answered in due course by on-going, longitudinal research into the before and after effects of the new legislation. See: Blanck, 1991 and 1992.

discriminate.[18]

However, the same observer notes that specificity is a "double-edged sword". Detailed legislation creates rigid law requiring legislative intervention to amend unforeseen interpretations of substantive provisions; a problem that is less insurmountable in "legislation" through regulations or codes of practice. Furthermore, detailed guidance as to the spirit of the law is perhaps best left to regulatory agencies or commissions. Burgdorf also points out that legislators may find it more difficult to disagree with statements of broad principle, but easier to pick holes in precisely defined legal standards.[19]

With those words of caution ringing in our ears, nevertheless, it is right to end upon a note of optimism and positive expectation. Equal rights for disabled workers is an idea and ideal whose time has come. Lessons from abroad must be learnt before any new disability discrimination law can be made to work. In the context of discrimination law at large, the means to enforce the non-discrimination principle will need to be looked at afresh, and reforms in respect of disability provide a ripe opportunity for such reassessment. It may be also that the enactment of disability discrimination legislation will influence the shape of sex and race discrimination laws, or inspire the development of legal responses to other forms of social discrimination. In particular, the reasonable accommodation concept might be one that could be usefully expressed as a component part of gender and race discrimination directives. The case for disability discrimination law is a compelling one. The comparative method assists us to make that case and to design the law's response to the disadvantage and vulnerability of a forgotten minority.

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[18] Burgdorf, 1991: 510.

[19] Burgdorf, 1991: 511.

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