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

Thesis presented for the Degree of Doctor of Philosophy

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PREFACE AND ACKNOWLEDGEMENTS

This study was conceived and largely executed during the UN Decade of Disabled Persons 1983-1992. The Decade itself did not provide the original stimulus for the thesis. The credit for that, as with much research by academics, must go to my students, who first asked the pertinent questions that inform the present work. Why was disability seen as a condition requiring labour market intervention decades before the regulation of sex and race discrimination? Why is reverse discrimination rejected as a tool of legal policy in British discrimination law, but a form of preferential treatment accepted as natural in respect of disabled workers? Why is the disabled workers' quota such a failure and, given that failure, why do quotas continue to exercise such fascination in discrimination theory generally? I realised that I could not readily answer these questions, and that they were not addressed, let alone answered, in the pages of British labour law. Preliminary research showed that disabled persons were a neglected group in labour law scholarship, barely meriting a footnote or an aside in the leading texts, and almost entirely neglected in the periodical and monographical literature.

The work began as a study of the Disabled Persons (Employment) Act 1944 and subsequent employment policy towards disabled persons. This confirmed how little legal regulation of disabled workers' rights in Britain there was and that, such as there was, the law had failed to achieve its ends. Indeed, it was particularly puzzling for a lawyer to find such an interventionist example of labour law, devised at a time of legal voluntarism, but which was almost entirely ignored by regulators and regulated alike. It soon became apparent that the study would have to look to abroad for inspiration. In the absence of an equal treatment directive, EC law did not seem a fruitful point of comparison, while the individual member states offered few paradigms that promised an improvement upon the British model. Instead, the US offered more fertile ground where, since 1973, federal legislation had furnished some degree of protection from disability discrimination in the workplace. However, the limitations of the American model soon became apparent, not least because it applied only indirectly to the private sector and offered only partial protection to disabled workers. To fill that gap, the Canadian and Australian experiences were examined and found to be of interest. Nevertheless, in what was intended to be the final stages of the research, the US passed comprehensive civil rights legislation on disability in the form of the Americans with Disabilities Act 1990. It became clear that the US would once again be the central focus of the thesis.

Accordingly, what follows is a wide-ranging account and analysis of the experience of

disabled persons in the labour market, and of the various attempts that have been made in numerous jurisdictions to ensure fair treatment in the competitive conditions of open employment. The study is larger than was originally intended and seems to have grown with a will of its own. Furthermore, during the writing-up process, serious attempts were being made in Britain to introduce disability discrimination legislation here. It is clear that the sponsors of such legislation are close adherents of the US model, but the influence of the Australian and Canadian examples is also apparent. This is felt to justify the inclusion of those two jurisdictions in the comparative analysis. Furthermore, developments in France and Germany suggest that the quota model has not yet run its course, while contemporary radical contributions to discrimination theory at large hint that regulation based upon preferential treatment or affirmative action may still have a role to play. Hence, the study retains the European dimension and looks at alternatives to the anti-discrimination principle, including the use of positive action, quotas and favourable treatment.

A study of this nature cannot be completed without incurring a number of debts of gratitude. The first and most extensive debt is that owed to my wife, Antoinette, who encouraged, cajoled and even threatened me at various stages of the research, particularly during the lonely and despairing hours of writing-up. I might have given up or settled for something less ambitious without her influence. At various stages in the gestation of this thesis, my students and fellow academics offered many insights into the process of doctoral research and the substantive topic itself, although naturally they cannot be blamed for the many deficiencies of style, presentation and analysis that remain. My department provided much in the way of material assistance during the research, not least in respect of my calls upon the travel budget and equipment funds. I am grateful to the Chairman of Department, Professor K.P. Gee, for his support.

The personnel of many libraries have answered my requests for sources and information, and provided me with temporary research accommodation at different stages of the study. I would mention in particular the Librarians and staff of the following libraries: the Clifford Whitworth Library at the University of Salford; the John Rylands Library at the University of Manchester; the libraries of the Faculties of Law at the Universities of Leeds, Liverpool and Manchester; the Bodleian Law Library at the University of Oxford; the Library of the Institute of Advanced Legal Studies in the University of London; the University of London Senate House Library; the British Library of Political and Economic Science at the London School of Economics; the Library of the Manchester Business School; the Library of the Equal Opportunities Commission in Manchester; the libraries of the Honourable Societies of the Inner Temple and Middle Temple in London; the City of Manchester Central Library; and the

British Library Document Supply Centre. I am also grateful to a number of individuals and organisations, too great to mention by name, who sent me papers and materials or responded to my requests for information.

The thesis complies with the Regulations for the Form of Theses of the University of Salford and incorporates may of the recommendations of British Standard 4821 (1990). It has been prepared in WordPerfect 5.1 and laser-printed on A4 80g/m^2 paper, using Univers scalable 10 point typeface. The body of the text, excluding indented quotations, footnotes and bibliographical detail, is set in 1.5 lines spacing. A general bibliography is supplied to indicate materials consulted to any extent during the research. In the main, the author-date citation method is employed and the general bibliography also serves as a key to cited sources. Footnoting is used to collect multiple citations and to refer to miscellaneous materials that are not easily incorporated into the general bibliography. Extensive use of abbreviations and acronyms is made, so that the reader should refer to the glossary for an explanation of these. Legal citations and references observe the varying conventions of the different jurisdictions, but with some modifications where appropriate.

Brian Doyle
Salford
October 1993

GLOSSARY

¶	paragraph
§	section
2d	2nd series
A	Alberta
AAP	Affirmative Action Program
AC	Appeal Cases
ACT	Australian Capital Territory
ADA	Americans with Disabilities Act; Anti-Discrimination Act
ADB	Anti-Discrimination Board
AIDS	Acquired Immune Deficiency Syndrome
AILR	Australian Industrial Law Reports
Alb	Alberta
All ER	All England Law Reports
Ann	Annotated
App Crt	Appeal Court
App Div	Appellate Division
Ark	Arkansas
Art(s)	Article(s)
BC	British Columbia
BFOQ/BFOR	*Bona fide* occupational qualification/requirement
BS	British Standard
c	chapter
C	Canada
CA	Companies Act; Court of Appeal
Cal	California
Can	Canada
CD	US District Court for the Central District
CEDP	Committee for the Employment of Disabled People
CFR	Code of Federal Regulations
ch	chapter
CHR&F	Charter of Human Rights and Freedoms
CHRR	Canadian Human Rights Reports
Cir	Circuit Court of Appeals
CLLC	Canadian Labor Law Cases
Cmd/Cmnd	Command Paper
Conn	Connecticut
CRDP [Bill]	Civil Rights (Disabled Persons) [Bill]
CRE	Commission for Racial Equality
CS&DPA	Chronically Sick and Disabled Persons Act
CSC	Civil Service Commission
Cth	Commonwealth (Australia)
D	District Court
DAS	Disablement Advisory Service
DC	District Court; District of Columbia
DDA	Disability Discrimination Act
DE	Department of Employment
Div Crt	Divisional Court
DLR	Dominion Law Reports
DPA	Disabled Persons Act
DP(E)A	Disabled Persons (Employment) Act
DRO	Disablement Resettlement Officer
EAT	Employment Appeal Tribunal

EC	European Community (Communities)
ECJ	European Court of Justice
ECU	European Currency Unit
ED	US District Court for the Eastern District
ed(s)	edition; editor(s)
EEA	Employment Equity Act
EEC	European Economic Community
EEOC	Equal Employment Opportunities Commission
EEO(CA)A	Equal Employment Opportunity (Commonwealth Authorities) Act
EOA	Equal Opportunity Act
EOB	Equal Opportunity Board
EOC	Equal Opportunity Cases; Equal Opportunity Commission
EOT	Equal Opportunity Tribunal
EP(C)A	Employment Protection (Consolidation) Act
EPD	Employment Practice Decisions
ERS	Employment Rehabilitation/Resettlement Service
F	Federal Reporter
FC	Federal Cases
FCA	Federal Court of Appeal
Fla	Florida
FPA	Fair Practices Act
FSupp	Federal Supplement
Ga	Georgia
Gen	General
HASAWA	Health and Safety at Work etc Act
Haw	Hawaii
HC	House of Commons
HC Deb	Parliamentary Debates (Hansard) House of Commons Official Report
HCEC	House of Commons Employment Committee
HELIOS	Handicapped People in the European Community Living Independently in an Open Society
HIV	Human Immunodeficiency Virus
HL	House of Lords
HL Deb	Parliamentary Debates (Hansard) House of Lords Official Report
HMSO	Her Majesty's Stationery Office
HPDT	Handicapped Persons Discrimination Tribunal
HPEOA	Handicapped Persons Equal Opportunity Act
HR&EOCA	Human Rights & Equal Opportunity Commission Act
HRA	Human Rights Act
HRC	Human Rights Code; Human Rights Commission
HRT	Human Rights Tribunal; Human Rights Review Tribunal
ICR	Industrial Cases Reports
IDS	Income Data Services Ltd
Ill	Illinois; Illinois Reporter
ILLR	International Labour Law Reports
ILO	International Labour Office/Organisation
Ind	Indiana
IRLR	Industrial Relations Law Reports
IRPA	Individual's Rights Protection Act
IRS	Industrial Relations Services
IT	Industrial Tribunal
J	Justice
JAN	Job Accommodation Network
La	Louisiana
M	Manitoba
Man	Manitoba

Mass	Massachusetts
Md	Maryland
Minn	Minnesota
Miss	Missouri
Mo	Montana
MSC	Manpower Services Commission
N	Newfoundland
NACEDP	National Advisory Council on the Employment of Disabled People
NAO	National Audit Office
NB	New Brunswick
NC	North Carolina
ND	US District Court for the Northern District
NE	North Eastern Reporter
New	Newfoundland
NJ	New Jersey
N°	Number
NR	New Reports
NS	Nova Scotia
NSW	New South Wales
NSWLR	New South Wales Law Reports
NT	Northern Territory
NW	North Western Reporter
NWT	Northwest Territories
NY	New York
NYS	New York Supreme Court Reporter
O	Ontario
OFCCP	Office of Federal Contract Compliance Programmes
OJ	Official Journal of the European Communities
Okla	Oklahoma
Ont	Ontario
OPCS	Office of Population, Censuses and Surveys
Pa	Philadelphia
PACT	Placement Assessment and Counselling Team
para(s)	paragraph(s)
PEI	Prince Edward Island
Penn	Pennsylvania
Pub L	Public Law
Q	Québec
QB	Queen's Bench
Qld	Queensland
Québ	Québec
RA	Rehabilitation Act
Reg(s)	Regulation(s)
Rev	Revised
RI	Rhode Island
RNIB	Royal National Institute for the Blind
RNID	Royal National Institute for the Deaf
RS	Revised Statutes
RSGB	Research Surveys of Great Britain Ltd
s	section
S	Saskatchewan; Statutes
SA	South Australia
Sask	Saskatchewan
SC	Supreme Court; Statutes of Canada
Sch(s)	Schedule(s)
SCR	Supreme Court Reports

SD	US District Court for the Southern District
SI	Statutory Instruments
SR&O	Statutory Rules and Orders
ss	sections
SSA	US Social Security Administration
Stat	Statutes
Supp	Supplement
Tenn	Tennessee
Tex	Texas
TUC	Trades Union Congress
UN	United Nations
US	United States; United States Reports
USC	United States Code
Va	Virginia
Vic	Victoria
Vol(s)	Volume(s)
VR	Victorian Reports
WA	Western Australia
Wash	Washington; Washington Reporter
WD	US District Court for the Western District
WHO	World Health Organisation
YT	Yukon Territory

ABSTRACT

Against the background of growing demands in Britain for anti-discrimination legislation covering disabled persons, the study examines the case for reform, and the shape which such legislation might take, in the employment field. Using the socio-legal tradition, the meaning of disability is explored and the demography, nature and experience of disability is described. The evidence of employment discrimination against disabled persons is evaluated and their position in the labour market is plotted. Existing law on disabled employment rights in Britain is set out and its strengths and weaknesses weighed. The employment rights of disabled workers in the European Community, the United States, Canada and Australia are narrated.

Then, using comparative legal methodology, a number of problems and issues in the regulation of disability-related employment discrimination (and the promotion of equal opportunities) are recounted and critically analysed. These problems and issues include the definition of disability discrimination, identification of the protected class, fitness for work and employment qualification, use of reasonable accommodation and positive action, preferential treatment and the role of quotas, and enforcement strategies and remedial action. The experience of the United States is recruited as the primary basis of comparison and lessons for suggested legal reforms in Britain are pointed out. Some general conclusions on the efficacy of disability discrimination laws are drawn.

The study surveys a wide variety of primary and secondary legal materials, including legislation and case law, and reviews the pertinent literature drawn from legal scholarship and other relevant disciplines. It does so in the context of a theoretical perspective that borrows from the body of legal theory and concepts developed in race and gender discrimination law.

DECLARATION

This thesis is based upon the author's original research and scholarship. During the course of the research and subsequent writing-up, the author published work-in-progress (Doyle, 1987a, 1987b, 1991, 1993a and 1993b: see General Bibliography). Chapter IV draws upon Doyle, 1987b and 1991, while Doyle, 1993b (forthcoming) in turn will draw upon an earlier draft version of that chapter. The framework of Part C (Chapters X-XIII in particular) was rehearsed in Doyle, 1993a which drew upon those chapters in draft.

CHAPTER I:
INTRODUCTION

INTRODUCTORY REMARKS

Throughout history disabled people have experienced social discrimination, segregation and exclusion. They have been characterised as incomplete or defective human beings, subjected at one extreme to neglect, persecution and death, and at the other extreme to charity, social welfare and paternalism.[1] Between these two poles lies the common experience of many, although not all, disabled persons: segregated in education, trapped by the benefits system, denied independence by health and social services, marginalised by the built environment, immobilised by the transport system, denied full participation in leisure and social activities, and disenfranchised by the political process. Disadvantage and inequality of opportunity represent the everyday experience of individuals with disabilities. Disability discrimination is institutionalised and interwoven in the fabric of our society.[2]

Persons with disabilities are especially vulnerable to discrimination and disadvantage in employment. For many disabled persons, entry or re-entry to the labour market is restricted by impairment or disability, lack of skills or qualifications, and income insecurity during the transition from disabled unemployment to rehabilitated employment. Labour market access can be encouraged by a combination of vocational resettlement, rehabilitation and training; social security and income maintenance measures; and provision of non-competitive or sheltered employment.[3] However, in Britain these facilities are the product of an uneven patchwork of legal regulation, administrative action and voluntary effort.[4] Moreover, borrowing from McCrudden,[5] it can be argued that the use of state funds to improve the socio-economic position of persons with disabilities (via the social security and social welfare systems, or through rehabilitation, training and employment programmes targeted upon this group) is an example of a "supply side" policy. What may be required, however, is the enactment of anti-discrimination legislation as an example of a "demand side" policy, which attempts to change the behaviour and attitudes of employers through the elimination of discriminatory policies and practices.

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[1] Burgdorf and Burgdorf, 1975.

[2] Oliver, 1985; Thompson *et al*, 1990; Barnes, 1991; Barnes, 1992.

[3] Haveman *et al*, 1984a; Habeck *et al*, 1985; Berkowitz and Hill, 1986a.

[4] McCrostie and Peacock, 1984.

[5] McCrudden, 1982: 303.

Although there are a number of statutory and extra-statutory measures that regulate the employment of disabled persons in Britain and provide them with a degree of employment protection, there is no anti-discrimination or equal opportunities legislation outlawing employment discrimination against disabled people. Today in Britain, a person's disability, unlike a person's sex, marital status or race, may be a lawful ground upon which to base an otherwise irrational employment decision. It is true that, in some cases, the nature and severity of disability can disqualify the individual from some economic activity. Nevertheless, disabled workers can be equally, if not further, handicapped by the ignorance, fear and prejudice of employers and "able-bodied" fellow workers.[6] Entry to and participation in the labour market can be obstructed by structural and institutional barriers erected by the norms of the non-disabled world and maintained by the legacy of past discrimination. Like women and minority groups, disabled workers often experience unequal employment opportunities, limited rights at work and reduced job security. This might be the result of prejudice or ill motive on the part of employers and others in the workplace. It is more likely to be caused by employers stereotyping disabled persons and applying preconceptions about their abilities and employability. Even in the absence of such discrimination, a disability can still be a disadvantage unless employers are willing or required to take reasonable steps to accommodate disabled applicants and employees.

Recognition of this pattern of discrimination, disadvantage and lack of opportunity that is the life menu of many disabled persons has led several and various voices to advocate the entrenchment of basic social, economic and political rights for disabled people in law. Disabled Britons have learned much from the disability rights and independent living movements in the US,[7] and have subscribed to the tenets of supranational disability associations.[8] Since the 1960s organisations *of* disabled people have begun to displace organisations *for* disabled people in the battle for rights and acceptance. The emergence of

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[6] Lyth, 1973; Walker, 1982. The evidence to rebut ignorance and fears about employing disabled persons is plentiful. See, for example: Stevens, 1986.

[7] See generally: DeJong, 1979; Scotch, 1984; 1987; and 1989. The American disability rights movement in turn was inspired by the struggles of African-Americans for civil rights in the 1960s and consciously adopted many of the strategies and examples of that episode: Kriegel, 1969; Burgdorf, 1991: 427-9.

[8] See, for example, Rehabilitation International's *Charter for the 80s* whose aims include ensuring the fullest possible integration of and equal participation by disabled people in all aspects of community life: Rehabilitation International, 1981. See also the seven basic human rights to education, employment, economic security, services, independent living, culture and recreation, and political influence identified by the Disabled People's International as essential for the integration and social participation of disabled individuals: Disabled People's International, 1981.

bodies such as the Disablement Income Group, Disability Alliance, the Union of Physically Impaired Against Segregation, Liberation Network, Voluntary Organisations for Anti-Discrimination Legislation, the Disability Manifesto Group and the British Council of Organisations of Disabled People has been symptomatic of and instrumental in the growing confidence of disabled people in the socio-political arena.[9] Despite:

> the excessive paternalism of the welfare state coupled with the absence of a strong British Civil Rights tradition [that] has caused disabled people in Britain to be relatively cautious in their choice of tactics,

since the late 1980s disabled activists have been prepared to use protests, civil disobedience and demonstrations - even at personal risk - to highlight the case for change.[10]

The justification for legislating for disabled employment rights has been advanced by Berkowitz and Hill:

> Disability imposes individual and social costs. With the onset of a potentially disabling condition, an individual experiences both economic and psychic losses as he or she faces restricted choices. The individual may suffer pain, incur increased medical costs, lose income, and face societal prejudice. Society may lose the output of an otherwise productive worker and use its resources for medical care and rehabilitation. A firm may lose its investment in the hiring and training of that worker.[11]

International labour standards recognise this argument and furnish some support for the guarantee of disabled employment rights. In 1923, the ILO first decided to recommend to governments the adoption of compulsory disabled employment schemes.[12] Bolderson reports that:

> In the ILO discussions the experts stressed the obligations owed to disabled ex-servicemen by society, the economic value of work to an injured man, the ill-effects of dependency and the need for countries to maximise their productive capacity. But they never lost sight of the fact that European war pensions were inadequate and that this made it imperative that work should be provided for the disabled men.[13]

The ILO subsequently required governments to formulate and implement policies for vocational rehabilitation and disabled employment, to promote equal employment opportunities in competitive employment and to permit positive discrimination in favour of

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[9] Oliver 1990; Finkelstein, 1991; Oliver and Barnes, 1991; Barnes, 1992; Shakespeare, 1993. The role of disability charities, such as the Spastics Society, the Royal National Institute for the Blind and the Royal Association for Disability and Rehabilitation, should not be discounted.

[10] Barnes, 1992: 18.

[11] Berkowitz and Hill, 1986b: 1.

[12] ILO, 1923.

[13] Bolderson, 1991: 45.

disabled workers.[14]

The UN Declaration on the Rights of Disabled Persons expresses the right of disabled people to:

> economic and social security and to a decent level of living, [and] according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation.[15]

The European Social Charter mandates signatory states "to take adequate... measures to encourage employers to admit disabled persons to employment". The EC Recommendation on the Employment of Disabled People exhorts member states to take all appropriate measures to promote fair employment and vocational training opportunities for disabled people.[16] Article 26 of the EC Charter of Fundamental Social Rights of Workers provides that:

> disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.[17]

Furthermore, Article 2 of the Social Chapter Agreement annexed to the EC Protocol on Social Policy calls for the EC to support and complement the activities of member states in, *inter alia*, "the integration of persons excluded from the labour market", a phrase that is capable of being applied to disabled persons.[18]

AIMS AND OBJECTIVES

It is against this background that this study aims to examine the role that the law might play

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[14] ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention N° 159 and ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation N° 168 of 1983. See also ILO Vocational Rehabilitation (Disabled) Recommendation N° 99 of 1955 which states that disabled persons should be afforded an equal opportunity to perform work for which they are qualified and to accept suitable work with employers of their choice. The Recommendation also emphasises the abilities and work capacities of disabled persons rather than disabilities.

[15] *Declaration on the Rights of Disabled Persons*, General Assembly Resolution 3447 (XXX) adopted 9 December 1975.

[16] Council Recommendation N° 86/376/EEC of 24 July 1986 on the Employment of Disabled People in the Community: OJ N° L225/43 12 August 1986.

[17] Community Charter of the Fundamental Social Rights of Workers adopted by the heads of state or government of eleven members states of the EC meeting at Strasbourg on 9 December 1989.

[18] The Protocol on Social Policy was part of the European Union Treaty signed at Maastricht in February 1992. Britain is not a signatory to either the Charter or the Protocol.

in combatting disability discrimination in the labour market and promoting the employment rights of disabled workers. The study sets itself six objectives. First, it will seek to clarify our understanding of disability and the experience of persons with disabilities in the context of employment activity. Second, it will examine the data that describes the status of disabled workers in the labour market and will assess how far their employment vulnerability or disadvantage is the result of prejudice, discrimination or lack of equal opportunities. Third, a number of different legal models addressing the employment rights of disabled persons will be described through an account of the legal position in selected comparative countries. Fourth, the study will explore how far, if at all, the comparative legal models and/or existing discrimination theories and laws can be applied in the reform of Britain's disabled employment legislation. Fifth, a number of inherent problems and issues for legal reform will be analysed and solutions suggested. Finally, the efficacy of using law as a means of social engineering will be assessed in the context of the present topic.

STRUCTURE

The remainder of this introductory chapter (Chapter I) is dedicated to a description and assessment of the methodology to be employed in this study, an overview of the relevant literature, an explanation of some fundamental concepts and basic terminology that provide the framework for this thesis (in particular, the notions of "disability" and "discrimination"), and an attempt to provide a theoretical perspective that will inform and assist the subsequent discussion and analysis. Chapters II and III will take the conceptual and theoretical considerations a stage further. The concept of disability is explored in more detail in Chapter II by looking at the demography of disability, the nature of disabilities and the experience of disabled persons. Chapter III examines the hypothesis that disabled people are the subject of prejudice and discrimination, and that this infects and effects their employment status and opportunities. In that chapter, the position of disabled workers in the labour market is described and the evidence of employment discrimination informed by disability is evaluated.

The first three chapters stand alone as a coherent and separate division of this thesis. Those chapters set the scene for the second part of the study, which is concerned to describe the national legal models addressing the employment rights of disabled persons in the chosen jurisdictions. Chapter IV narrates the current legal position in Britain and outlines the contemporary pressures for legal reform of disability rights in the employment field. As British employment rights, in general, and sex discrimination law, in particular, have been heavily influenced by developments in the EC since the early 1970s, Chapter V examines the state of disabled employment rights in Europe. This chapter is in two sections: the first section looks at the prospects for disabled workers under supranational EC law, while the second

section sketches out the predominant features of the legal treatment of disabled persons in the labour laws of the other eleven member states of the EC.

The main point of comparison in this study is between the law in Britain and the legal rights of disabled workers in the US. Given the complexity of the US legal jurisdictions - in particular, the interaction and potential conflicts between public and private law, between constitutional rights and statutory arrangements, and between federal and state provision - the discussion of the US is in two halves. In Chapter VI, the use of the constitutional law to protect disabled workers is examined, the federal and state fair employment laws affecting disabled employment opportunities are described, and their respective strengths and weaknesses assessed. Chapter VII looks at the pressures for reform that built up in the US during the 1970s and 1980s and at the background to the emancipatory Americans with Disabilities Act 1990. That statute is then dissected and explained. This second part of the thesis is concluded with two further chapters introducing additional comparative perspectives. Chapter VIII summarises the position in the Canadian provincial and federal jurisdictions, while Chapter IX attempts a similar task for the Australian Commonwealth and state legislation.

The third and final part of the thesis adds analysis and discussion to the concepts, theories, data and descriptive material of the earlier two parts. In Chapter X, the problems of applying discrimination theory to disability are explored. The main issue here is concern with how to define in legal terms what amounts to disability-related discriminatory actions or effects. Chapter XI examines the difficulties of translating the medical and social conceptions of disability into legal terms. This chapter is concerned with identifying the protected class, a concern that is largely absent in other examples of discrimination law, but which is crucial to the success of disability-related equal opportunity legislation. The question of how to accommodate the right of disabled persons to be treated fairly in the labour market with the right of employers to organise their workforce and production efficiently is tackled in Chapter XII. In this chapter, the application of the merit principle to disability discrimination laws is examined, and the formulae for ensuring fitness for work and qualification for employment are weighed.

In what is perhaps a key chapter, Chapter XIII sets out the essential ingredient of any legal reform in this area: the need to make reasonable accommodation for disabled persons. It is suggested that the credibility of disability discrimination reform stands or falls on how far it is prepared to embrace the need to recognise and entertain difference. Chapter XIV returns to the British experience of the use of quotas as a means of promoting disabled employment opportunity. This chapter asks whether there is a case for the retention of disabled persons'

quotas and, if so, whether and how the quota might be reformed. The role of preferential treatment and positive discrimination will be probed in this chapter. Chapter XV looks at how the disability discrimination law is to be enforced, what remedies should be granted, what procedures followed, and how the law might encourage alternative dispute avoidance and resolution. Looking beyond enforcement, Chapter XVI explores how positive action, equal opportunity policies and contract compliance techniques might be recruited to the present discussion. Finally, Chapter XVII attempts a summary of the main arguments of this study and draws appropriate conclusions.

METHODOLOGY

The present study attempts to enlighten the current debate that is developing in Britain about whether the law can be used to ensure that persons with disabilities can compete for their fair share of employment opportunities in a period of measurable unemployment. It is concerned to answer the question - should there be disability discrimination laws in this country? - with another question - what shape should those laws take? Thus it seeks to describe what is and to prescribe what ought to be. In Western Europe, and in Britain too, at least until relatively recently, employment laws and practices in other countries have constituted a frequent source for innovation. Because of that recent tradition, and because also of the fact that since 1979 the political climate has been adverse to legal reform enhancing individual employment rights, this study similarly looks abroad for inspiration in shaping disabled employment rights.

This means that the primary methodology to be used here is the comparative legal method. The author is not a "comparative lawyer" but a labour lawyer. However, in a sense, every British labour lawyer of the present generation has had to become a "comparative labour lawyer", following in the wake of the late Otto Kahn-Freund, who pioneered the comparative approach in British labour law scholarship.[19] However, the "uses and misuses" of comparative law must be acknowledged.[20] An appropriate use of comparative labour law is aptly illustrated by Britain's adoption, almost wholesale, of the American model of race and sex discrimination regulation: a transplantation of norms that will be referred to at various stages in this thesis. Contemporary developments in EC equal treatment jurisprudence have also been instrumental in the evolution of British equal opportunity legislation. However, one must also guard against the misuse of the comparative method and, in particular or primarily,

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[19] See Lewis, 1983 for a consideration of Kahn-Freund's use of the comparative method and an account of his published contributions to comparative labour law scholarship.

[20] Following Kahn-Freund, 1974 and Whelan, 1985.

the risk of transplanting ideas or rules or institutions into a fundamentally different culture or context and thus risking rejection. The socio-political environment of the donor and donee jurisdictions must be accounted for, as "legal ideas do not have an independent existence outside their own local setting".[21]

The methodology of this work is influenced by two further approaches. First, like much legal scholarship, it shows an (unhealthy?) obsession for the *minutiae* of statute law and case law. The author believes that the lessons of comparativism cannot be learnt by skirting around the law as it is drafted, practised, litigated and interpreted. Kahn-Freund taught that the lawyer must go through the law, not around it, in order to understand the law.[22] Accordingly, where appropriate, the ambiguous draftsmanship of legislative provisions will be exposed and the foibles of judicial interpretation denounced. Second, however, the author does not subscribe to the "black letter" tradition of legal writing. It would be impossible to study the concepts of "disability" or "discrimination" without praying in aid the other social sciences. Accordingly, following the socio-legal school, this monograph will attempt to place the law in context and to draw where necessary upon the literature of other disciplines.

LITERATURE OVERVIEW [23]

Inevitably, much of the literature of disability is to be found in the research and scholarship of the medical and rehabilitative sciences. While this literature is essential to informing the causes, diagnosis, pathology and treatment of disability, and valuable in itself, it has largely contributed to the medical model of disability that identifies disabled persons by association with their disability rather than as human beings with rights and needs. Furthermore, this literature equates disability with inability or limitation and regards disability as the sole or predominant cause of the relatively disadvantaged social and economic position of disabled people in many walks of life. It thus ignores the interaction of disability and environment, and of disability and social attitudes, and thereby overlooks the social construction of disability and handicap.[24]

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[21] Whelan, 1985: 1437.

[22] Kahn-Freund, 1966: 129.

[23] A very useful review of the literature, written from the perspective of a political scientist and in the context of US disability policy, is provided by Hahn, 1986.

[24] An especially telling account of the social construction of disability is that of Dianne Pothier, a student and subsequent faculty member at Dalhousie Law School. It should be read by all law teachers as part of their induction and training. See: Pothier, 1992.

During the 1960s and subsequently, however, a number of writers began to employ sociological methods to define disability and to account for the life experiences of disabled people.[25] This thread of scholarship has done much to provide an alternative to the medical or pathological model of disability. By seeking to examine the interaction of society and disabled people, the sociology of disability has laid the foundations for our present day understanding of disability as a social construction rather than merely a medical diagnosis. The sociological approach is complemented by a vast body of psychology literature that explores the socio-psychological experience of disability and the attitudes of others towards disabled individuals.[26] The particular contribution of psychology to the study of disability has been its examination and explication of prejudice and discrimination against disabled people.

The 1970s and 1980s witnessed a number of classic studies of disabled people, borrowing from the social sciences in general, but written primarily from the perspectives of the sub-disciplines of social policy and social administration.[27] These inquiries fix upon the position of disabled persons in the welfare state and challenge the view of disabled people as passive clients of state provision and services (rather than citizens with rights and expectations). Breaking down the investigation into separate analyses of work, education, income, leisure, health and so on, this corpus of literature is frequently critical of the legislation and administrative framework, against the background of which disabled persons' rights are determined. This scholarship also furnishes much evidence in the form of anecdote and case studies of discrimination and disadvantage, and provides the impetus for the more detailed and systematic research in that regard referred to in Chapter III below.

Thus far, the legal rights of disabled persons are treated only tangentially, while the position of disabled workers in employment and the labour market is viewed as merely one aspect of the disabled experience. Exceptionally, however, the discipline of economics has been concerned with this latter issue. A number of studies by economists have examined the various strategies for assisting disabled workers compete in the open labour market and have weighed them in the balance. Furthermore, these studies have been comparative, usually drawing lessons from the experiences of a number of countries.[28] The comparative theme

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[25] See in particular: Lees and Shaw, 1974; Albrecht, 1976; Blaxter, 1976; Stubbins, 1977; Laura, 1980; Brechin *et al*, 1981; Shearer, 1981; Thomas, 1981; Locker, 1983.

[26] See for example: Shontz, 1975; Stubbins, 1977; Vash, 1981; Wright, 1983.

[27] See, in particular: Sainsbury, 1970; Sainsbury, 1973; Topliss, 1979; Topliss and Gould, 1981; Topliss, 1982; Stone, 1985.

[28] See, primarily: Culyer, 1974; Berkowitz *et al*, 1976; Berkowitz, 1979; Hammerman and

is also pervasive within these studies, which pursue a detailed evaluation of differing strategies and policies affecting disabled employment opportunities. Thus these works typically look at the efficacy and effects of rehabilitation services, resettlement and training provision, sheltered and open employment arrangements, the interaction of employability and the availability of social security benefits, and the use of legal tactics (such as quota and anti-discrimination laws) to promote disabled employment. Not surprisingly, this body of literature is also concerned with the costs and benefits of such programmes and strategies, and thus comes nearest to assessing the viability and utility of using the law as a tool of change.

Concern with the legal rights of disabled people appears to have been stimulated by the UN International Year of Disabled People in 1981. A number of collaborative reviews of law and legislation affecting disabled rights appear at this time, although it is noticeable that, in the main, these reports are the work of social scientists in the disability field rather than of lawyers.[28] In turn, these publications spawned a number of polemical papers addressing the right to work of disabled persons, but again the originators of such pieces were not legal scholars.[30] The value of these contributions is in their trenchant criticisms of existing employment law's failure to guarantee a right to work for disabled people, but their rhetoric is ultimately wasted in attempts to make the disabled quota legislation (discussed in Chapters IV and XIV below) operable. There is little or no consideration of alternative legal models, such as anti-discrimination legislation, although occasional reference is made to the existence of such laws elsewhere, particularly in the US.

In the organic way in which literature in a given field develops and evolves, interest in disability discrimination legislation soon became a central concern for disability rights commentators. Undoubtedly, the simultaneous spurs for this interest were the acceptance of the view that the disabled workers' quota was unlikely to be reformed, but would be

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Maikowski, 1981; Burkhauser and Haveman, 1982; Haveman *et al*, 1984a; Habeck *et al*, 1985; Berkowitz and Hill, 1986a; Berkowitz, 1987; Kiernan, 1989; Berkowitz, 1990.

[28] Guthrie, 1981; Walker and Townsend, 1981. In recent years also, some supranational organisations have produced surveys of disabled employment legislation, but these are typically compendia of reports from national *rapporteurs* (usually civil servants) and consist of a litany of legislative provisions with little or no attempt at critical analysis or further practical assessment. See in particular: Commonwealth Secretariat, 1981; Council of Europe, 1990; UN, 1990a; WHO, 1990. The legal literature in the US is rich in its coverage of the civil and legal rights of disabled persons. Leaving aside the vast periodical literature for the moment, see in particular the following monographs upon which the present study draws: Burgdorf, 1980a; Sales *et al*, 1982; Rothstein, 1984; Percy, 1989.

[30] See, for example: Jordan, 1979; Field, 1980; Lonsdale, 1981; Grover and Gladstone, 1981; Lonsdale and Walker, 1984; Walker, 1986.

allowed to become fossilised (see Chapter XIV below), and the publication of a number of reports identifying disability discrimination and comparing it with race and sex discrimination.[31] In Britain, the work of two scholars in particular - Oliver and Barnes - has been important in politicising the disability rights issue in Britain and in proposing a legislative solution.[32] Again, remarkably, this scholarship is rooted in the broad social sciences rather than in legal studies.[33] An exception is the work of Campbell and Heginbotham in the area of mental illness and discrimination.[34]

However, all this recent work has one or more inherent limitations. First, it is concerned with disability discrimination in all aspects of social activity and not merely with the particular problems of employment. Second, the work of Campbell and Heginbotham focuses upon mental disability alone and does not present a thesis for general disability anti-discrimination laws. Third, although each of these works makes reference to the principle of anti-discrimination law, there is very little attempt (with the exception of Campbell and Heginbotham) to set out of what such law might consist and how it might be devised. Finally, such references as there are to the comparative legal models of other countries are passing and make little attempt to assess what the experience has been of such legislation.[35] In the pages of British labour law, moreover, existing regulation of disabled employment rights is merely footnoted or mentioned *en passant*,[36] while the prospects for and direction of reform

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[31] Large, 1982 and Fry, 1986 among others.

[32] Oliver (1984; 1985; 1986; 1990) and Barnes (1991; 1992). See also: Bynoe, Oliver and Barnes, 1991; Cunningham, 1993.

[33] A literature search in the main bibliographies of British labour law reveals that the employment rights of disabled workers is a sorely neglected topic: Hepple *et al* (1975 and 1981) as supplemented by irregular up-dating bibliographies in the *Industrial Law Journal*. More recently, the *Legal Journals Index* records that disability and employment has not been subjected to sustained legal scholarship beyond legal guidance notes and short contributions in practitioners' periodicals. The contrast with the wealth and volume of relevant literature in the US, Canada and Australia could not be starker.

[34] Campbell and Heginbotham, 1991. See also the contribution of Bynoe, 1991.

[35] A possible exception is Bynoe (1991), but his analysis of the US, Canadian and Australian law is perforce limited to a few pages.

[36] See, for example: Davies and Freedland, 1993: 62. The major textbooks and practitioner commentaries on modern employment law devote little, if any, space to disabled workers, perhaps believing (erroneously) that the topic will be dealt with in the social welfare or health and safety literature. Furthermore, a recent major and scholarly work on discrimination law ignored disability discrimination, although providing ample coverage of sex, race, age and religious discrimination: Hepple and Szyszczak, 1992. This omission is all the more noteworthy when compared with the generous treatment given to disability discrimination in two contemporary and polemical works on discrimination law originating in

are almost entirely ignored. It is these limitations that the present thesis hopes to overcome or address.

CONCEPTUAL FRAMEWORK

Terminology of disability

The starting point in any investigation of this kind must be the selection and definition of terms and terminology. Three terms are central to the study of disabled persons and their experience: namely, "impairment", "disability" and "handicap". An understanding of all three terms is essential before we can proceed further. However, it will be necessary to return to the problem of defining disability at several stages in this study.

A dictionary definition of the above labels casts only a little light upon their importance as conceptual signifiers. Impairment means the "action of impairing, or fact of being impaired; deterioration; injurious, lessening or weakening", where "impaired" denotes "rendered worse; injured in amount, quality or value; deteriorated, weakened, damaged".[37] Disability indicates:

> Want of ability (to discharge any office or function); inability, incapacity, impotence... Incapacity in the eye of the law, or created by the law; a restriction framed to prevent any person or class of persons from sharing in duties or privileges which would otherwise be open to them; legal disqualification.[38]

The most controversial of the three words is "handicap". This is because it is believed to have originated from the phrase "hand i' cap" or "hand in the cap", a description of a 17th century sport or game involving the action of drawing objects out of a cap.[39] The term was applied to horse-racing in the 18th century and came into general usage in the 1850s. In that sense it signifies:

> The extra weight or other condition imposed on a superior in favour of an inferior competitor in any athletic or other match; hence, any encumbrance or disability that weighs upon effort and makes success more difficult.[40]

Although "handicap" is used in modern times in this latter sense, when employed in relation to persons with disabilities or impairments, it obtains a narrower, more negative connotation

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Australia and in the US: Thornton, 1990; Epstein, 1992.

[37] *The Oxford English Dictionary* (2nd ed, 1989; Oxford: Clarendon Press) Vol VII at 696.

[38] *Ibid* Vol IV at 713-14 and where "disabled" is defined to mean "rendered incapable of action or use, *esp.* by physical injury; incapacitated...".

[39] *Ibid* Vol VI at 1073. Some commentators have suggested that this phrase became corrupted as "cap in hand" and thus the term "handicap" became associated with begging: Barnes, 1991: 2.

[40] *Ibid* at 1074.

of disadvantage and inferiority.[41]

The medical view of disability has been the predominant one in twentieth century industrialised democracies. This is also reflected in the terminology and etymology of disability. The World Health Organisation's classification of impairment, disability and handicap has gained widespread usage. This defines handicap as:

> 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.[42]

In that context, impairment is "any loss or abnormality of psychological, physiological, or anatomical structure or function", while disability indicates "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being".[43] Little disagreement exists over the concept of impairment, which is essentially a matter of clinical judgment.

Although this classification focuses upon physical or mental impairment and its medical and functional consequences, it at least recognises that the disadvantage experienced by persons with disabilities is also the product of society's negative reaction (or failure to react positively) towards impairment and disability. Impairments are of many causes and varying severity, and possession of an impairment does not inevitably mean that the individual is disabled or handicapped, contrary to the popular perception and conventional usage. On the other hand, disability depicts the individual's experience of a limitation in a particular activity or range of activities, but without colouring all other life functions. In contrast, handicap describes the manner in which society interacts with a disabled person and his or her impairment or disability.[44]

This latter point bears out Burgdorf's observation that:

> One of the most important elements in delineating who is and who is not handicapped is a social judgment; a person truly qualifies as handicapped only as a result of being so labeled *(sic)* by others. And the decision to impose or not to impose the *handicapped* label is ultimately grounded upon perceptions of an individual's role in society.[45]

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[41] Burgdorf, 1980b: 3-4.

[42] WHO, 1980.

[43] WHO, 1980.

[44] Acton, 1981: 2.

[45] Burgdorf, 1980b: 10 (emphasis in the original).

The popular perception would probably recognize blindness, deafness or paraplegia, for example, as disabilities or impairments; in contrast, colour blindness, vertigo or other "hidden" disabilities would probably not be so acknowledged.[46] There is no fine dividing line which can be drawn between disability and "normality", and between capability and inability. Such lines as are drawn are necessarily arbitrary. The better view is to regard disability and able-bodiedness as being extremes on a broad spectrum or continuum of human behaviour and experience. A person may disabled or non-disabled at different times of life and/or for different purposes or activities.

Careless and lazy use of these terms produces phraseology such as "the handicapped" or "the disabled". The objection to such language is that it emphasises or exaggerates a person's medical condition or status, or characterizes disabled individuals as tragic (or courageous or heroic) victims, unable to make a full contribution to society and, therefore, fit only as the proper recipients of charitable assistance and social welfare.[47] The nomenclature dehumanizes disabled persons and fails to accord them their proper respect as individual human beings. As a consequence, individuals with disabilities have attracted numerous derogatory sobriquets which tend to demean their status further.[48] Unless the context requires otherwise, this study will use the expressions "disabled persons" or "persons with disabilities" (or variations thereon), and the term "disability" (and its co-derivative "disabled") will be used in relation to the individuals and groups in whose support the law is mobilised. This decision reflects the growing awareness of the negative power of labels and the preference of disabled persons for descriptive language which focuses upon the individual rather than the disability.[49] In legal terms, however, the choice of nomenclature is not significant and, as will be seen, these terms are often used interchangeably without affecting their legal import. Nevertheless, it will be essential below to grasp the nettle and attempt to

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[46] A recent study of adults with disabling conditions found that individuals were more likely to perceive themselves as disabled if they believed that others who knew them well considered them disabled: Krauss *et al*, 1993. Ranking next in importance as influencing their self-perception was their self-rated severity of disability, followed by their identification with others with disabilities. Less than half of the sample (48.4 per cent) regarded themselves as disabled.

[47] For a review of the tensions between the medical model and the social theory of disability, see: Sullivan, 1991.

[48] See, for example, the multiplicity of terms used to describe disabilities and disabled persons unearthed by Burgdorf, 1980b: 1-4.

[49] Burgdorf (1980b: 5) has argued that the phrase "handicapped person" is preferable. The word "disabled" implies an inability to do something, whereas "handicap" more accurately reflects the social construction of disability. *Cf* West, 1991b: 13-15.

furnish a legal definition of the protected class.

Concept of discrimination

The concept of discrimination is central to this study. In its more positive sense, the term denotes the process of making careful distinctions, and implies that the person discriminating has good taste or applies good judgement. In its negative sense, and in the sense used here, however, discrimination describes the actions or conclusions of selecting someone for favourable or unfavourable treatment on the basis of some difference (such as race, sex or disability) between that individual and another.

Discrimination is often the product of prejudice. According to Becker's economic analysis of discrimination,[60] employers' taste for discrimination leads them to employ majority group workers rather than members of minority groups until the difference between majority and minority group rates of pay exceeds the amount employers are willing to pay to indulge their prejudices. Discrimination is thus inefficient and unprofitable. Discrimination law and its attendant legal literature have been dogged by the confusion, or failure to distinguish, between discrimination and *prejudice*. Prejudice betokens a preconceived opinion or biased view in favour or against an individual or group and which is usually (although not necessarily) manifested in dislike or hostility and informed by misconception, fear or ignorance. It has been defined as:

> an aversion or hostile attitude toward a person who belongs to a group, simply because he belongs to that group and is, therefore, presumed to have objectionable qualities ascribed to that group.[61]

The term might also depict the injury or harm that results to the individual as a result of discrimination. What has created difficulties in discrimination law is the question to what extent is prejudice a necessary or sufficient condition of discrimination or whether discrimination is causally linked to prejudice?[62]

Confusion over the meaning of discrimination has produced second-order effects. The bracketing of discrimination with prejudice could lead many to assume that intention is an indispensable component of discrimination. As a result, unintentional or careless or otherwise well-motivated actions might be treated as not being discriminatory acts. This would almost certainly cause problems of proof in disability discrimination cases, for disability discrimination

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[60] Becker, 1957.

[61] Allport, 1954: 8.

[62] McCrudden, 1982: 304.

is often (although not always) the result of unthinking deeds rather than ill-motivated or intentional actions.[53] Furthermore, it would mean that the term discrimination could not be used to describe exclusionary acts which are the result of the application of facially-neutral criteria which have a disparate impact or effect upon certain groups (so-called indirect discrimination). On the other hand, prejudice might be an important aspect of identifying statistical discrimination where an individual is treated differently because of a (negative) characteristic or trait, which he or she does not actually possess, but that is generally imputed to a particular class, of which he or she is a member.

As with the terminology of disability, so it will be necessary to return to the concept of discrimination at a number of junctures in the present investigation. However, because this study sets out to explain the disadvantaged labour market status of disabled persons by reference to discrimination, and to recruit the assistance of discrimination law in addressing that disadvantage, it may be immediately useful to provide a theoretical perspective upon what follows.

THEORETICAL PERSPECTIVES [54]

Minority rights

The protection and recognition of the human rights of minorities under international law[55] raises the question whether disabled people enjoy the rights of a minority group. Wirth defines a minority group as being:

> a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination.[56]

Disabled persons *have* been described as an "unexpected minority" in search of civil rights

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[53] See, for example, the attempt, ultimately unsuccessful, to introduce the criminal legal concept of *mens rea* into Australian disability discrimination law: *Jamal v Secretary, Department of Health* (1986) EOC 92-162 (NSW EOT); (1986) EOC 92-183 (NSW SC); (1988) 14 NSWLR 252 (NSW CA) discussed in Chapter X below.

[54] This section draws heavily upon: McCrudden, 1982; O'Donovan and Szyszczak, 1988; Townshend-Smith, 1989; Campbell and Heginbotham, 1991; McCrudden, 1991a; McCrudden, 1991b; McCrudden *et al*, 1991; Morris and Nott, 1991; Hepple and Szyszczak, 1992.

[55] See, for example; McKean, 1983. Disabled persons are largely ignored in commentaries on international human rights.

[56] Wirth, 1970: 34.

and protections equivalent to those afforded to racial and ethnic minorities and women.[57] LaPlante has stated that by "any reckoning, persons with disabilities comprise the largest minority group ever defined, eclipsing the elderly and black populations".[58] However, it is debateable whether or not disabled people are a true minority,[59] a status that would entitle them to the presumption of a right to recognition in law and to protection from discrimination and suspect treatment.[60]

Wertlieb argues that disabled persons do satisfy the definition of a minority.[61] She contends that disabled people are subordinated by the non-disabled majority and suffer prejudice, discrimination and exploitation as a consequence. They share a socially important characteristic in common, which is, despite the variety of disabilities, the label of defect. Increasingly, through the civil rights and independent living movements, disabled people have coalesced and exhibited the signs of group solidarity. Their membership of the putative minority group is not voluntary and there are various other factors which point to minority group status.[62] On the other hand, there are a number of dissimilarities between disabled persons and other established minority groups. For example, physical limitation is not a feature of racial and religious minorities (although women, who have been treated as a non-numerical "minority" *might* be said also to have some physical limitations: for example, in respect of physical strength). It is true also that many disabled persons "voluntarily" withdraw from full social participation and actively seek segregation because of their own self-perception of the limiting nature of their disabilities. Furthermore, unlike racial minorities, disabled people usually do not share their disability as a distinguishing feature of family or community, while disability is a heterogeneous characteristic rather than the homogeneous

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[57] Gliedman and Roth, 1980.

[58] LaPlante, 1991: 56.

[59] Best, 1967; Jordan, 1963; Longres, 1982; Wertlieb, 1985.

[60] Research in the US points to the developing minority group status of persons with disabilities. Three-quarters of disabled Americans surveyed described themselves as sharing a common identity with other disabled persons, while 45 per cent felt that disabled people shared the attributes of a minority group with African-Americans and Hispanics: Louis Harris and Associates, 1986 cited in West, 1991b: 12. Such feelings are counter-balanced, however, by the fact that most disabled individuals are isolated from others with disabilities, so lack the sub-culture or shared experience which identifies minority groups. Nevertheless, there is a growing disabled minority culture alongside the advancing disability rights and independent living movements: West, 1991b: 12-13; DeJong, 1979.

[61] Wertlieb, 1985.

[62] Wertlieb, 1985: 1047-9.

characteristics of skin colour, race, ethnicity or gender shared in common by other minorities.

Perhaps the most damning argument against the minority group status of disabled people is the problem of identifying the non-disabled "majority". As Wertlieb concedes:

> A person's state of health is not a discrete concept; rather it lies on a continuum which has been arbitrarily dichotomized into disability and nondisability. And the 'purer' the nondisability, the less numerous the nondisabled majority. Health and ability do not ensure maintenance of the rank nondisabled; rather this is ensured by the lack of society's label. All nondisabled people have a certain probability of involuntarily becoming disabled during the course of their lifetime.[63]

In the present writer's view, however, the arguments for minority group status based upon disability outweigh those against. Most compelling is the fact that disabled persons share many of the badges of vulnerability worn by other so-called "minorities": in particular, discrimination, unemployment and poverty. Nevertheless, the designation of disabled people as a minority group does not automatically attract legal recognition of their minority rights, much less determine what those "rights" might be. Can it be asserted, for example, that disabled people have a "right to work"?

Right to work

The case for positive laws addressing disability discrimination can be made if it is accepted that disabled people in modern societies have a "right to work". The right to work is not a universally recognised right. As Hepple has demonstrated, it is a right that is "value-laden" and one that might be exercisable against the state or employers or other workers or trade unions.[64] As a right exercisable against the state, the right to work is translated as a mere expectation that governments will maintain commitment to full employment policies, provide employment and training services, and uphold freedom of contract, while providing welfare income alternatives for those who fail to compete successfully for such employment opportunities as market forces care to provide. The common law failed to devise a right to work exercisable against private employers,[65] although the doctrine of restraint of trade can be utilised to construct a "right to work" as against the restrictive practices of organisations of workers. With few exceptions, Hepple concluded that the right to work, in the sense of a right to be engaged or to be given work was an illusion.[66]

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[63] Wertlieb, 1985: 1059-60 and citing Safilios-Rothschild, 1970 in support of her view.

[64] Hepple, 1981: 68-9.

[65] *Allen v Flood* [1898] AC 1 (HL) *per* Lord Davey at 172-3: "An employer may refuse to employ for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived...".

[66] Hepple, 1981: 73-8. The obvious exception, of course, is the statutory disabled

Nevertheless, other writers have contended for a right to work based upon justice in the distribution of employment. Marsh points to the rewards of paid employment - in particular, income and psychological well-being - and argues that employment is a "good" that is subject to the principles of distributive justice.[67] She rejects the position that governments have no role in providing employment, but really takes us no further in determining the parameters of a right to work and the function of law in guaranteeing such a right. In fact Hepple's analysis is more compelling, as he argues for a strengthened framework of anti-discrimination laws, including extension to groups such as disabled persons, and for improved job security or employment protection legislation to safeguard the "right to work" once in employment.[68] However, the most pertinent contribution to the debate, and of especial assistance to the expectations of disabled people, is that of Kavka.[69]

Kavka argues that disabled people have a "moral right" to work and that this requires legal guarantees to uphold the right.[70] He adds, however, that this right to work is "*prima facie*, not absolute"; that is, it may be overridden by competing rights or other factors. Kavka continues that it is nevertheless a strong *prima facie* right to work and it is a right exercisable against government and private employers. He defines the right to work as "the right to participate as an active member in the productive processes of one's society, insofar as such participation is reasonably feasible",[71] and in practical terms is a right to employment and *earned* income, rather than welfare benefits or income substitutes. In Kavka's model, the right to work for disabled people entails four particular rights. First, there is a right to non-discrimination in employment opportunities. Second, a right to compensatory education and training is required to allow disabled persons to overcome their disability and to qualify for employment. Third, disabled people have a right to expect that society will make reasonable investment to make jobs accessible. Fourth, the right to work implies a right to minimal or tie-breaking positive action or preferential treatment.[72] These claims to a right (or rights) to work are based upon arguments of social utility and distributive justice, and reject counter-

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workers' quota, discussed below.

[67] Marsh, 1991.

[68] Hepple, 1981: 82.

[69] Kavka, 1992.

[70] Kavka, 1992: 264.

[71] Kavka, 1992: 264.

[72] Kavka, 1992: 265.

arguments based solely upon economic efficiency.[73] Kavka's and Hepple's separate analyses clearly meet at a common point: a role for anti-discrimination law.

Role of anti-discrimination law

McCrudden *et al*, writing in the context of a study of race relations legislation, and drawing upon earlier sources, identified a number of objectives for anti-discrimination legislation.[74] First, the law can be used as an unequivocal statement of public policy. Employers should be left in no doubt as to the stance which the state and society has adopted towards discriminatory practices. Second, the law supports those employers who do not wish to discriminate, but who nevertheless are forced to do so through socio-economic forces. Third, the law provides protection from discrimination and means of redress for the minority group in question. Fourth, by these means, the law constructs a grievance procedure through which disputes can be resolved and conflict defused. Fifth, and perhaps most ambitiously, the law discourages prejudiced behaviour and thus in turn tackles the root of much discrimination: prejudice itself. Sixth, the law regulates market forces which may have failed to control discrimination even where discrimination is inefficient in economic terms. Seventh, and most controversially, by changing discriminatory policies and practices, the law can attempt to increase equality of opportunity. Eight, and finally, the law establishes standards by which public and private behaviour may be measured, assessed and criticised.

If one adopts the agenda established by this analysis, it raises two fundamental questions for a study of the present kind. First, how is the law to tackle discrimination and to provide the protection and remedies which the anti-discrimination principle implicitly promises? Second, how is the law to promote equality of opportunity and what does equal opportunity mean in that context anyway?

Individual justice or group justice?

Two models of anti-discrimination law have been developed by American legal theorists. The first is the individual justice model which seeks to reduce discrimination by focusing upon the decision-making process rather than the end results of that process.[75] It aims to achieve

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[73] Kavka, 1992: *passim*, employing the theoretical perspective of Rawls, 1971. This is not the place to engage the issue of Rawlsian social justice. However, at least one other writer upon the civil rights of disabled people has employed Rawlsian theory to support the contention that disabled people, as a least advantaged group, are entitled to special treatment in the unequal distribution of material goods, such as employment: Gray, 1992.

[74] McCrudden *et al*, 1991: 3-4. What follows is an adapted version of this account.

[75] Brest, 1976; Abram, 1986.

justice for the individual rather than for an identifiable class or group in society and protects all-comers equally, whether or not they belong generally to the group or class for whose protection the law might be thought to be acting. So, under this model, protection from discrimination would be afforded to men and women, black and white, disabled and able-bodied alike. The weaknesses of this model, it is said, are that it is insufficiently interventionist and fails to recognise that discrimination is institutionalised and reinforced by social and economic disadvantage.[76]

The second model, often suggested as a cure for the defects of the first, is the so-called group justice model.[77] This is less concerned with "process" and more with "results": what is the outcome of discrimination and how can that outcome be changed? It is a model based upon the idea of redistributive justice because it aims to change the position of the disadvantaged group (rather than just for selected individuals) for the better. It recognises the legacy of past discrimination and identifies the oppressed class or group as the intended beneficiary of legal intervention. As a result, it tends not to be even-handed, but acts to advance the economic position of women, ethnic minorities or (for present purposes) disabled persons. This model may be criticised too on grounds of inefficiency, ignorance of the merit principle, problems in defining the group in question, and its disregard for innocent third parties who must pay the price of remedying past wrongs.[78]

Equal opportunity and the merit principle

Equal opportunity or equality of opportunity concentrates upon the notion of merit in a competitive world. The law acts to promote equal opportunity in order to create conditions of perfect competition in which merit is the distinguishing feature or determining factor rather than gender, race or medical status. Equality of opportunity, like the individual justice model, is concerned with formal equality by adjusting or regulating the process or procedure by which goods (in this case, jobs or employment benefits) are distributed. It may be contrasted with equality of outcome which, like the group justice model, is concerned with substantive justice and the results of competition on merit.

The weakness of the equal opportunity idea is that it is based upon merit and the assumption that all who are competing in the labour market do so from the same standing start. As O'Donovan and Szyszczak observe in the context of sex discrimination:

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[76] McCrudden *et al*, 1991: 5-6.

[77] Fiss, 1971.

[78] McCrudden *et al*, 1991: 6-7.

> [In] discussions of anti-discrimination legislation it is often assumed that once barriers to competition are removed women, who have been historically discriminated against, will show their prowess and compete equally. But this conception of equality is limited, for it abstracts persons from their unequal situations and puts them in a competition in which their prior inequality and its effects are ignored.[79]

So, in order to achieve true equality of opportunity, the law has to take account of the effects of past discrimination and present disadvantage, if necessary remedying these conditions and/or redefining merit. This may involve the law in a more interventionist role and the utilisation of legal strategies of preferential treatment, positive action or reverse discrimination to assist minorities to reach the starting line.

Equal treatment and treatment as an equal

Another way of looking at discrimination theory is to ask whether anti-discrimination law ensures equal treatment or treatment as an equal. Dworkin describes the former as "the right to an equal distribution of some opportunity or resource or burden", whereas the latter is "the right...to be treated with the same respect and concern as anyone else".[80] He describes the right to treatment as an equal as "fundamental" and the right to equal treatment as "derivative".

This raises the question of whether the goal of equality law should be the levelling of the playing field so that all groups can compete on merit under similar conditions, or whether it should be the recognition that different groups have different qualities and needs which the law must accommodate. This latter, pluralist perspective may be more appropriate for the development of disability discrimination theory. Whereas Dworkinian equal treatment would ignore the different experiences, backgrounds and physical needs of disabled persons, Dworkinian treatment as an equal would entitle disabled persons to be recognised as different: entitled to be measured and judged on their own terms and in their own environmental conditions. The ability to be measured upon their own terms is crucial, because the traditional Aristotelian idea of justice involves treating people alike in like circumstances, but the standards of measuring like with like are typically those of the majority or dominant group (for example, white, European, able-bodied males). Writers such as MacKinnon, writing from a feminist perspective, argue that existing inequalities must be taken on board when devising anti-discrimination legislation.[81]

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[79] O'Donovan and Szyszczak, 1988: 4.

[80] Dworkin, 1978: 227.

[81] MacKinnon, 1982. The feminist perspective may be particular useful for understanding disability discrimination. There is growing evidence that disabled women suffer a "double handicap" of gender and disability: Vash, 1982; Kutner, 1984; Deegan and Brooks, 1985;

Radical alternatives to the anti-discrimination and equal opportunity models

Becker suggests that the inadequacy of formal equality is its inability to answer the question of who is similarly situated with an objective, value-free answer. For example, formal equality has so far failed to deal adequately with pregnancy-based discrimination because of the difficulties inherent in comparing the circumstances of the pregnant woman with a comparable man.[82] Indeed, it is interesting to note that discrimination legal theory has had to adopt an analysis of pregnancy which approximates or equates it with disability. Becker states that:

> in the absence of appropriate standards, women are not likely to be served well by a formal equality standard applied by predominantly male judges on the basis of their subjective values and perspectives.[83]

If one substitutes "disabled persons" for "women" and "able-bodied" for "male" in this quotation, the limitations of formal equality for disabled people also becomes apparent. Formal equality would also mean that disabled persons who are perceived to be like non-disabled persons will be treated like non-disabled persons. Formal equality cannot be used by disabled workers to challenge the workplace environment and practices which have been designed according to the needs and preferences of the able-bodied majority.

Distributive justice or formal equality requires treating similarly situated people similarly. Discrimination, therefore, involves treating similarly situated persons differently. But discrimination involves more:

> [It] consists of repeatedly turning real or perceived differences into socially constructed disadvantages for [one group] and socially constructed advantages for [another group].[84]

Furthermore, formal equality assumes that it is possible to ignore an individual's sex or race or disabled status. This assumption is flawed for a number of reasons.[85] First, it assumes that such distinguishing features can be put out of mind and that they do not continue to play a subconscious role in employment decision-making. Intuitively, one would expect that assumption to be far-fetched. Second, it assumes that distinguishing features are never

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Hanna and Rogovsky, 1991. This has led a number of writers on disability to adopt a specifically feminist and critical approach: Campling, 1979; Campling, 1981; Morris, 1989; Lonsdale, 1990; Boylan, 1991; Morris, 1991. However, for a recent criticism of feminism's failure to integrate the concerns of disabled women, see: Morris, 1993.

[82] Becker, 1987: 206.

[83] Becker, 1987: 207.

[84] Becker, 1987: 208.

[85] For one view of how the distributive justice or formal equality models have failed disabled persons, see: Bolla, 1983.

relevant, whereas in sex and race discrimination law (and potentially in disability discrimination law) they might be related to an ability to do a job or might be a positive occupational qualification. Third, in the disability rights context, advocates of such rights may wish to argue that disability is a difference which should not be ignored, but should rather be recognised and accommodated. Moreover, formal equality often breaks down in the face of systematic discrimination. Members of minority groups might tend to regard applying for jobs traditionally held by majority group members as a fruitless exercise.[86] There might be a belief that these jobs are only open to them in name only or there might be a genuine preference for other jobs. Positive or affirmative action (for examples, by means of outreach initiatives) is needed to ensure that formal equality is kept alive in such circumstances.

The failures and weaknesses of formal equality, even with the assistance of institutional or indirect discrimination analyses, has led to attempts to fashion other theories of discrimination law. MacKinnon's feminist perspective produces the alternative "inequality approach".[87] At least one writer in the disability sphere has utilised this approach in constructing a framework for challenging disability discrimination.[88] The inequality approach urges upon the law the role of subjecting policies and practices to scrutiny on the basis of whether they contribute to the maintenance of an underclass or position of deprivation based upon private status (for example or specifically, gender). However, this begs the question of identifying which policy or practice has contributed to such maintenance, what change is required to remedy the situation and who is to be the subject of litigation (a defendant) to bring about enforced change? Littleton proposes what she calls the "acceptance standard" as an alternative to formal equality.[89] If there is evidence that a minority group have greater difficulty in meeting a particular occupational qualification or standard that the majority group, the reason for this should be solicited. If the difficulty is natural and inherent, this might justify the apparent discrimination; but if it has been created by the legacy of previous lack of opportunities or because the standard has been artificially defined, then a positive legal remedy should be forthcoming. This would mandate reasonable accommodation or the restructuring of the job according to norms which are more conducive to the background and experience of minority group members.

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[86] Becker, 1987: 211.

[87] MacKinnon, 1979; MacKinnon, 1982; MacKinnon, 1987.

[88] McCluskey, 1988.

[89] Littleton, 1981; Littleton, 1987.

Symmetry or asymmetry of discrimination theory

Lacey points to another difficulty which is inherent in the way in which the ideal of equal treatment and formal equality have been translated into anti-discrimination law.[90] She points out that sex (and race) discrimination law (with the exception of the marital status provisions) is symmetrical. That is to say, although the law is clearly concerned with the problems of discrimination against and the disadvantages of women (and ethnic minorities), it applies to the treatment of both women *and men*. She concludes that:

> as a response to a specific set of social problems, we can see that by conceptualising the problem as *sex [or race] discrimination* rather than *discrimination against women [or ethnic minorities]*, the legislation renders invisible the real social problem and deflects away a social ideal or goal which would identify and address it.[91]

The result is that any form of reverse discrimination or positive action is ruled out as equally unlawful discrimination. As will be seen, this dilemma of symmetry has not been a feature of comparative disability discrimination laws, but Lacey's argument raises the need to be aware of the consequences of symmetrical discrimination legislation.

CONCLUDING REMARKS

As these last sections have shown, the study of disabled workers' rights can glean much from the development of orthodox and radical discrimination theories that have been applied in the context of race and sex discrimination (or, indeed, to age or religious belief discrimination, not considered here). The body of theory helps us to understand discrimination and to plan responses to it, while assisting subsequent assessments of the efficacy of those responses. However, before we examine the contention that disability is analogous with other grounds of unlawful discrimination, we must first return to the concept of disability itself and to the nature and experience of disability.

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[90] Lacey, 1987.

[91] Lacey, 1987: 415-16 (emphasis in the original).

PART A:
DISABILITY, DISABLED PEOPLE AND EMPLOYMENT DISCRIMINATION

CHAPTER II:
DISABILITY AND DISABLED PERSONS

INTRODUCTION

The reform of disability rights has been dogged by difficulties in identifying persons with disabilities and in measuring the disabled population. Disability is an elusive concept. The problem of whether and how to distinguish between short term or long term illness, temporary or permanent conditions, fleeting or chronic sickness, and disabling or non-disabling impairments has been ever present. As a result, governments have been unable to plan adequately for welfare and other services or to make appropriate provision for disabled needs within social security and public expenditure budgets. The lack of hard data has also allowed political procrastination and a denial that there is any sizeable constituency of people whose experience merits legal or administrative intervention. It is essential, therefore, that as a precondition to any reform of disabled employment rights, there should be consensus on the meaning of disability, the dimensions of the disabled population and the quality of life of persons with disabilities.

MEANING OF DISABILITY

In the previous chapter, the terminology of impairment, disability and handicap was reviewed. However, defining disability and its attendant terms brings us no nearer to understanding the meaning of disability. This is amply demonstrated by a survey of disabled persons themselves. When asked what the term "disabled" meant to them, 50 per cent replied that it refers to a general restriction or restriction in personal movement.[1] Thirty per cent thought that "disabled" referred to someone with a named disability and 21 per cent identified disability with someone who is unable to do certain types of jobs. A further 13 per cent visualised an individual who needs help or who is dependent on others or cannot do things for themselves, while 10 per cent mentioned an inability to get about or around. Only 5 per cent thought that the term "disabled" applied to someone unable to work and a further 6 per cent to someone who is unable to perform certain named activities. This research demonstrates, albeit tentatively, the difficulties of defining disability and identifying disabled persons, as well as the pitfalls of relying upon self-definition or self-perception.

Disability is often used to describe the limitations produced by ill health or a medical condition upon an individual's normal social activities and roles.[2] Such limitations are almost invariably

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[1] Research Surveys of Great Britain Ltd (RSGB), 1978: Table 3.1.

[2] Nagi, 1965; Nagi, 1969a; Nagi, 1969b; Nagi, 1991; LaPlante, 1991: 58.

the product of impairments, which in turn involve a loss of mental, anatomical, or physiological structure or function. The causes of such loss of structure or function might be congenital or might originate in disease or injury. The limitation in activity may be absolute, as in a case of full or partial incapacity, or relative, as in a case of reduced ability or difficulty in functioning. Nevertheless, this still does not adequately describe the concept of *disability*. It is necessary to distinguish further between limitations in *actions* and limitations in *activities*. Speaking and walking are primary examples of actions. They would be thought of as essential actions necessary to fulfil the role of a university teacher, for whom the activities of being mobile and able to communicate with students and colleagues are clearly important. Nonetheless, those activities can be accomplished just as well by modifying or substituting the actions required. So, for example, communication can be achieved with a keyboard speech synthesizer, while mobility might be assured by means of a power-operated wheelchair. So impairment need not produce disability and, even if it does, such disability need not be a handicap.

As used in this study, disability signifies a physical or mental condition substantially modifying or limiting daily life functions without necessarily destroying the ability to work or to participate in other activities.[3] For Berkowitz and Hill, a disabled person is someone who "is unable to perform some social role because of a mental or physical condition".[4] Following Nagi and Haber,[5] they define disability as "the loss of the ability to perform socially accepted or prescribed tasks and roles due to a medically definable *condition*".[6] The medical condition may have left the individual with residual impairments: that is, "some physiological, anatomical, or mental loss or abnormality that persists after the condition has stabilized".[7] In turn, the residual impairments may result in "functional limitations", which create inability in lifting, carrying, walking, and so on. Functional limitations may then result in difficulty in performing expected roles and, in that sense, a person may be "disabled". The concepts of mental or physical condition, impairment, and functional limitation are essentially medical and can be determined by medical examination. However, the existence of disability is more elusive, "since the inability to perform an expected or prescribed role may be due to a functional limitation as it interacts with a whole host of other factors in that person's

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[3] Weiss, 1974: 457.

[4] Berkowitz and Hill, 1986b: 1.

[5] Nagi, 1969a; Haber, 1985.

[6] Berkowitz and Hill, 1986b: 4 (emphasis in the original).

[7] Berkowitz and Hill, 1986b: 6.

environment".[8] In that sense, disability is a "socio[-]economic phenomenon".

DEMOGRAPHY OF DISABILITY

Arriving at a widely-accepted delineation of the social meaning of disability does not resolve the problem of how to identify disabled persons and to gauge the magnitude of the disabled population. In fact, it exacerbates this problem, as socially defined subjects or phenomena are notoriously hard to catalogue under survey research conditions and easily elude calculation. The Herculean task of attempting to ascertain the size of the disabled population is inextricably associated with the difficulties of defining, identifying, recognizing and recording disability. For example, a recent statistical compendium of disability surveys indicated that the percentage of disabled persons in 55 countries ranged from 0.2 per cent to 20.9 per cent of the general population.[9] Such findings are undoubtedly the result of figures which rely upon various and differing definitions of disability, disparate age ranges and variable methods of data collection. The purposes for which the information is collected will also inform the lack of comparability.

Survey evidence of disability

It was against that background that the Department of Health and Social Security decided in 1983 to commission the Office of Population Censuses and Surveys (OPCS) to undertake a comprehensive survey of the disabled population in Britain. This decision was prompted by the lack of the kind of accurate information required to formulate policies regarding disabled benefits and services.[10] The new survey extended to disabled people in and beyond private households, included children as well as adults, and encompassed all types of disabilities. Significantly, the research focused upon *disability* rather than *impairment* or *handicap*. Between 1985 and 1988, two surveys were carried out of disabled adults living in private households and disabled adults living in communal establishments. The surveys resulted in the publication of three pertinent reports in 1988 and 1989.[11] In 1989, separate survey research was carried out by Social and Community Planning Research (SCPR) on behalf of the Department of Employment. This set out to estimate the size and distribution of the population of persons registrable under the Disabled Persons (Employment) Act 1944 and was undertaken specifically to inform disabled employment policy and provision. A report of the

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[8] Berkowitz and Hill, 1986b: 6.

[9] UN, 1990b.

[10] Martin, Meltzer and Elliott, 1988: 2.

[11] Martin, Meltzer and Elliott, 1988; Martin and White, 1988; Martin, White and Meltzer, 1989. The OPCS surveys are subjected to critical analysis by Berthoud *et al*, 1993.

research findings was published in June 1990.[12]

The surveys highlight the conceptual and definitional problems inherent in establishing the size of the disabled population and its circumstances and needs. As already noted, the prevalence of disability will be a product of how disability is defined and measured. Martin, Meltzer and Elliott comment that disability is best viewed as a continuum.[13] Survey data will be influenced directly by the researchers' choice of the cut-off point (below which a subject will be excluded from the survey estimates) on the range from very severe disability to very slight disability. In turn, the threshold or cut-off point will be influenced by the aims and objectives of the research itself.[14] In the event, the OPCS research selected a relatively low threshold of disability, being defined as a restriction or lack of ability to perform normal activities, which has resulted from an impairment of a structure or function of the body or mind.[15] The severity of disability was measured by self-assessment on a scale of 1-10 in 10 main areas of disability: locomotion, reaching and stretching, dexterity, seeing, hearing, personal care, continence, communication, behaviour, and intellectual functioning. For example, in the least severe category might be found a person who is deaf in one ear and who has difficulty hearing someone talking in a normal voice in a quiet room, or a person who cannot see well enough to recognise a friend across the road and has difficulty reading ordinary newspaper print. In the most severe category would be located a person with senility or a stroke. The middle of the severity range might be illustrated by someone with phlebitis, mild cerebral palsy, a combination of arthritis, partial stroke and heart condition, or epilepsy.[16] In contrast, the SCPR research focused upon the definition of disabled person in the 1944 Act, which fixes upon the effect of the individual's health status in the labour market. Under the Act a "disabled person" is someone who is substantially handicapped in obtaining or keeping employment or in undertaking work of a kind which (apart from that injury, disease, or deformity) would be suited to his or her age, experience and qualifications.[17]

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[12] Prescott-Clarke, 1990. Further statistical and survey evidence that complements and reinforces these studies has been undertaken by Bruce *et al*, 1991 and focuses upon blind and partially sighted adults.

[13] Martin, Meltzer and Elliott, 1988: 6.

[14] 73 per cent of economically active, occupationally handicapped respondents in the SCPR survey fulfilled the OPCS "disabled" criteria: Prescott-Clarke, 1990: 44.

[15] Martin, Meltzer and Elliott, 1988: xi and 9.

[16] See generally: Martin, Meltzer and Elliott, 1988: 13-15.

[17] DP(E)A 1944 section 1(1). Substantial handicap must be produced by injury, disease,

Prevalence of disability

The OPCS surveys established an estimate of the prevalence of disability by severity and type of disability. As Table I demonstrates, the surveys calculated that there is a disabled adult population in Britain of some 6.2m people, of whom 5.7m are located in private households. Not surprisingly, the research shows that "substantial proportions of the most severely disabled adults are living in communal establishments" and the choice of disability threshold has had a significant impact upon the estimated prevalence of disability.[18] The result of this latter observation is that the survey results in 14.2 per cent of adults in the general population being defined as disabled or 13.5 per cent of adults in private households.[19] In the ordinary course of events, an adult in Great Britain might expect to be economically active between the ages of 16-59 years or 16-64 years. Taking these age spans of economic activity, the OPCS surveys found that 42 per cent of all disabled adults living in private households were aged between 16-64 years, of which 31 per cent were aged 16-59 years, compared with 74 per cent of the general population.[20] Sub-analysis of the OPCS data leads to the conclusion that disabled adults, broadly defined, constitute 5.9 per cent (or 5.8 per cent in private households) of the economically-active general population (aged 16-59, for this purpose).

Further analysis results in the OPCS finding that the numbers of disabled adults increase with increasing age (see Table II), as does the severity of disability.[21] When gender is entered into the equation, OPCS found that women constitute approximately 59 per cent of the disabled population.[22] In the economically-active age group of 16-59 years, disabled women represent 53 per cent of the total or 6.4 per cent of women in this age group (disabled men constitute 5.6 per cent of their gender and age group). The prevalence rate for disability would appear to increase for men in the 60-64 years age band, suggesting that the hitherto traditionally higher retirement age for men may be influential upon the reporting of disability (although, in what way is not exactly clear). We learn that 37 per cent of disabled women are aged 16-64 years (29 per cent aged 16-59 years), while 49 per cent of disabled men are

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or congenital deformity.

[18] Martin, Meltzer and Elliott, 1988: 16.

[19] Martin, Meltzer and Elliott, 1988: 18.

[20] Martin, White and Meltzer, 1989: 1 and Table 2.1.

[21] Martin, Meltzer and Elliott, 1988: 27.

[22] Martin, Meltzer and White, 1988: 21-22. The OPCS surveys did not discover significant differences in the prevalence of disability among different ethnic groups.

Severity category	In private households	In establishments	Total population
	Thousands	*Thousands*	*Thousands*
10	102	108	210
9	285	80	365
8	338	58	396
7	447	39	486
6	511	34	545
5	679	29	708
4	676	27	704
3	732	19	750
2	824	16	840
1	1,186	13	1,198
Total	5,780	422	6,202

Source: Adapted from Martin, Meltzer and Elliott (1988: Table 3.1)

Table I: Estimates of number of disabled adults in Great Britain by severity category

	Age group							
	16-19	20-29	30-39	40-49	50-59	60-69	70+	Total
Severity	*Thousands*							
10	5	13	9	7	11	22	144	210
9	6	13	11	15	31	64	224	365
8	5	18	22	26	40	64	221	396
7	6	20	26	35	49	81	269	486
6	9	31	31	43	61	87	283	545
5	12	31	42	51	95	148	329	708
4	7	37	47	59	96	155	304	704
3	5	28	45	52	110	175	335	750
2	4	28	31	58	112	227	379	840
1	15	45	78	107	187	311	454	1,198
Total	76	264	342	453	793	1,334	2,941	6,202

Source: Adapted from Martin, Meltzer and Elliott (1988: Table 3.3)

Table II: Estimates of number of disabled adults in Great Britain by age and severity

so categorised (33 per cent in the narrower age band).[23] In the earlier years of potential economic activity (between the ages of 16 and 49 years), the majority of disabled adults are women (55 per cent), while in the latter years of a person's potential working life (50 to 64 years), disabled men are in the majority (51 per cent).

The survey undertaken by SCPR found that, among adults of working age, 22 per cent had a health problem or disability (or 7.3 million adults).[24] This split into 14 per cent who suffered no occupational handicap as a result and 8 per cent who did (among which 4.8 per cent were economically active or expected to be so in the next 12 months). With age as a factor in SCPR research, it is also clear that both health problems and occupational handicaps become more prevalent with increasing age, as Table III drawn from the SCPR survey shows. After cross-checking responses, the SCPR researchers estimated that persons who are occupationally handicapped and economically active represent 3.8 per cent of the working age population.[25] The 3.8 per cent figure breaks down into 2.8 per cent in work, 0.2 per cent on a government scheme and 0.8 per cent wanting work. It was estimated that 3.2 per cent of the working population were registrable as disabled under the 1944 Act. As a result, the SCPR research gauges the economically active, occupationally handicapped population of Britain to be 1.3 million (plus 0.1 million who expect to become economically active).[26] When the SCPR statistics are examined by gender, we find that the numbers of men and women reporting health problems are roughly equal. However, slightly more men than women report that they are occupationally handicapped by their health status (a difference of 1 per cent). The same observation is true among those who were both occupationally handicapped and economically active.[27] The SCPR survey found that 94 per cent of economically active, occupationally handicapped respondents were white and 6 per cent were from ethnic minority groups.

Further evidence

The differences in the data produced by the OPCS and SCPR surveys are largely explicable by the different thresholds of disability selected for identifying respondents. Both surveys

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[23] Martin, White and Meltzer, 1989: 1 and Table 2.1.

[24] Prescott-Clarke, 1990: 20.

[25] Prescott-Clarke, 1990: 20. A further 0.3 per cent expected to become economically active within a year.

[26] Prescott-Clarke, 1990: Table 4.1.

[27] Prescott-Clarke, 1990: Table 4.1.

	Age				
	16-24	25-34	35-44	45-54	55-59/64
	%	%	%	%	%
Health problem	13.6	16.1	20.2	26.6	41.5
Health problem and occupational handicap	3.8	4.9	7.5	11.4	20.9
Occupational handicap and:	2.2	2.9	4.4	5.9	7.4
economically active					
expecting to become so in next 12 mths	0.4	0.5	0.7	0.9	0.7
not economically active	1.3	1.5	2.5	4.6	12.8

Source: Adapted from Prescott-Clarke, 1990: Table 4.2

Table III: Occupational handicap in working age population by age

confirm earlier impressions that the numbers of disabled persons have been significantly under-estimated in official statistics and that disabled people represent approximately 10-15 per cent of the population.[28] The OPCS study itself sought to make comparison with the 1985 *General Household Survey* which was based upon limiting long-standing illness or disability. The *General Household Survey* estimated a disability prevalence of 20.8 per cent of the general population, compared with 13.5 per cent in the OPCS research.[29] Amongst the economically active population (aged 16-59), the *General Household Survey* found a disability prevalence rate of 13.9 per cent, compared with the OPCS rate of 5.8 per cent. Undoubtedly, part of the difference in these results can be explained by a lower definitional threshold for disability chosen for the *General Household Survey* study.

Comparative evidence

In Australia, a survey found a disability prevalence rate of 13 per cent among the population of all age groups.[30] Whereas nearly 6 per cent of Australians aged 15-24 years were disabled, this figure rose to 8 per cent in the 25-34 years age group, 11 per cent in the 35-44 years age group, 17 per cent in the 45-54 years age group and 27 per cent in the 55-64 years age group. Research in Canada in 1983-84 found a disabled population of 2.7m in a total population of 24.5m persons: a disability prevalence rate of 10-12 per cent.[31] As to be expected, the absolute size of the disabled population increased with age. Between the ages of 15 and 64 years, nearly 9 per cent of Canadian men and nearly 10 per cent of Canadian women were disabled. The survey shows that, among disabled adults, 5 per cent of disabilities were caused congenitally, 25 per cent by illness or disease, 15 per cent by accident, 16 per cent by aging, 7 per cent by other causes and 32 per cent by unknown causes. Later research estimated that in 1987 approximately 14 per cent of Canadians (15 per cent of adults) experienced limitations about their functions or activities.[32]

In the US, it was estimated that the number of *physically* handicapped individuals in 1972 was 11.7 million.[33] Another report the following year estimated that there were 22 million

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[28] See, for example: Sainsbury, 1970; Harris *et al*, 1971; Buckle, 1971; Sainsbury, 1973; Townsend, 1979.

[29] Martin, Meltzer and Elliott, 1988: 20-21.

[30] Australian Bureau of Statistics, 1984 cited in UN, 1990b.

[31] Statistics Canada, 1984 cited in UN, 1990b.

[32] Study cited in LaPlante, 1991: 62.

[33] *Hearings on HR 8395 Before the Subcommittee on the Handicapped of the Senate*

physically disabled adults, of whom only 800,000 were in employment.[34] The 1978 *Survey of Disability and Work* found that about one half of working age adults experienced one or more functional limitations, and that about one-third of these respondents were limited in their capacity for work.[35] This survey has been interpreted as suggesting that 5.8 per cent of the non-institutionalised population of working age were disabled.[36] On 1980 figures,[37] the prevalence of work disability among the general population of working age was of the order of 9 per cent of males and 8 per cent of females. In contrast, a survey of all age groups suggested two years later that approximately 33 per cent of the population had some form of disability or impairment.[38] Further research estimated that almost half the working-aged population had one or more chronic health conditions or impairments.[39] The 1984 *Survey of Income and Program Participation* recorded a finding of 21 per cent of American adults possessing functional limitations, the most prevalent of which was walking.[40] The 1989 *National Health Interview Survey* postulated that 14 per cent of the US population were limited in major life activities, including work.[41]

Analysis based upon the 1982 *Current Population Survey*, using a liberal definition of disability,[42] shows a work disability prevalence rate of 5.4 per cent for 25-34 year old

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Committee on Labor and Public Welfare, (1972) 92nd Congress, 2nd Session, 265 cited in *Georgetown Law Journal*, 1973: 1501. The article itself estimated the disabled population of the US at 14 million: *idem*, 1512. In the preamble to the (US) ADA 1990, Congress estimated that there were 43 million disabled Americans. However, this figure represents the number of individuals of all ages with impairments or chronic conditions: Burgdorf, 1991: 435.

[34] *Senate Report N° 319*, (1973) 93rd Congress, 1st Session, 8. This same report referred to the range of estimates of *all* disabled Americans as being between 28 million to over 50 million.

[35] Lando, Cutler and Gamber, 1982 cited in LaPlante, 1991: 61.

[36] Haber, 1985.

[37] US Bureau of the Census, 1983a cited in UN, 1990b. Berkowitz and Hill (1986b: 9) suggest that the 1980 census found that 4.4 per cent of the population aged 16-64 were disabled, a conflict of interpretation which pinpoints the difficulties inherent in surveying the disabled population and agreeing the subsequent analysis of the data.

[38] US Department of Health and Human Services, 1982 cited in United Nations, 1990b.

[39] Ferron, 1981 cited in LaPlante, 1991: 61.

[40] US Bureau of Census, 1986 cited in LaPlante, 1991: 61.

[41] LaPlante, 1991: 62.

[42] Including any health problem preventing or limiting work and long term illness.

males, 7.4 per cent for 35-44 year old males and 12.8 per cent for 45 to 54 year old males.[43] The comparable figures for women in these age groups were 4.7 per cent, 6.8 per cent and 11.7 per cent respectively. When the figures are sub-analysed by race, in the respective age groups 5.2 per cent, 7.0 per cent and 12.4 per cent of white males were classified as work-disabled, but for black males the figures were 8.3 per cent, 11.8 per cent and 18.5 per cent respectively. For women, the distinctions based upon race are even more marked, with the prevalence rate for disability among black females being double that for white females in all age groups. There would also appear to be a correlation between the prevalence of disability and years of education, with the rate of disability decreasing as the length of formal education increases. Thus age, sex, race and education all seem to be informants of disability prevalence. This supports the view that disability cannot be explained by reference to an individual's medical condition alone.[44]

NATURE OF DISABILITIES

Examination of the types and frequency of disabilities produces useful results.[45] As Table IV explains, the OPCS surveys used thirteen broad categories of disability in order to determine a scale of disability severity. Locomotor disability emerges as the most common source of disabled person status (9.9 per cent of the general population), followed by hearing disabilities (5.9 per cent), personal care difficulties (5.7 per cent), problems of dexterity (4.0 per cent) and seeing disabilities (3.8 per cent). Another way to scrutinise the prevalence of different disabilities is to measure the frequencies of complaints causing disability among adults living in private households, remembering that more than one disability might be present at one time. The SCPR research found that locomotion disabilities accounted for 40 per cent of complaints experienced by economically-active, occupationally-handicapped persons. This was followed by hearing disability (20 per cent), intellectual functioning (19 per cent), behavioural disabilities (18 per cent), dexterity problems (16 per cent) and vision impairments (14 per cent).[46] In the OPCS research, complaints of the musculo-skeletal

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[43] US Bureau of the Census, 1983b: 9-14 and Table 9; Berkowitz and Hill, 1986b: 9-11 and Table 1.2.

[44] There may be some evidence that the prevalence of reported disability and the apparent withdrawal of disabled persons from the labour market is informed by the availability of income replacement and income support via the social security system or industrial injury compensation. This is beyond the scope of the present study. See, for example: Leonard, 1986; Worrall and Butler, 1986.

[45] Comparable information about the nature of disabilities is available in the US: LaPlante, 1991: 65-68.

[46] Prescott-Clarke, 1990: Table 6.3.

Type of disability	In private households	In establishments	Total population
	Thousands	*Thousands*	*Thousands*
Locomotion	4,005	327	4,332
Hearing	2,365	223	2,558
Personal care	2,129	354	2,483
Dexterity	1,572	165	1,737
Seeing	1,384	284	1,668
Intellectual functioning	1,182	293	1,475
Behaviour	1,172	175	1,347
Reaching and stretching	1,083	147	1,230
Communication	989	213	1,202
Continence	957	185	1,142
Eating, drinking, digesting	210	66	276
Consciousness	188	41	229
Disfigurement	391	-	-

Source: Adapted from Martin, Meltzer and White (1988: Table 3.11)

Table IV: Estimates of number of disabled adults in Great Britain by disability

system were the most commonly reported in 46 per cent of disabled adults,[47] followed by ear complaints in 38 per cent of cases.[48] Eye complaints (22 per cent),[49] mental disabilities (13 per cent),[50] and problems affecting the circulatory system (20 per cent),[51] the respiratory system (13 per cent),[52] and nervous system (13 percent)[53] also figure significantly in reported disabilities. Other complaints reported include infectious and parasitic problems, neoplasms, diabetes, other endocrine and metabolic problems, complaints of the blood and blood-forming organs, stomach illnesses, ulcers, dyspepsia, hernia and hiatus hernia, other gastrointestinal tract complaints, kidney disease, excretory problems, reproductive system disorders, skin disease or disorders, dizziness, vertigo and simple old age.[54] In contrast, for disabled adults living in communal establishments, complaints of mental disability (56 per cent), musculo-skeletal problems (37 per cent) and illnesses of the nervous system (30 per cent) were most frequently cited.[55]

Some 46 per cent of disabled adults are disabled in only one area or grouping of disabilities (physical, mental, seeing, hearing or other), while 31 per cent are affected in at least 2 areas or groupings of disabilities.[56] On average, a disabled adult is likely to experience three different types of disability across two different areas of disability. Of those adults with disabilities in only one area, physical disabilities were far and away the most common, followed by hearing, mental, seeing and then other disabilities. Those who experienced

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[47] Arthritis is the most usual form of this complaint. The complaint also encompasses osteo-arthritis, rheumatism, damaged or delayed healing, rheumatoid arthritis, back problems, knee problems, absence or loss of extremity, and other (non-specific) complaints.

[48] Deafness forms the majority of this complaint category, which includes sensorineural deafness, conductive deafness, noise-induced deafness, tinnitus and other ear complaints

[49] Cataracts and glaucoma being specifically recorded.

[50] Senile dementia, anxiety and phobias, depression, mental retardation, and other mental illnesses.

[51] Coronary artery disease, valve disease, hypertension, other heart problems, other arterial and embolic diseases, varicose veins, phlebitis and other circulatory complaints.

[52] Bronchitis, asthma, allergy, and other problems.

[53] Stroke, hemiplegia, Parkinson's disease, multiple sclerosis, epilepsy, migraine and other (non-specific) complaints.

[54] Martin, Meltzer and White, 1988: 29.

[55] Martin, Meltzer and White, 1988: 34.

[56] Martin, White and Meltzer, 1989: 6.

disabilities in two areas were most likely to report physical and hearing disabilities. The findings of the SCPR research are comparable. The SCPR survey confirms that occupational handicap is frequently the product of more than one disability. About a third of economically active respondents named more than one condition as the cause of their occupational handicap.[57] The most frequently reported conditions related to problems with the musculo-skeletal system (48 per cent) and for 41 per cent of respondents this was their main problem.[58] Arthritis or rheumatism was most commonly reported here. The second largest group of conditions affecting employability (about 16 per cent) were those related to the respiratory system (such as asthma, bronchitis or emphysema), followed by heart and circulatory complaints (13 per cent). Mental disorders were reported in 11 per cent of cases (most notably, psychoneuroses) and nervous diseases in 8 per cent of reports. Mental disorders would also appear to be higher among those wanting to work than those in work, and even higher among those anticipating wanting to work.

EXPERIENCE OF DISABILITY

What effect does disability have upon the lives and experiences of disabled individuals? The effect of disability upon the working lives of persons with disabilities will be considered in the next chapter. For present purposes, three alternative indicators of the quality of disabled lives will be portrayed: marital status, mobility and transportation needs, and use of aids or equipment. Each of these factors can be expected to have some second order effects upon work and employment status because they will define an individual's financial, economic and physical dependence or independence and thus shape their need to work. Here the OPCS surveys are more informative than the SCPR research.

Marital status

Analysis of the marital and living status of disabled adults shows that 53 per cent of disabled adults are married or cohabiting (70 per cent of disabled men and 41 percent of disabled women) compared with 64 per cent (67 per cent of men and 61 per cent of women) for the general population.[59] Of all disabled adults aged under 50 years, 60 per cent were married or cohabiting and 13 per cent were living alone.[60] Between the ages of 50 and 64 years, these percentages are 73 per cent and 18 per cent respectively. Disabled women are more

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[57] Prescott-Clarke, 1990: 38.

[58] Prescott-Clarke, 1990: Table 6.1.

[59] Martin and White, 1988: Table 2.2.

[60] Martin, White and Meltzer, 1989: Table 2.3.

likely than disabled men to be married or cohabiting under the age of 50 years (61 per cent as opposed to 58 per cent), but the tendency is reversed between the ages of 50-64 years (65 per cent of disabled women compared with 80 per cent of disabled men). In both age groups, disabled women are more likely to be living alone (15 and 23 per cent of disabled women respectively, compared with 10 and 14 per cent of disabled men). Only 10 per cent of disabled adults had dependent children compared with 35 per cent of adults in the general population.[61]

Mobility status and transportation needs

What effect does disability have upon disabled persons' mobility status and transportation needs?[62] The OPCS surveys show that 78 per cent of disabled adults are mobile[63] without assistance and 92 per cent with assistance if necessary.[64] With or without assistance, 74 per cent of all disabled adults were mobile every day or several times a week,[65] but even amongst mobile disabled adults, only 37 per cent experienced no restrictions on their mobility in terms of frequency or distance.[66] Of the rest, 13 per cent report transport problems as the explanation, 8 per cent did not have help always available, 6 per cent could not afford to be mobile and 4 per cent suffered access problems. Not surprisingly, mobility is linked in inverse proportion to the severity of disability, and increasing age is also a factor in decreasing mobility.

In respect of transport use by disabled people, the OPCS surveys were able to draw comparisons with data for the general population provided by the 1985/86 *National Travel Survey*. Whereas 86 per cent of adults generally use a private car, only 76 per cent of disabled adults do. Buses, trains and taxis are popular forms of transport for the general population (60 per cent, 40 per cent and 43 per cent respectively) but, with the exception of buses (used by 57 per cent of disabled adults), trains and taxis do not appear to be as

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[61] Martin and White, 1988: 7.

[62] These factors may affect, and be closely linked to, the economic activity of disabled persons.

[63] Mobility here denotes a status other than being bedfast, chairfast or being restricted to or within a dwelling.

[64] Martin, White and Meltzer, 1989: 21.

[65] Martin, White and Meltzer, 1989: Table 3.3.

[66] Martin, White and Meltzer, 1989: Table 3.4.

accessible to disabled people (40 and 43 per cent respectively).[67] Again, there is a correlation between increasing severity of disability and decreasing utilisation of transport. However, this picture is slightly skewed by the inclusion of disabled and non-mobile adults in the statistics. Among mobile disabled persons, public transport was most likely to be used by those not needing assistance, while those needing assistance were more likely to use private cars. Usage of buses and private cars amongst mobile disabled adults of both sets was more in line with usage by the general population, although trains and taxis continued to be less accessible.[68]

These findings are broadly supported by the SCPR research, which recognised that mobility to and from the workplace is obviously an important influence upon employability. About half the number of economically-active, occupationally-handicapped individuals surveyed by SCPR had access to a motor vehicle for personal use and which they drove themselves.[69] However, 32 per cent reported that they were restricted in the type of transport they could use to get to work because of their disability or health, or that their condition placed limitations upon how they travel to and from work.[70]

Use of aids, equipment and adaptations

As Table V demonstrates, overall 69 per cent of disabled adults used some sort of equipment to assist or relieve their disability and the likelihood of equipment use increased with severity of disability. Walking aids, special furniture and other personal care aids are the most commonly cited examples of disability equipment employed by disabled adults. Undoubtedly, this "reflects the fact that over two thirds of the sample had a locomotor disability".[71] Among disabled adults in the economically active age groups of 16-49 and 50-64 years, 45 per cent and 63 per cent respectively were likely to use disability equipment,[72] and there was no significant differences in usage between the sexes.

Information about the proportion of disabled people who required adaptations to their home in order to accommodate their disability is of interest as a possible pointer to concomitant

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[67] Martin, White and Meltzer, 1989: Table 3.10 and 24-27.

[68] Martin, White and Meltzer, 1989: Table 3.12.

[69] Prescott-Clarke, 1990: Table 7.10.

[70] Prescott-Clarke, 1990: Tables 7.11 and 7.12.

[71] Martin, White and Meltzer, 1989: 47.

[72] Martin, White and Meltzer, 1989: Table 5.2.

Types of disability equipment	Severity category					All disabled adults
	1-2	3-4	5-6	7-8	9-10	
	Proportion of disabled adults who used at least one item of disability equipment in each category					
Wheelchairs	0	2	7	17	44	7
Walking aids	19	30	43	56	57	34
Surgical aids & appliances	14	17	20	25	20	18
Vision aids excl glasses	8	11	14	16	22	12
Hearing aids	16	15	14	16	17	15
Incontinence aids	2	2	6	11	34	6
Special furniture & other personal care aids	27	32	45	58	70	39
Small aids & gadgets	6	11	18	28	30	14
Any equipment used excl glasses	**58**	**64**	**76**	**84**	**91**	**69**

Source: Adapted from Martin, White and Meltzer, 1989: Table 5.1

Table V: Proportion of disabled adults using disability equipment by severity of disability

Adaptations to home	Disabled adults with a locomotor disability	Disabled adults with a personal care disability	All disabled adults
	Proportion who had each adaptation		
Ramp outside instead of steps	3	5	2
Hand rail outside	7	8	6
Ramp inside instead of steps	1	1	0
Hand rail inside	17	22	13
Door altered for better access	2	2	1
Stair lift	1	1	1
Other alterations for better access	1	1	1
Fitted furniture altered	1	2	1
New bathroom or toilet added	2	3	2
Shower installed	8	10	7
Door answering or opening system	1	1	1
Sockets higher or switches lower	0	0	0
Any other adaptations	3	4	2
Any adaptations to the home	**31**	**38**	**24**

Source: Adapted from Martin, White and Meltzer, 1989: Table 5.25

Table VI: Proportion of disabled adults who had adaptations to their homes

adaptations to the workplace which might be required to accommodate their employment aspirations, although not all domestic adaptations will be easily transferable or appropriate in the workplace. Martin, White and Meltzer found that 24 per cent of all disabled adults had some domestic adaptation, and that this broad figure encompassed 31 per cent of those with a locomotor disability and 38 per cent of those with personal care disabilities.[73] These findings are reproduced in Table VI. Not surprisingly, as the severity of disability increases, so too does the proportion of disabled persons requiring adaptive measures.

CONCLUDING REMARKS

The survey research demonstrates that disabled people or persons with health problems constitute a sizeable minority group in British society. It is estimated that approximately 6-7 million disabled adults are resident in Britain and constitute about 14-22 per cent of the general population. Between 4 and 6 per cent of the economically active population or adults of working age are classifiable as disabled. Furthermore, both the prevalence and degree of disabilities increase with age, while women represent a marginally larger proportion of the disabled population than men, at least during the main years of working capacity. The general direction of these findings appears to be in line with comparative studies elsewhere. Research also furnishes better information about the species and range of disabilities, and of their impact upon major life activities. Such evidence and information are necessary but not sufficient conditions for legislation designed to protect the civil rights of disabled persons. The next step is to uncover what effect disability has upon the working lives of disabled individuals and, where that effect is a negative one, to attempt some explanation of the social or other forces that shape disabled lives. In the following chapter, the position of disabled workers in the labour market is examined and the contention that disability discrimination is a factor in accounting for that position will be scrutinised.

[73] Martin, White and Meltzer, 1989: 59 and Table 5.25.

CHAPTER III:
DISABILITY, DISCRIMINATION AND THE LABOUR MARKET

> [The disabled individual] does not even possess the sense of being actively hated or feared by society, for society is merely made somewhat uncomfortable by his presence... The cripple simply embarrasses. Society can see little reason for recognizing his existence at all.[1]

A major hypothesis of the present study is that persons with disabilities face social and economic discrimination in the labour market. While the difficulties inherent in identifying disabled persons and measuring the disabled population have hindered the development of comprehensive disability policies in Britain, proponents of the need to take action against disability discrimination have met other hurdles. Government has simply refused to recognise that the economic status of disabled workers can be explained by discrimination, but prefer to highlight the often erroneous perception that disabled persons are handicapped by their medical condition rather than by social attitudes. This chapter examines the position of disabled persons in the labour market and presents the evidence to support the hypothesis that the second class status of disabled workers is attributable to prejudice and discrimination.

DISABILITY AND ECONOMIC ACTIVITY

In the general population, an adult would expect to be economically active between the ages of 16 and 60 or 65 years old. By economic activity we mean that the individual is engaged in self-employed activity or earns an income through employment as an employee or is seeking to enter work either in the present or the near future. We might also include among the economically active those who might be termed "discouraged workers": that is, those who are not seeking work and have withdrawn *involuntarily* from the labour market, because they perceive that there is no work available for them or believe that, based upon personal past experiences, the market is not open to competition by them, for whatever reason. Evidence presented in the previous chapter suggests that 13-14 per cent of the general population can be classified as disabled (or, on a less conservative estimate, 22 per cent of adults of working age) and that as much as 31-42 per cent of disabled adults are of working age. Disabled persons represent approximately 4-6 per cent of the economically active adult population.

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[1] Kriegel, 1969: 414.

Disability and unemployment status

The OPCS surveys compared the working status of disabled adults with that for the general population, as Table VII shows. Overall, only a minority of disabled adults, regardless of sex, age or marital status, are working and this compares unfavourably with the working status of adults in the general population. This disparity also widens with age and with the increasing severity of disability.[2] Martin and White examined factors associated with whether or not disabled adults were in paid jobs,[3] but Martin, White and Meltzer took a broader look at the employment status of disabled people.[4] For this purpose, the OPCS surveys defined economic activity by reference to a "working age" of under 65 for men and under 60 for women.[5] From Table VIII it can be seen that 33 per cent of men and 29 per cent of women were in paid employment, while 12 per cent of men and 7 per cent of women were unemployed.[6] These figures superficially suggest that 31 per cent of disabled adults are in employment and between 10-15 per cent of disabled adults are unemployed.[7]

However, these figures are based upon the conventional view of unemployment: being available for work and actively seeking work. Extrapolation from Table VIII reveals that the true unemployment rates for economically active disabled men and women should be 27 per cent and 20 per cent respectively.[8] Although 34 per cent of all disabled adults are recorded as permanently unable to work, this does not take account of part-time or sheltered

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[2] Martin and White, 1988: 13-14.

[3] Martin and White, 1988.

[4] Martin, White and Meltzer, 1989.

[5] The presumptuousness of this will be noted. If a unisex working age if defined as being 16-65 years, then it is possible to calculate that there are 2.6m disabled adults of working age, of whom 2.4m are in private households and 0.2m in communal establishments (by combining the information in Martin, Meltzer and Elliott, 1988: Table 3.6; Martin, White and Meltzer, 1989: Table 2.1).

[6] These figures would be 17 per cent and 11 per cent respectively if those available for work but not looking for employment were to be classified as unemployed.

[7] The 1989 *Labour Force Survey* suggests that 20.5 per cent of disabled adults were unemployed, compared with 5.4 per cent of the general population (evidence cited in HCEC, 1990a: para 7). The Winter 1992-93 *Labour Force Survey* records that 38 per cent of working age people with a health problem or disability limiting employment were in employment: *Employment Gazette* Vol 101 N° 8 at 434 (September 1993). Research carried out in 1982-83 estimated that 21 per cent of the unemployed in the general population were disabled (5 per cent who had registered as disabled and 16 per cent unregistered): Parker, 1983.

[8] Martin, White and Meltzer, 1989: 74. See also Moreton, 1992: 75.

Age group	Married			Unmarried			All under pension age		
	Men	Women	All	Men	Women	All	Men	Women	All
	Proportion of disabled adults (compared with general population) under pension age who are working*								
Under 30	48 (83)	27 (46)	34 (61)	36 (74)	27 (69)	32 (72)	39 (77)	27 (59)	33 (68)
30-39	53 (88)	40 (59)	45 (73)	28 (77)	28 (65)	28 (72)	45 (86)	36 (60)	40 (73)
40-49	46 (91)	39 (73)	43 (82)	26 (69)	29 (77)	28 (73)	41 (86)	36 (74)	38 (80)
50-59	36 (78)	24 (54)	30 (67)	21 (65)	18 (16)	19 (35)	33 (76)	22 (45)	27 (60)
60+	21 (49)	- (-)	21 (49)	14 (34)	- (-)	14 (34)	19 (46)	- (-)	19 (46)
Total	**36 (82)**	**31 (58)**	**34 (70)**	**27 (72)**	**25 (62)**	**26 (67)**	**33 (78)**	**29 (60)**	**31 (69)**

* *Taken from the Family Expenditure Survey 1985*

Source: Adapted from Martin and White (1988: Table 2.15)

Table VII: Working status of adults under pension age by age, sex and marital status: disabled adults and general population

Economic activity	Men	Women	All disabled adults under State pension age
	%	%	%
Working	33	29	31
Looking for work	8	4	7
Intending to look, but temporarily sick	4	3	3
Available, but not looking for work	5	4	5
Full-time education	1	1	1
Adult training centre	2	1	2
Permanently unable to work	37	31	34
Retired	8	2	5
Keeping house	0	24	11
Other	2	1	1
Total	100	100	100

Source: Martin, White and Meltzer, 1989: Table 7.1

Table VIII: Economic activity of disabled men and women under State pension age

employment opportunities. Support for this analysis can be gleaned from the SCPR research. It found that 78 per cent of occupationally handicapped persons who were economically active were in work (66 per cent employees and 12 per cent self-employed), while 22 per cent wanted to work (15 per cent actively looking for work and 7 per cent otherwise).[9] By way of comparison, the 1987 *General Household Survey* showed that 77 per cent of people in the general population were in work (63 per cent employees and 14 per cent self-employed) and 15 per cent wanted work (12 per cent were actively seeking work).[10]

Martin, White and Meltzer suggest that economic activity varies with severity of disability and with age.[11] It is also apparent that the economic activity of disabled persons, as for the general population, varies according to their socio-economic or occupational categorisation and their educational or training qualifications.[12] The SCPR survey discovered that 46 per cent of the economically active, occupationally handicapped population had no formal educational qualifications, as compared with about 27 per cent of the general population.[13] Manual occupational status and low levels of qualifications tended to be associated with an increased incidence of disabled unemployment. Cross-tabulation of the OPCS survey results further demonstrated that the significant variables determining employment status of disabled persons were in rank order: severity of disability, age, occupational status, qualifications and gender. These rank-ordered factors also appear to explain the likelihood of disabled persons defining themselves as being permanently unable to work.[14]

The OPCS surveys found that 69 per cent of all disabled adults under State pension age were not working for whatever reason. Looking at this group of disabled adults, it was discovered that 73 per cent were not available for work and 27 per cent were available.[15] Within the 73 per cent unavailable for work, 7 per cent were retired, 1 per cent in full-time education and 2 per cent at adult training centres. This leaves 63 per cent of non-working disabled adults unavailable for work, of which 46 per cent reported that it was impossible to do any

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[9] Prescott-Clarke, 1990: Table 5.1.

[10] *General Household Survey 1987* (1989: London: HMSO) cited in Prescott-Clarke, 1990: 31-2.

[11] Martin, White and Meltzer, 1989: 69-71.

[12] Martin, White and Meltzer, 1989: Tables 7.5 and 7.6.

[13] Prescott-Clarke, 1990: 36 and Table 5.8.

[14] Martin, White and Meltzer, 1989: 72-73.

[15] Martin, White and Meltzer, 1989: Table 7.10.

paid work, 13 per cent did not want or need to work and 3 per cent were ill and unsure about the future. Within the 27 per cent available for work, 17 per cent had not found a suitable job, 5 per cent could do only sheltered work, 4 per cent could do only part-time work and 1 per cent were not working for some other reason.

Of those disabled adults available for work, 49 per cent were currently looking for work, but 12 per cent had stopped looking and 20 per cent had not looked at all because in their view there were no suitable jobs for someone with their disability. Ten per cent cited the general employment situation as the cause of their not looking for work and 9 per cent gave other reasons.[16] Among non-working disabled adults available for work, 78 per cent of men and 70 per cent of women thought that their disability had had some effect on the difficulty of them finding work. They were more likely to take that view if they had not looked for work or had stopped looking for work. If they were still looking for work, they were less likely to take that view. In rank order of effect, disability was cited as affecting the type of work, working conditions, amount of work, journey to work, hours of work and attendance at work.[17]

Disability and employment status

As previously noted, 31 per cent of disabled adults under pensionable age were in paid employment. Martin, White and Meltzer observe that 14 per cent of disabled men and 10 per cent of disabled women in paid work were self employed, and while 94 per cent of the men were in full-time work, 53 per cent of the women were in part-time work.[18] Table IX sets out the socio-economic status of disabled persons in employment and compares them with the general population of workers. There is a close degree of congruence between the findings for the disabled working population and for the general population, although it is noticeable that disabled workers are more likely to be in manual occupations. Among persons with a health problem with an occupational handicap, but who were in work, the SCPR survey found that 12 per cent were in professional or managerial occupations (compared with 21 per cent of the general population), 30 per cent were in other non-manual occupations (*cf* 33 per cent), 26 per cent were classified as skilled manual (*cf* 25 per cent), 25 per cent were semi-skilled workers or providing personal service (*cf* 16 per cent) and 6 per cent were

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[16] Martin, White and Meltzer, 1989: Table 7.14.

[17] Martin, White and Meltzer, 1989: 80.

[18] Martin, White and Meltzer, 1989: 80. This compares with 43 per cent of women in the general population: *General Household Survey* 1985.

Socio-economic group	Men		Women				All women workers	
			Full-time		Part-time			
	%		%		%		%	
Professional	3	(8)	1	(2)	1	(1)	1	(1)
Employer or managerial	15	(20)	11	(12)	2	(3)	6	(8)
Intermediate non-manual	9	(10)	16	(25)	15	(13)	16	(20)
Junior non-manual	10	(8)	32	(34)	26	(34)	28	(34)
Skilled manual and own account non-professional	37	(37)	13	(9)	10	(7)	12	(8)
Semi-skilled manual & personal service	19	(14)	24	(18)	27	(30)	26	(23)
Unskilled	7	(4)	2	(1)	19	(11)	11	(6)
Total	100		100		100		100	

Figures in brackets are for the general population and are taken from the 1985 General Household Survey

Source: Adapted from Martin, White and Meltzer, 1989: Table 7.20

Table IX: Socio-economic status of disabled adult workers under pension age compared with general population of workers

unskilled manual workers (*cf* 5 per cent).[19]

Sub-analysis of the OPCS data unfortunately does not prove or show any meaningful relationship between socio-economic status and severity of disability. Martin, White and Meltzer hypothesised that there might be a correlation between manual occupations and increasingly severe disability status, either because manual occupational groups tend to be associated with a greater incidence of ill health and disability or because a combination of disability and unemployment might force disabled workers further down the occupational hierarchy.[20] On the other hand, they postulate that the more severe the disability, the less likely the disabled worker will be able to fill a physically demanding manual position and the more likely he or she would seek light office duties. Nevertheless, Martin, White and Meltzer go on to show that the majority of disabled workers themselves (68 per cent) thought that their disability had some effect upon their occupational status, in particular as regards the type of work they could do, followed by the amount of work they could do, the conditions in which they could work, their hours of work and their attendance at work. In general, for both disabled men and women, the likelihood of their disability having some effect upon their employment increased with the severity of disability. The exception to this trend was in respect of disabled women in the highest categories of disability severity.[21] The researchers attempt the following explanation:

> It may be that, since women earn less than men on average and are often not the main wage earner in a family, more severely disabled women have less incentive to continue working than men with the same level of disability and those who do work are less handicapped by their disability.[22]

An alternative possible explanation, both for this group of disabled women and for the one third of disabled workers who report that their disability had no effect upon their employment, is that their job may be particularly suitable for them, or their employers have accommodated their disability.

Because the SCPR research was primarily concerned with the effects of disability upon employment, it goes a long way towards informing our understanding of the way in which

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[19] Prescott-Clarke, 1990: Tables 5.4 to 5.5. Prescott-Clarke analyzes this data and finds that there is a heavy concentration of occupationally handicapped women in clerical work and the service sector (1990: 35).

[20] Martin, White and Meltzer, 1989: 82.

[21] Martin, White and Meltzer, 1989: Table 7.23.

[22] Martin, White and Meltzer, 1989: 82.

health status or disability contributes to occupational handicap.[23] Table X shows the ways in which health or disability affect the chance of getting work or the type of work which can be done. Clearly, physical limitations in undertaking manual work are most frequently recorded, and nearly ten per cent of economically active, occupationally handicapped people report facing prejudice and ignorance among employers concerning disability. Among occupationally handicapped persons in work, 22 per cent admitted an incapacity to work a 5 day, 35-40 hour week; 12 per cent could not work a 5 day week of any duration, while 20 per cent could not work a 7-8 hour day.[24] These percentages increase noticeably for those not in work but wanting to work or expecting to want work in the next year.

According to the *General Household Survey*, persons of working age in the general population experience an average of 21 days per year restriction of normal activities through illness or disability. In contrast, the SCPR survey found that about half the number of economically active, occupationally handicapped respondents took less than 5 days off per year for sickness or treatment, although 10 per cent took 30 days or more.[25] Some 28 per cent of respondents reported having to take regular breaks or rests during the working day because of their health or disability (9 per cent reported such breaks as necessary several times a day, 10 per cent about once or twice a day, and the remainder at longer or more infrequent intervals).[26] About 3 in every 10 respondents recorded that they were unable to do some of the tasks that were normally part of their job and about the same number required some assistance in carrying out their job duties.[27] The need for special equipment or aids to do the job was mentioned by 8 per cent of respondents and a similar number indicated that they

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[23] Research carried out in 1978 found that 52 per cent of individuals with disabilities who were unemployed had experienced problems in seeking work. Of these respondents, 48 per cent reported that there was a restricted field of jobs they could do, 34 per cent thought that employers did not offer jobs to known disabled persons and 14 per cent were of the opinion that employers think you cannot do the job if you are disabled. Among those in employment, 48 per cent had experienced problems at work. Just over half of these respondents (54 per cent) reported being unable to cope with certain types of activity in the job due to disability, 15 per cent had to half time off work and 11 per cent could cope with their job but suffered after-work effects. Six per cent believed that their working conditions were unsuitable and 2 per cent had been dismissed because of disability. See: RSGB Ltd, 1978.

[24] Prescott-Clarke, 1990: Table 7.2.

[25] Prescott-Clarke, 1990: Table 7.4.

[26] Prescott-Clarke, 1990: Table 7.5.

[27] Prescott-Clarke, 1990: Table 7.6.

	All in work	Employee	Self-employed	Want work now	Anticipate wanting work
	%	%	%	%	%
Physical limitations					
Manual work, lifting, carrying	33	33	36	33	25
Standing/sitting for long periods	11	11	13	15	17
Stiffness, restricted limb movements, arthritic complaints	20	19	25	27	19
Lack of stamina, fatigue, need to rest	8	8	8	4	11
Respiratory problems	10	9	13	11	7
Difficulty walking	6	5	8	10	11
Other physical	11	12	8	10	11
Intellectual/Psychological/ Emotional					
Anxiety, depression, nervousness	4	4	5	6	15
Prejudice/Ignorance					
Of employer about health problems	9	9	10	9	7

Source: Adapted from Prescott-Clarke, 1990: Table 7.1

Table X: Affect of health problems on work

had special needs in gaining access to the workplace.[28] Health status or disability also was a factor affecting the quality of the work respondents felt able to obtain. Some 45 per cent thought that they could get a more skilled job but for their condition; 27 per cent thought that their chances of promotion were affected by disability.[29] Supporting the view that disability discrimination affects pay, 28 per cent believed that they were earning less than co-workers doing the same job.[30]

Whatever their current occupational position, do disabled workers feel that their disabilities might be a disadvantage in moving jobs? 72 per cent of men and 62 per cent of women thought that their disabilities would make it more difficult for them to change their employment in the future, especially as regards the type of work they could do and the conditions they could work in.[31] Once again, the severity of disability tends to influence the pessimism of response to this enquiry. Table XI shows that 55 per cent of disabled working adults opined that both their current job and their future employment prospects were adversely affected by disability, whereas only 19 per cent thought that neither would be affected. Both severity of disability and occupational status influence this view. The less severe the disability and the higher the occupational status, the less likely would be the opinion that disability has an adverse effect upon present and future employment prospects.

Missing link: employment, disability and unemployment

The work histories of disabled persons may cast light upon their experience of discrimination or disadvantage. The SCPR survey found that 70 per cent of economically active but occupationally handicapped persons were in work when they first experienced the onset of ill health or disability (57 per cent remained in work now); 30 per cent were not in work at the onset of ill health or disability (25 per were in work now or had been in work since the onset, 3 per cent had worked prior to the onset but not since, and the remainder had never worked).[32] Prescott-Clarke found that:

> The 70% of respondents who were working at the time they first started to experience problems at work were almost equally divided between those whose problem occurred suddenly as a result of an illness (such as a heart attack), an accident or something similar (45%) and those for whom it had gradually become a

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[28] Prescott-Clarke, 1990: Table 7.7.

[29] Prescott-Clarke, 1990: Table 7.8.

[30] Prescott-Clarke, 1990: Table 7.8.

[31] Martin, White and Meltzer, 1989: Tables 7.24 and 7.25.

[32] Prescott-Clarke, 1990: Table 10.1.

Effect of disability on current job and prospect of finding another job	Men	Women	All disabled workers under pension age
	%	%	%
No effect on current job or finding another	17	21	19
No effect on current job, but would affect finding another	15	11	13
Affects current job, but not finding another	11	16	13
Affects both current job and finding another	57	52	55
Total	100	100	100

Source: Adapted from Martin, White and Meltzer, 1989: Table 7.26

Table XI: Summary of effect of disability on current job and prospect of finding another for disabled workers under pension age

problem (55%).[33]

The average length of work experience before the onset was 15 years, and the average number of years worked in the job held at the time of onset was 8 years.[34]

In smaller organizations, it was much more likely that the onset of illness or disability would not be made known to the employer. This is obviously an important factor in whether or not the newly-disabled worker retains his or her job after the onset of disability. Approximately one-third of employees were still working for their original employer, either in an identical job (14 per cent), in the same job with accommodation (7 per cent) or in a different (or changed) job (10 per cent); the remaining 3 per cent had been off work continuously since the onset of the problem.[35] About 28 per cent had left the employer's employment for a non-health related reason and 37 per cent for a health related reason. Of this latter group, 9 per cent had been dismissed, 2 per cent pressurised into resigning, 10 per cent advised by their doctor to leave, 13 per cent decided on their own to leave, 1 per cent took early retirement by mutual agreement and 2 per cent left for other reasons. The SCPR research shows that the chances of a newly-disabled employee being retained by the employer at onset of disability are in direct proportion to their length of service. Whereas only 15 per cent with under a year's service and 20 per cent with less than 2 years' service were retained, nearly half those with 10 or more year's service were retained. The chances of being *dismissed* were also greater with less service.[36] The size of organisation was also a factor in the record of being retained, with larger enterprises being more likely to try to keep the worker in employment.[37] Managerial or professional employees had a greater chance of being retained, while skilled or unskilled manual employees were least likely to be retained.[38] For those who were not retained, 23 per cent had not worked again and the remainder had taken an appreciable time to find fresh employment.[39]

Prescott-Clarke notes that age and educational qualifications both play a part in obtaining

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[33] Prescott-Clarke, 1990: 97.

[34] Prescott-Clarke, 1990: 92.

[35] Prescott-Clarke, 1990: Table 10.8.

[36] Prescott-Clarke, 1990: Table 10.9.

[37] Prescott-Clarke, 1990: Table 10.10.

[38] Prescott-Clarke, 1990: Table 10.11.

[39] Prescott-Clarke, 1990: 104.

work after the onset of disability. The older and less qualified the person, the more difficulty gaining post-disability employment becomes.[40] The first job after onset of disability or after leaving the job in which the onset of disability occurred will be difficult to find. Nevertheless, in 61 per cent of cases, the newly-disabled worker applied for only 2 or fewer jobs before re-employment. Only 9 per cent of cases required 20 or more applications before finding new work.[41] About a third of respondents got a new job in less than a month and over half had gained fresh positions in under two months.[42] Given disabled persons natural suspicion that their disability will inform their employment opportunities, the SCPR research asked economically active, occupationally handicapped respondents whether they would declare their disability or health problem on an application form and whether they would disclose it at interview. About 6 in 10 respondents would declare their disability in an application form and, of the remaining 4 in 10, 3 might not disclose their status at interview.[43]

Among occupationally handicapped respondents in work, 85 per cent were employees and the remainder were self-employed.[44] This is in line with the 1986 *Labour Force Survey* statistics of 88 per cent and 12 per cent respectively. About three-quarters were in full-time employment (over 30 hours per week), again in line with the general population. The largest socio-economic group to which disabled respondents in work belonged was "other white collar". The SCPR survey shows that 30 per cent of respondents were so classified, compared with 33 per cent of the general population under the 1987 *General Household Survey*. Skilled manual workers comprised 26 per cent of the total, which is line with general statistical expectations. Most noticeable, however, is the disproportionate representation of disabled workers in semi-skilled occupations and their under-representation in managerial or professional jobs. The 1987 *General Household Survey* predicts that 16 per cent and 21 per cent respectively would be represented in these socio-economic groups; in fact, 25 per cent of the disabled respondents were employed in semi-skilled positions and only 12 per cent in managerial or professional occupations.[45] Occupationally handicapped employees in work are likely to be found in workplaces with under 20 workers (39 per cent) or less than 100 workers (66 per cent). However, the total size of the organization (rather than the individual

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[40] Prescott-Clarke, 1990: 105-7.

[41] Extrapolation from Prescott-Clarke, 1990: Table 10.16.

[42] Prescott-Clarke, 1990: Table 10.17.

[43] Prescott-Clarke, 1990: 112-3.

[44] Prescott-Clarke, 1990: Table 10.22.

[45] Prescott-Clarke, 1990: Table 10.22.

workplace or site) is also a factor. Some 40 per cent of disabled workers in employment in the SCPR survey are to be found working in enterprises with a workforce of 1,000 or more employees, although 35 per cent were to be located in organizations of less than 20 staff.[46] The respondents indicated that their employer knew of their condition in 78 per cent of cases.

Disability and earned income

Martin and White speculate that there are three main ways in which disability may have financial consequences for disabled people and their families:

> First, disabled individuals may have lower incomes either because they are not able to earn as much as non-disabled people, or because they are unable to work and are therefore more likely to be dependent upon state benefits. A second consequence is that disabled people may incur extra expenditure as a result of disability resulting in less money being available to meet other needs. A third consequence may be that if help is needed from other members of the family this may affect the ability of those members to undertake paid work and thus to contribute to the family's income.[47]

Only a minority of disabled adults are in employment and receive earned income but, as Table XII shows, with the exception of the gross weekly earnings of female non-manual disabled employees and the average hourly pay of female manual and non-manual employees, there are significant differences between the earnings of disabled and non-disabled employees. By comparing hourly rates of pay, it is clear that even when patterns of working time are accounted for, disabled workers are disadvantaged.

The SCPR survey also uncovered some interesting findings on the income of occupationally handicapped persons and these are reproduced in Table XIII. Based upon full-time and part-time work, 60 per cent had gross weekly incomes of £100 or more, while 65 per cent would exceed this figure if earnings from partner's jobs and income from other sources were to be included. Prescott-Clarke compared these findings with the 1989 *New Earnings Survey*.[48] She found that whereas the median income group in the SCPR survey was £150-199 per week, the *New Earnings Survey* of the general population produced a median income group of £200-249.[49]

The differences in earnings cannot be simply explained away by the fact that disabled adults might work fewer hours than non-disabled workers. Martin and White attempt an explanation

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[46] Prescott-Clarke, 1990: Table 10.23.

[47] Martin and White, 1988: 1.

[48] *New Earnings Survey 1989* (1989: London: HMSO).

[49] Prescott-Clarke, 1990: 86-8.

Type of full-time employee	Disabled adults	Working population*	Disabled adults	Working population*	Disabled adults earnings as % of working population earnings
	Average gross earnings (£ per week)		*Average hourly pay (£ per hour)*		%
Male non-manual	194.90	225.00	4.80	5.70	87 (84)
Male manual	135.70	163.60	3.20	3.60	83 (90)
All male full-time	156.70	192.40	3.80	4.50	81 (84)
Female non-manual	125.30	133.80	3.40	3.60	94 (94)
Female manual	89.90	101.30	2.40	2.50	88 (96)
All female full-time	111.20	126.40	3.00	3.30	88 (91)

* Extracted from the New Earnings Survey 1985

Source: Adapted from Martin and White (1988: Table 3.1)

Table XII: Average gross weekly earnings and hourly pay from employment: disabled full-time employees compared with working population

	Working respondent' gross pay (paid work)	Working partner's gross pay (paid work)	Respondent's and partner's total income (all sources)
	%	%	%
Under £50	14	13	9
£50-99	20	17	16
£100-149	20	18	14
£150-199	16	14	12
£200-249	10	8	12
£250-299	7	6	10
£300-399	4	5	7
£400 or over	3	4	10
Unknown	6	15	10

Source: Adapted from Prescott-Clarke, 1990: Table 9.1

Table XIII: Weekly gross income of economically active, occupationally handicapped person and partner

of these findings:

> It would therefore appear that, within the broad categories of non-manual and manual employment, disabled men are to be found in the less well-paid jobs.
>
> The nature and severity of the disability may constrain the type of work it is possible for disabled adults to do, even among those working full-time, but other factors may also explain the lower earnings of disabled men... [W]e have already seen that disabled adults of working age are on average much older than the general population, which may have implications for the type of work they do and their earnings. Another possibility is that people in lower paid occupations are more likely than others to become disabled.[60]

The researchers also speculate that the lower earnings of the least severely disabled employees are a product of shorter working hours and that the most severely disabled are in addition most likely to be found in lower paid jobs.

Comparative perspectives

A survey of the labour market in Australia in 1981 found 82.9 per cent of the male population aged 15-64 (and 48.4 per cent of the comparable female population) were employed, whereas only 44.1 per cent of the disabled male population in this age group (and 23.9 per cent of their female counterparts) were employed.[61] Only 35 per cent of disabled adults were in employment. While 4.2 per cent of Australian males and 4.4 per cent of Australian females were unemployed, the figures for disabled persons were 5.1 per cent and 4.5 per cent respectively. The unemployment rates between disabled and general population groups are not noticeably distinguishable. However, whereas 12.9 per cent of Australian men and 47.3 per cent of Australian women are not in the labour force at all, the indices for disabled persons are 50.7 per cent and 71.6 per cent respectively.

Research in Canada showed that 1.5m Canadians of working age were disabled, of which 42 per cent were employed, 6 per cent were unemployed and 52 per cent had left the labour force.[62] While the employment rate for men was 69 per cent and for women 47 per cent, the employment rate for disabled men and women was 36 per cent and 21 per cent respectively. Whereas 23 per cent of Canadian men generally were not in the labour force, 59 per cent of disabled men were so situated (the comparable figures for women being 47 per cent and 76 per cent). Some 7 per cent of Canadian men and 6 per cent of Canadian women were unemployed, compared to 5 per cent of disabled men and 3 per cent of disabled women in Canada.

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[60] Martin and White, 1988: 17.

[61] Australian Bureau of Statistics, 1984 cited in UN, 1990b.

[62] Statistics Canada, 1984 cited in UN, 1990b.

Research in the US into the labour force participation of persons with disabilities does not paint an optimistic picture, despite the presence of anti-discrimination legislation.[63] This shows that the growth in service sector employment during the 1980s boom produced new job openings for persons with disabilities, but failed to offset the decline of disabled employment opportunities elsewhere in the economy. Yelin states a general rule which seems to emerge from this pattern:

> persons with disabilities, like those from minority races, constitute a contingent labor force, suffering displacement first and disproportionately from declining industries and occupations, and experiencing gains in ascending ones only after those without disabilities are no longer available for hire.[64]

During the 1970s and 1980s, the labour force participation of American women grew by 36 per cent, although the participation rate for women with disabilities grew by only 30 per cent. In contrast, the labour force participation of disabled men declined by 15 per cent and at a rate five times the decline among able-bodied men.[65] In aggregate, while the labour force grew by 10 per cent between 1970 and 1987, this represented a decrease of 4 per cent for disabled adults and an increase of 12 per cent for non-disabled adults. Yelin concludes that:

> on balance, the person with a disability fared worse in the labor market at the end of the period than at the beginning, even though the labor force expanded both absolutely and relatively during this time. The only groups with disabilities that fared better - white women of all ages and young non[-]white women - experienced much smaller gains in their labor-force participation than comparable women without disabilities.[66]

The loss of disabled employment opportunities centred upon manual labour and craft occupations in the manufacturing, construction, agriculture and mining industries, followed by lost employment in professional and managerial occupations in the financial and wholesale/retail industries.

Earlier evidence in the US recorded that less than one quarter of epileptics, less than half of paraplegics and only one-third of visually-impaired persons were in employment.[67] A 1973 report estimated that there were 22 million physically disabled adults, of whom only 800,000 were in employment.[68] One study[69] showed that 25 per cent of unemployed disabled

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[63] US Bureau of Census, 1989; Yelin, 1986; 1989; 1991.

[64] Yelin, 1991: 135-6.

[65] Yelin, 1991: Table 1.

[66] Yelin, 1991: 135.

[67] (1972) 118 *Congressional Record* 3320-21.

[68] *Senate Report N° 319*, (1973) 93rd Congress, 1st Session, 8. This same report referred to the range of estimates of *all* disabled Americans as being between 28 million to over 50

respondents had tried but were unable to find work. One-third of severely disabled respondents were unemployed, while the rate of unemployment for disabled respondents as a whole was approximately 50 per cent. By the mid-1980s, the Louis Harris and Associates surveys were painting a picture of a uniquely underprivileged and disadvantaged disabled population: relatively poorer, less well educated and enjoying lower levels of life satisfaction than the population at large.[60] Two-thirds of all disabled Americans aged 16-64 years old were unemployed,[61] although 66 per cent of these (8.2 million) wanted to work.[62] Furthermore, evidence in the US demonstrates that over 20 per cent of disabled Americans of working age live in comparative poverty.[63] In 1980 in the US, disabled men earned 23 per cent less than non-disabled men, and disabled women earned 30 per cent less than non-disabled women.[64] By 1988, the average earned income of disabled men in the US was 36 per cent less than the comparable figure for other men.[65]

DISABILITY AND EMPLOYMENT DISCRIMINATION

The statistical data undoubtedly presents a depressing portrait of the disabled unemployment rate, employment prospects and status, and inequality of earnings. There is evidence that some of this canvas can be coloured by the direct effects of the limitations of disabling conditions. However, it is suggested that this is not a complete depiction of the experience of disability and employment. Weiss identified a number of problems faced by disabled workers in attempting to enter employment.[66] First, they must surmount physical and vocational obstacles during rehabilitation and training. Second, disabled persons must

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million.

[59] Cited in *Georgetown Law Journal*, 1973: 1512.

[60] Louis Harris and Associates, 1986; 1987.

[61] Louis Harris and Associates, 1986: 47 (a rate of unemployment exceeding that for African-Americans). See also: National Council on the Handicapped, 1986: 5; National Council on the Handicapped, 1988: 14.

[62] Louis Harris and Associates, 1986: 50-1. See also: National Council on the Handicapped, 1988: 15.

[63] National Council on the Handicapped, 1986: 5; Louis Harris and Associates, 1986: 25; National Council on the Handicapped, 1988: 13-14.

[64] Evidence cited in Hearne, 1991: 115.

[65] US Bureau of the Census, 1989: Table D. Disabled women earned 38 per cent less than their non-disabled counterparts.

[66] Weiss, 1974: 458.

overcome the barriers confronted in architectural designs and transportation systems. Third, they will encounter resistance by employers to hiring persons with disabilities. Fourth, disabled job-seekers experience self-doubt as a product of previous prejudice. Fifth, they must master the tests created by inflexible medical examinations, which many employers use without questioning their value and utility. In short, it is contended that disability-informed discrimination in many guises plays an important hand in affairs.

Nature of disability discrimination in employment

Borrowing from Posner's economic analysis of sex discrimination laws, it might be possible to attempt some explanation or postulation of discrimination against disabled persons.[67] First, there may be an element of distaste for association with disabled persons, equivalent to the misogynist's distaste for women. It may be born of a fear or mistrust of disabled people, perhaps informed by images of the discriminator's own possible future, disabled by old age or disease or accident. Alternatively, it may be purely a question of aesthetics, based upon a judgement of what is normal and attractive, and predicated upon a desire to associate only with those who match the discriminator's view of what is appreciable. Second, disability discrimination may be based upon exploitation by the "fit" of the "unfit" or by the "strong" of the "weak". Stereotypically and erroneously, disabled persons have too often been regarded as passive individuals, who have come to terms with their compromised station in life, and who will be willing to accept further compromises in their status without demur. This may provide self-justifying and reinforcing evidence for a discriminator's view that disabled persons may be exploited or treated unfavourably without a risk of complaint. Third, disability discrimination may be simply based upon ignorance of disabled person' abilities and capacities. The discriminator is misinformed about what disabled workers can or cannot do and allows that misinformation to inform employment decisions. Fourth, even if employers are well-informed and have no discriminatory impulses:

> it may be rational for employers to discriminate against [disabled persons] because of the information costs of distinguishing a particular [disabled] employee from the average [disabled] employee.[68]

This is statistical discrimination. Fifth, the discriminator may be merely a conduit of third party discrimination. That is to say, the discriminator is merely reflecting the tastes of co-workers, other employers and customers, whose own predisposition towards disabled persons may be informed by the factors already discussed immediately above.

A crucial cause of disabled unemployment is employer attitudes and stereotyped prejudices.

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[67] Posner, 1989: 1318-21.

[68] Posner, 1989: 1320.

Discrimination against disabled persons often takes the form of prejudice. Prejudice is manifested in attitudes that distort social relationships by over-emphasis upon the characteristic of disability.[69] Prejudice feeds the stereotypical, stigmatized view of disabled persons, exaggerates the negatives connotations of impairment and excludes or devalues other measures of social worth or attributes. The view of disabled persons as lesser individuals poisons their chances of full participation in employment opportunities. The assumption is that *disability* means *inability* and consequently many jobs are assumed to be beyond the capacity of disabled workers. The literature suggests that prejudice against disabled persons increases with the nature and severity of disabilities, while prejudice is strongest in respect of sensory impairments, mental disabilities, disfigurement or deformity and visible imperfections. The intensity of disability prejudice among employers is also seemingly greater than negative attitudes towards elderly persons, ethnic minorities, criminal offenders and political radicals.[70]

One study suggested that personnel directors would prefer to engage former prisoners or mental hospital patients than they would an epileptic.[71] Employers tend to justify such resistance by reference to supposed reduced productivity, unsatisfactory performance, safety problems, insurance costs and the attitudes of co-workers.[72] This is despite evidence that disabled workers's performance emulates that of their able-bodied peers.[73] For example, one study in 1948 found that disabled workers had a slightly higher productivity rate (by one per cent) and fewer disabling injuries than non-disabled workers.[74] In this study, however, disabled workers experienced slightly higher rates of absenteeism,[75] and a higher rate of turnover.[76] A more recent US study found that employers rated disabled workers' performance as being average or above average when compared with non-disabled

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[69] West, 1991b; US Commission on Civil Rights, 1983.

[70] Yuker *et al*, 1966; Bowe, 1978; Hahn, 1983.

[71] Rickard *et al*, 1963; Rickard *et al*, 1977.

[72] US Bureau of Labor Standards, 1961; *Hearings on HR 8395 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, (1972) 92nd Congress, 2nd Session, 265; and further studies cited in Weiss, 1974: 458.

[73] US Bureau of Labor Standards, 1961; Louis Harris and Associates, 1987: 7; National Council on the Handicapped, 1988: 15; US Commission on Civil Rights, 1983: 32.

[74] US Department of Labor, 1948.

[75] 3.8 days per 100 work days as opposed to 3.4 for non-disabled workers.

[76] 3.6 per 100 employees compared to 2.6 per 100 non-disabled employees.

colleagues, and that, the more employers hired disabled applicants, the more positive their attitude towards them became.[77] Furthermore, the fear that hiring disabled workers will increase employers' liability insurance rates is not necessarily borne out, either by insurance underwriting practices, or by the excellent safety record of disabled workers.[78] In the face of evidence to the contrary, however, many employers still seek to justify disability discrimination by an unfounded belief that disabled workers have a poor safety record or will cause an increase in the employer's insurance premia.[79]

In research undertaken for the Department of Employment, and published in 1990, Morrell solicited British employers' accounts of their experience regarding disabled persons.[80] She found that, among employers employing disabled workers, 1 in 10 rated their level of performance as better than other employees, while 7 in 10 thought such workers to be comparable with other employees. These employers reported that disabled employees' attendance records were about the same (59 per cent) or better (14 per cent) than their non-disabled workers, although nearly a quarter thought that their disabled personnel took more time off that their comparators. A large majority of employers reported their perception of the attitudes of line management as being very or fairly willing to have disabled workers as part of the team (85 per cent) and the attitude of co-workers as very or fairly positive towards disabled workers (93 per cent). As many as 40 per cent of employers believed that there were no problems facing them in employing disabled persons. However, when prompted, a number of problems were perceived by 91 per cent of employers.[81] The unsuitability of available jobs, problems with the suitability of the workplace premises, and lack of disabled applicants were the problems most frequently mentioned, although other problems anticipated included problems of getting to work (because the workplace was inaccessible) and shift working.

Disabled people may also be the victims of statistical discrimination. Johnson cites evidence to suggest that employers offer minority workers poorer employment opportunities because

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[77] Zadny, 1979.

[78] Evidence cited in *Georgetown Law Journal*, 1973: 1513 suggests that disabled workers have 8 per cent fewer accidents than their co-workers.

[79] See for example: Flaccus, 1986b: 262-3.

[80] Morrell, 1990: 13-15.

[81] Morrell, 1990: Table 20.

of a belief that they are on average less productive than majority workers.[82] This is reinforced by employers' use of pre-employment test scores which may be inadequate proxies for measuring productivity. In particular, Johnson asserts that:

> Test scores are biased when an impairment limits test-taking skills but does not limit performance on the job for which the test is required... Some firms flag test results for impaired persons or waive the test requirements for their employment. Unfortunately, both solutions increase the subjectivity of the hiring decision.[83]

In the absence of objective testing methods, it is thus tempting for employers to stereotype all disabled workers as non-productive or of limited productivity, and to regard them suspiciously as a source of increased costs.[84] In addition, persons with disabilities also face structural discrimination or discrimination through the erection of barriers in the social and physical environment. Without accommodation of disability, disabled persons are unable to participate in many aspects of society and employment.

Evidence of disability discrimination

In the US, the evidence of discrimination against disabled persons is well documented.[85] In some cases, disabled Americans also appear to experience dual discrimination because of the combination of race or gender with disability.[86] The Louis Harris studies discovered that 66 per cent of disabled persons who are not working would like to work, but that 25 per cent of disabled persons of working age reported incidents of employment discrimination.[87] Approximately one-half of those not in full-time employment felt that employers failed to recognize their capability for full-time work, while a similar proportion believed that discrimination contributed to their employment status.[88] The surveys also provided evidence that 75 per cent of employers and managers support that belief, and evidence to underpin the contrary view of many employers to the effect that increasing the employability of disabled persons is good for business.[89] Nevertheless, other reasons for the poor employment status of persons with disabilities were also offered, including unavailability of

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[82] Johnson, 1986: 246.

[83] Johnson, 1986: 246.

[84] Schroedel and Jacobsen, 1978.

[85] See, for example: Livneh, 1982; US Commission on Human Rights, 1983.

[86] Burkhauser, Haveman and Wolfe, 1990.

[87] Louis Harris and Associates, 1986: 75 and Table 34.

[88] Louis Harris and Associates, 1986: 70 and Table 32.

[89] Louis Harris and Associates, 1987: 12.

suitable positions, inability to find any jobs, lack of educational qualification, transportation problems and lack of auxiliary aids or equipment.[90] Of those in work, 56 per cent thought that their disability was a barrier to employment rather than employers' attitudes, compared with 77 per cent of those looking for work or unable to work.[91]

In Britain, much of the evidence concerning employment discrimination against disabled people has been anecdotal or illustrative rather empirical and systematic. This has allowed government to deny that the employment disadvantage of disabled persons is caused by discrimination:

> Discrimination may occur on occasion - perhaps particularly where the person is mentally handicapped - but there is little evidence to suggest that unemployed disabled people generally fail to get jobs because of discrimination against them.[92]

The Department of Employment has preferred the view that many disabled persons would find it hard to gain employment because of their age, lack of education or skill, or some other social disadvantage, regardless of impairment or disability.[93] Nevertheless, during the late 1970s and early 1980s, separate inquiries undertaken by the Working Party on Integration of the Disabled and by the Committee on Restrictions Against Disabled People began to establish more formal records of systematic and institutional discrimination against disabled people.[94] Other social research pointed to negative attitudes and discrimination faced by people with particular disabilities.[95] However, two pieces of research undertaken by the Spastics Society in the first half of 1986, and then in late 1989 and early 1990, provided methodologically sound evidence of disability discrimination in employment practices.[96]

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[90] LaPlante (1991: 71) comments that "most persons with activity limitation felt it was the limitation rather than employer's attitudes that prevent them from getting the type of job they desired".

[91] Louis Harris and Associates, 1987: Table 37.

[92] DE, 1973: para 40.

[93] See also: MSC, 1979: para 21. It may be that disabled persons would become unintended beneficiaries of any legal controls of ageism and age discrimination. See, for example: Buck, 1992.

[94] Snowdon, 1976 and 1979; Large, 1982.

[95] See, by way of illustration: Bunting, 1981; British Deaf Association, 1984; Whaley *et al*, 1986; Banking, Insurance and Finance Union, 1987; Royal National Institute for the Deaf, 1987. More recent research found that about 40 per cent of employers surveyed regarded disabled persons as unsuitable employees, a view that was most prevalent among employers with no experience of employing disabled workers: *IRS Employment Trends* N° 517 (August 1992) at 13-14.

[96] Fry, 1986; Graham, Jordan and Lamb, 1990. There is also evidence that disabled

In the first study,[97] employers' reactions to two largely identical job applications were measured.[98] The job applications were for secretarial positions in London requiring a few years work experience. The positions were advertised in newspapers or magazines and were nearly all being offered by private sector employers. Paired applications based on standard letters were made for 152 jobs. In each pair of applications, one of the letters indicated that the applicant was a registered disabled person with cerebral palsy, but no mention of any limitations arising from the disability was made and emphasis was placed upon the fact that the applicants' disability had not affected their education or work history. The other letter would appear as an application from an apparently able-bodied applicant. Each application letter in a pair would be constructed so that the applicants' educational qualifications and employment experience were similar but not identical. Other measures were taken to control for other factors which might produce bias or prejudice other than such based on disability (for example, gender, race or residential location).

Of the 152 pairs of applications, 93 valid tests were conducted. The balance of 59 pairs were excluded where both letters received a negative response from the employers. A negative response would be counted if anything short of an interview, request to phone or an application form sent for the job applied for (or for another job) was received. Such a pair of negative responses casts no light upon whether the employer had discriminated against the disabled applicant because of disability or some rational ground. In the 93 valid tests, only the able-bodied applicant received a negative response in 3 cases (3 per cent), only the disabled applicant received a negative response in 38 cases (41 per cent) and both responses were positive in 52 cases (56 per cent). Analyzing these results in another way, it can be seen that 97 per cent of able-bodied applications received positive responses, but only 59 per cent of disabled applications.[99] In short, a non-disabled application was 1.6 times more likely to receive a positive response than an application from a disabled person.

Examining the 38 cases where the disabled applicant received a negative response and the able-bodied applicant a positive response is of further instruction. In one case, the employer's reply to the disabled applicant made indirect comments to suggest that disability had

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persons are discriminated against in training provision by Training and Enterprise Councils: Smith, 1992a.

[97] Fry, 1986.

[98] This is a research method which has been used to measure racial discrimination in employment. See, for example: Brown and Gay, 1985.

[99] Fry, 1986: 9.

informed the employment decision:

> In this case the employer, without actually mentioning the disability, wrote that they could not consider employing her until they moved to less cramped and difficult offices in two to three months time. This was, of course, without having found out any details of the disability first.[100]

In the usual case, no reply at all was received or, at best, a standard letter of rejection which offered no reasons for the decision. However, Fry continues:

> Occasionally however, employers *(sic)* replies to the disabled candidate were more disingenuous. Two employers claimed that the disabled candidate's qualifications and experience were not what was required, while asking the able-bodied candidate with similar qualifications and experience for an interview. Another excuse given was that the position had already been filled, even though the able-bodied candidate was, at the same time, invited to an interview. One employer informed the disabled candidate that the temporary secretary who had been working with them had decided to stay. The able-bodied candidate had already been offered an interview.[101]

These are scenarios which are readily recognisable from the experience of ethnic minorities in the labour market.

The Spastics Society repeated the research in a second study at a time when unemployment was falling and the demand for skilled labour was relatively high.[102] The methodology used was identical with the 1986 exercise: 197 pairs of applications were sent out; 147 replies to both applications were received, of which 81 cases were valid; and 20 replies to one applicant only were received, of which 13 cases were valid. Of the 94 valid tests (at least one applicant receiving a positive response), in 51 cases both applicants received positive responses (54 per cent), in 37 cases only the able-bodied application was well-received (39 per cent), while in 6 cases only the disabled applicant attracted the employer's interest (6 per cent). Analyzing these results in another way, it can be seen that 94 per cent of able-bodied applications received positive responses, but only 61 per cent of disabled applications. In short, an able-bodied applicant was 1.5 times more likely to receive a positive response than an application from a disabled person. The similarity in the outcomes of the two studies is marked.[103]

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[100] Fry, 1986: 14.

[101] Fry, 1986: 14.

[102] Graham, Jordan and Lamb, 1990: 2.

[103] Research conducted among French employers in 1989 found that highly qualified able-bodied applicants were 1.78 times more likely to receive a favourable response than their disabled counterparts, and modestly qualified able-bodied applicants were 3.2 times more likely to receive a positive response. The incidence of disability discrimination increased with company size. See: Ravaud *et al*, 1992. In contrast, further analysis by Smith (1992) suggests that disabled persons are 6 times more likely to be denied a job interview than non-

As in the 1986 study, so in the 1990 study was it clear that many employers had based the decision to reject the disabled applicant upon "unfounded assumptions about disability".[104] In rejection letters and, more insidiously, in letters classified as positive responses, employers erected hurdles in the way of the disabled applicant or made assumptions about her disability which were unsupported by evidence or contrary to the facts stated in the application letter. Graham, Jordan and Lamb quote the following examples:

> 'It is frequently necessary for all staff to travel between the subsidiary companies using a company vehicle, attend meetings and conferences and generally be available to assist in a wide range of duties, many of which may require a degree of physical ability'[105]

and, in another reply:

> 'due to your disability I feel I should bring to your attention the fact that there are steps up to the building and in addition our offices are situated over three floors. A lift serves the ground and subsequent floors but not lower ground floor which is where the successful applicant will be required to work... *if you feel you can cope with this, please contact us*'.[106]

As before, the disabled applicant would be rejected on grounds of experience, qualifications or work history, but the able-bodied applicant, with an equivalent *curriculum vitae* would be permitted to proceed further into the selection process. There was a marked unwillingness to afford the disabled applicant an opportunity to show her worth or to dispel doubts at an interview. There was also evidence of the two applications being handled different: for example, by requesting further information or requiring a *pro forma* application from the disabled applicant but not from her counterpart.[107]

An important difference between the 1986 survey and the 1990 survey was that the latter study presented evidence of the type and size of employer who discriminates. Seventy per cent of the recorded cases of disability-based discrimination were in small to medium sized firms (up to 250 employees), but equally the small number of cases where the disabled applicant had been preferred over the able-bodied candidate were predominantly in small businesses. It is not possible to draw any conclusions from this finding given the size of the sample and the limited objectives of the study and its methodology. The industrial sectors found to produce most cases of discrimination were (in rank order) estate agency, hotel and

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disabled applicants.

[104] Graham, Jordan and Lamb, 1990: 5.

[105] Graham, Jordan and Lamb, 1990: 5.

[106] Graham, Jordan and Lamb, 1990: 5 (my emphasis).

[107] Graham, Jordan and Lamb, 1990: 6.

catering, public administration, marketing, publishing, finance and entertainment. However, these conclusions cannot be based upon statistically significant data and little comment can be made about them.

CONCLUDING REMARKS

This chapter has sought to make a connection between disability, employment status and discrimination. The evidence suggests that disabled people suffer an unemployment rate 2-3 times that of the general population and the length of disabled unemployment is likely to be greater than that for the unemployed in general. Many disabled people have withdrawn from the labour market and so are not truly economically active, although a good proportion of these are discouraged workers. Many others seek employment, but without much success or optimism. For those persons with disabilities who are in work, the picture is not necessarily rosier, as disability tends to inform occupational status and there is a consequent over-representation of disabled workers in the lower reaches of the occupational hierarchy. The ill effect of disability upon earned income is also manifest. For those who become disabled while in post, employment security is not an automatic expectation.

While there is much evidence to link disability with unemployment and impoverished employment prospects, the statistics do not prove one way or another the influence of disability-informed discrimination upon disabled employment opportunities. Indeed, disabled people themselves frequently cite their self-perceived limitations and lack of full capacity as a greater cause of their employment position than employers' attitudes or prejudice. Nevertheless, the data does raise an inference that disabled persons do not enjoy fair treatment in the labour market and this is now borne out by empirical research that suggests that employers may be acting unfavourably towards disabled job applicants and pre-judging their capabilities. The case for protective legislation to safeguard and to realise the employment expectations of disabled persons is arguably made out. In Part B, we examine what legal regulation, if any, has been put into place in major industrialised democracies to secure basic employment rights for disabled people, and we identify those legal models that explicitly or implicitly recognise the phenomenon of disability-related discrimination in employment.

PART B:
DISABLED EMPLOYMENT RIGHTS IN SELECTED COUNTRIES

CHAPTER IV:
DISABLED EMPLOYMENT RIGHTS IN BRITAIN [1]

INTRODUCTION

Tomlinson principles

Disability discrimination in employment has not been addressed in direct terms by British labour law. Post-war employment policy towards disabled people has been informed by the guiding principles enunciated by the Interdepartmental Committee on the Rehabilitation and Resettlement of Disabled Persons (the Tomlinson Committee).[2] The Tomlinson Committee recognised that "disabled persons, given the opportunity, are capable of normal employment", and articulated "the need for a strategy to secure for the disabled their full share, within their capacity, of such employment as is ordinarily available".[3] This principle subsequently has been pursued primarily through measures promoting rehabilitation, retraining and job placement services for disabled people. Although these measures have had some impact on the employment prospects of disabled people, they appear as mere palliatives to the problems of disability disadvantage and may even add to the marginalisation of disabled people.

In Britain, therefore, post-war employment policy has conceded to persons with disabilities only a limited recognition of a right to work. The report of the Interdepartmental Committee, although with the war disabled chiefly in mind, acknowledged that the exclusion of disabled persons from the labour force reduced productive capacity and increased social costs. Disabled persons were seen to have a justifiable claim to competitive employment rights and, given the opportunity, to be capable of normal working lives without institutional or sheltered protection.[4] Measures to promote opportunity and negate prejudice were essential, but the creation of employment for disabled workers and the extension of preference to them without regard to individual ability and production efficiency were ruled out. The Tomlinson Committee recommended the creation of a register of those handicapped in employment by disability, the reservation of certain occupations for such persons, the imposition of a disabled employment quota upon employers, a framework for vocational rehabilitation, training and

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[1] This chapter draws heavily upon the author's publication of work-in-progress: Doyle, 1987a; 1987b; 1991; and 1993b.

[2] Tomlinson, 1943.

[3] Tomlinson, 1943: para 71.

[4] Tomlinson, 1943: para 9.

resettlement services, and obligatory provisions for sheltered employment.[5] These recommendations formed the substance of the Disabled Persons (Employment) Act which was enacted in 1944,[6] although the Committee had originally envisaged that compliance with the disabled employment quota would be an employer's duty in the national interest, rather than a statutory obligation.[7]

When a decade later a second committee examined developments since 1944, the system was found to be sound and without need of radical change.[8] Only minor changes were effected by the DP(E)A 1958. Since then there have been changes in the composition of the disabled population, advances in medical science and health care, and increases in the levels of unemployment. Furthermore, novel demands for a skilled and flexible work-force have arisen, alongside developments in technology, and expansion in the range of assistance and benefits available to disabled people. Most importantly of all, the last quarter of the century has witnessed changes in the aspirations of disabled people themselves. Nevertheless, subsequent official reviews of employment services for disabled people have rarely questioned the Tomlinson philosophy.[9]

Most recently, the National Advisory Council on the Employment of Disabled People (NACEDP) established under the DP(E)A 1944 reviewed the Tomlinson principles. It found basic continuity in the approach to disabled employment provision and endorsed the justification for helping disabled people in the employment field.[10] It reiterated the fundamental principle that:

> access of disabled people to training and to jobs and their development within organisations should be based on their capacities as individuals, properly and fairly assessed... [and that] disabled people for whom special employment provision has been arranged should enjoy the same employment rights as other workers.[11]

The NACEDP recognised that there was a strong case for saying that "legislation properly designed and applied is an essential tool, particularly when supported by persuasive action,

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[5] Tomlinson, 1943: *passim*.

[6] DP(E)A 1944 amended principally by the DP(E)A 1958. The Act has also been amended by the Armed Forces Act 1981 and the Criminal Justice Act 1982.

[7] Tomlinson, 1943: para 77.

[8] Piercy, 1956.

[9] MSC, 1978; 1982; 1986.

[10] NACEDP, 1986.

[11] NACEDP, 1986: paras 5.9 to 5.10.

for helping the employment prospects of disabled people".[12] Nevertheless, a contemporary change in emphasis in disabled employment policy away from the statutory quota scheme and towards the promotion of voluntary equal opportunity practices is illustrated by a number of developments in the last decade.

Rise of the voluntarist approach

In 1977, the MSC launched a major programme to encourage and to educate employers about the employment of disabled persons. Following a review of disabled employment services,[13] the Disablement Advisory Service was established with a brief to promote progressive personnel policies and practices in respect of disabled people. Since 1980 and until comparatively recently,[14] good employment practice had been recognised under the Fit for Work Award scheme, which highlighted the record of employers with constructive disabled employment policies and practices. A review of the statutory quota scheme suggested that the quota should be replaced by a general statutory duty, linked to a code of practice, requiring employers to promote the employment of disabled people.[15] Although this idea was supported by the NACEDP,[16] it did not attract political support.[17] A code of good practice was subsequently produced,[18] but without the statutory framework of the original proposal the code is deprived of legal status and is devoid of sanctions to underpin it.

DISABLED PERSONS (EMPLOYMENT) ACT 1944

The employment rights of disabled workers have been considered at first hand in three respects: the statutory quota scheme, the legal requirement for corporate disability policy statements, and the promotion of voluntary good practice. The main source of the law on

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[12] NACEDP, 1986: para 6.6.

[13] MSC, 1982.

[14] Contemporary developments are discussed in Chapter XVI below and will not be alluded to here.

[15] MSC, 1981.

[16] *The MSC Report on Review of the Quota Scheme - Memorandum by the National Advisory Council on Employment of Disabled People* (evidence to the House of Commons Employment Committee) and reproduced in House of Commons Employment Committee (HCEC), 1981: 38-9.

[17] HCEC, 1981: paras 14-19; and HCEC, 1982. The Committee was particularly concerned at the problems of defining disability, the identification of disabled persons by employers and the enforcement of the general duty.

[18] The Code of Good Practice on the Employment of Disabled People was originally prepared and issued by the MSC in 1984. It is now published by the DE.

disabled employment in Britain is the DP(E)A 1944. This legislation offers a basic, although not universal, definition of "disabled person" and provides for the registration of individuals satisfying that definition. It obliges certain employers to employ a quota of registered disabled persons, subject to exemption by permit, and to keep records of their compliance with the statutory obligation. The Act also designates certain occupations as reserved for registered disabled persons. Although the 1944 Act restrains the freedom of employers to dismiss without good cause an employee who is a registered disabled person, disabled employees are likely to enjoy equal, if not better, employment protection rights under general employment law. In particular, the unfair dismissal and redundancy rights of the Employment Protection (Consolidation) Act 1978 will be relevant.[19] Consideration should also be given to employers' duties and employees' rights under the Health and Safety at Work etc Act 1974 and related legislation.[20] These will be considered below.

Definition of disability

The expressions "disabled person" and "disablement" are central to the operation of a number of statutory employment measures. The cognate expressions "disabled" and "disability" have been the source of much categorisation and confusion in social security law. In the context of employment law, however, the qualification of a person by disability for the receipt of compensation, income maintenance or replacement benefits and extra costs allowances is of little or no concern. For many present purposes, the key concept is that of "disabled person" within the meaning of section 1 of the Disabled Persons (Employment) Act 1944. The substance of the section is reproduced in Text Box 1. A disabled person is defined there as someone who is substantially handicapped in obtaining or keeping employment because of injury, disease or congenital deformity. Disease includes a physical or mental condition arising from imperfect development of any organ.[21] Being handicapped in undertaking work on his or her own account by reason of these causes also qualifies an individual as a disabled person. The employment or work in question must be of a kind which, apart from the injury, disease or deformity, would be suited to that person's age, experience and qualifications. The term "disablement" is to be construed from this basic definition.[22]

This is a broad definition of "disabled person". It encompasses congenital disabilities,

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[19] EP(C)A 1978 as amended by various statutes. Parts V and VI of the Act are relevant for instant purposes.

[20] HASAWA 1974.

[21] DP(E)A 1944 s 1(2).

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

1. **Definition of 'disabled person'**

(1) In this Act the expression 'disabled person' means 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; and the expression 'disablement', in relation to any person, shall be construed accordingly.

(2) For the purposes of the definitions contained in the preceding subsection, the expression 'disease' shall be construed as including a physical or mental condition arising from imperfect development of any organ.

Text Box 1: Section 1 Disabled Persons (Employment) Act 1944

industrial or war injuries, accidental injuries at large, and diseases or deformities (whether occupationally-related or not). However, it is not enough that a person has experienced a loss or abnormality of a psychological, physiological or anatomical structure or function. Nor is it sufficient that this impairment restricts or reduces the range of activities that the person is able to perform. What is necessary is that the individual should be handicapped or disadvantaged in employment as a result of the impairment or disability. For example, paralysis of the legs is an impairment which prevents walking and is thus disabling; but this does not produce an employment handicap unless mobility is a prerequisite of a particular occupation or the employer cannot accommodate a wheelchair in the workplace. Any employment handicap might also be the consequence of societal prejudice against persons with disabilities or a stereotypical view of disabled persons' abilities and inabilities. Furthermore, apart from the impairment or disability, the disabled person must be otherwise qualified for employment. Employment handicap must be the result of impairment or disability alone and not simply because the individual lacks the necessary training, educational qualifications or personal qualities for particular employment.

Register of disabled persons

The primary importance of the definition of disabled person is for the purpose of registering under the 1944 Act as a "person registered as handicapped by disablement".[23] Only such registered disabled persons may qualify for *certain* employment assistance and services offered by the DE and discussed at page 90 *et seq* below. Employers' obligations under the statutory quota scheme and in respect of designated employment (discussed below at pages 83 and 87 respectively) are measured by reference to registered disabled persons alone. The DE maintains a register of disabled persons under section 6 of the 1944 Act.[24] An individual who satisfies the definition of disabled person (above) may apply at a Job Centre to be entered upon the register, provided that the disablement is likely to last for at least 12 months.[25] The applicant must also have attained the school leaving age, desire to engage in remunerative work, have a reasonable prospect of obtaining and keeping such work, and be ordinarily resident in Great Britain (unless a serviceman or merchant seaman).[26] A

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[23] DP(E)A 1944 s 6(3).

[24] DP(E)A 1944 s 6(1). Regulations have been made under s 6(2) and (4) appertaining to registration and the register: Disabled Persons (Registration) Regulations 1945 (SR&O 1945 N° 938, as amended by SR&O 1946 N° 262 and SI 1959 N° 1510).

[25] DP(E)A 1944 s 7(2)(a). In cases of dispute, the application is referred to a district advisory committee for determination: s 7(2)(b). This will be the local Committee for the Employment of Disabled People (CEDP).

[26] DP(E)A 1944 s 7(1) and the Disabled Persons (Registration) Regulations 1945.

registered disabled person is issued with a certificate of registration, known as a "Green Card", production of which an employer or prospective employer subject to the 1944 Act may demand.

The Disabled Persons (Registration) Regulations 1945 contain a number of grounds upon which a person may be disqualified from attaining or retaining the status of a registered disabled person.[27] Prisoners are disqualified, as are whole-time hospital patients who are unable to undertake vocational training or work. A person of habitual bad character may also be denied registration. A refusal without reasonable cause to attend or to complete vocational training, if so required by the DE, can result in the disabled person being removed from the register. A persistent refusal without reasonable cause to undertake suitable work can also result in de-registration. The duration for which a disabled person's name shall remain on the register will be determined at the time of registration.[28] A person who ceases to satisfy the conditions for registration or who otherwise comes under a disqualification may be removed from the register.[29] Once in employment, however, a registered disabled person's registration will not terminate (if it would do otherwise) so long as he or she retains employment with that employer. Otherwise, a registered disabled person may apply to have his or her name removed from the register at any time.[30] There is no right of appeal from a refusal to register or a decision to de-register.

Statutory quota scheme

Under section 9 of the 1944 Act employers of a "substantial number" of employees are under a duty to employ a quota of "persons registered as handicapped by disablement" and to allocate vacancies for that purpose when they occur. The duty is subject to some misunderstanding and, in order to assist the explanation which follows, the substance of this legislative provision is reproduced in Text Box 2 below.

Employers to whom the quota scheme applies are not in breach of duty simply by failing to maintain the quota of disabled persons in their employment. They are under no obligation to dismiss able-bodied employees and replace them with disabled persons. However, section

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[27] The authority for these grounds of disqualification derives from DP(E)A 1944 ss 7(1) and 8(2).

[28] DP(E)A 1944 s 8(1).

[29] DP(E)A 1944 s 8(3). Removal will only occur after a reference to a local CEDP for recommendations.

[30] DP(E)A 1958 s 2(2).

(1) It shall be the duty of a person who has a substantial number of employees to give employment to persons registered as handicapped by disablement to the number that is his quota..., and, where he is not already doing so at times when vacancies occur, to allocate vacancies for that purpose; and the said duty shall be enforceable... in the case of a person to whom this section applies, that is to say, a person who for the time being has, or in accordance with his normal practice and apart from transitory circumstances would have, in his employment persons to the number of not less than twenty...

(2) ... [A] person to whom this section applies shall not at any time take, or offer to take, into his employment any person other than a person registered as handicapped by disablement, if immediately after the taking in of that person the number of persons so registered in the employment of that person to whom this section applies... would be less than his quota.

(3) Subsection (2) of this section shall not apply to a person's taking, or offering to take, into his employment at any time a person whom apart from that subsection it would have been his duty to take into his employment at that time... by virtue of any Act...

(4) Subsection (2) of this section shall not apply to a person's taking, or offering to take, into his employment any person in accordance with a permit issued by the Minister under the subsequent provisions of this Act in that behalf.

(5) A person to whom this section applies who for the time being has in his employment a person registered as handicapped by disablement shall not, unless he has reasonable cause for doing so, discontinue the employment of that person, if immediately after the discontinuance the number of persons so registered in the employment of the person to whom this section applies... would be less than his quota: Provided that this subsection shall not have effect if immediately after the discontinuance the employer would no longer be a person to whom this section applies.

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Text Box 2: Section 9 Disabled Persons (Employment) Act 1944

9(2) stipulates that such employers shall not take, or offer to take, into employment[31] any person other than a registered disabled person if, immediately after employing such other person, the number of registered disabled persons in their employment would be less than the specified quota. This does not affect the legal validity of any such engagement,[32] but otherwise contravention of this provision is a criminal offence punishable by a fine and/or imprisonment.[33] By virtue of section 9(3), employers are not prevented from employing or re-employing any person if under a statutory duty: for example, a reinstatement or re-engagement order made under the unfair dismissal provisions.[34] Section 9(4) disapplies the duty in respect of employers issued with exemption permits under section 11 of the 1944 Act (discussed at page 86 below). There will be no breach of duty where transferees of a business take into their employment non-disabled employees employed by the transferor immediately before the transfer.[35]

The 1944 Act also regulates the dismissal of registered disabled persons.[36] Employers subject to the statutory quota obligations shall not dismiss a registered disabled person without reasonable cause if, as a result of that dismissal, the number of registered disabled persons employed by them would be less than the specified quota. The dismissal is still legally valid,[37] but otherwise such a dismissal is a criminal offence.[38] It does not follow that a dismissal in breach of the 1944 Act will be an unfair dismissal under the EP(C)A 1978 (discussed at page 95 below). There is no minimum service qualification for protection under this enactment. In contrast with the recruitment provisions of the 1944 Act (above), there are no general exceptions to or exemptions from this prohibition. However, a proviso states that the Act has no effect if the dismissal would result in the employer no longer being subject to the quota obligation; that is if, as a result of the dismissal, there are now less than

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[31] As to the interpretation of references to taking into employment, see: DP(E)A 1944 s 13(2).

[32] DP(E)A 1944 s 13(5).

[33] DP(E)A 1944 s 9(6); note s 9(7) which contains provisions relating to prosecution.

[34] EP(C)A 1978 s 69.

[35] DP(E)A 1944 s 13(2)(b).

[36] DP(E)A 1944 s 9(5).

[37] DP(E)A 1944 s 13(5).

[38] DP(E)A 1944 s 9(6)-(7).

20 employees in the employment.[39]

These recruitment and employment security obligations apply only to employers of not less than 20 employees.[40] When calculating both the quota number and the total number of employees, employees working less than 10 hours per week are disregarded and those working between 10 and 30 hours per week count as half an employee.[41] The quota percentage is determined by section 10 and regulations made thereunder. The standard percentage is 3 per cent.[42] However, in respect of employment in the capacity of master or crew member of a British ship, there is a special percentage of 0.1 per cent.[43] Disabled persons employed in a designated employment under section 12 (discussed at page 87 below) do not count towards satisfaction of employers' quota obligations,[44] nor do disabled persons who have not registered under the 1944 Act. The quota percentage may be reduced for up to a year on an application of an employer whose particular circumstances suggest that it is too great.[45] Applications are renewable and are made through the Disablement Resettlement Officer (DRO) and on the advice a local CEDP.[46]

Exemption permits

Were it not for section 11 of the 1944 Act, many employers would be in breach of the

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[39] DP(E)A 1944 s 9(5).

[40] DP(E)A 1944 s 9(1). The Act does not bind the Crown. The Act also only applies to employment relationships which are in the nature of a contract of service or of apprenticeship: s 13(1).

[41] Disabled Persons (General) Regulations 1945 (SR&O 1945 N° 1558, as amended by SR&O 1946 N° 1256) made under DP(E)A 1944 s 13(3). The ascertainment of the quota number is determined by the rules of calculation set out in s 10(4).

[42] DP(E)A 1944 s 10(2)(a). The standard percentage is fixed by the Disabled Persons (Standard Percentage) Order 1946 (SR&O 1946 N° 1258) made under s 19(3) after consultations with both sides of industry.

[43] DP(E)A 1944 s 10(2)(b). The special percentage is fixed by the Disabled Persons (Special Percentage) (N° 1) Order 1946 (SR&O 1946 N° 236) made under s 10(3). The Minister may fix a special percentage for employment in any trade or industry (or part thereof) where there are distinctive characteristics with respect to its suitability for the employment of disabled persons.

[44] DP(E)A 1944 ss 9(2), 9(5), 10(4) and 10(6).

[45] DP(E)A 1944 ss 10(5) and 10(6); Disabled Persons (General) Regulations 1945.

[46] From 1992, the role of the DRO, the Disablement Advisory Service (DAS) and the Employment Resettlement Service is undertaken by Placement Assessment and Counselling Teams (PACTs).

statutory quota scheme. Application may be made through a DRO (now PACT) for permits allowing employers to recruit employees who are not registered disabled persons.[47] Where a permit has been issued under section 11 there can be no breach of the recruitment restrictions in section 9(2) above. A permit will be granted if, having regard to the nature of the work to which the employer wishes to recruit, there are no available registered disabled persons (or an insufficient number) who are qualified and suitable for that work.[48] The permit may be unconditional or subject to conditions,[49] such as an undertaking that job vacancies will be notified publicly as they arise. It may refer to a specified individual or to a number of persons (a so-called "bulk permit"). A refusal of a permit or the placing of conditions upon its issue may be referred for the advice of a local CEDP.[50]

Designated employment

Certain classes of employment have been designated by ministerial order as affording specially suitable opportunities for disabled employment.[51] The Disabled Persons (Designated Employments) Order 1946[52] has identified employment as a passenger electric lift attendant and as a car park attendant as designated employments. Two consequences flow from the designation of employments in this way. First, employers may not engage or employ in a designated employment any person other than a registered disabled person unless, as discussed above, in pursuance of a statutory re-employment obligation or within the scope of an exemption permit.[53] Breach of this provision is a criminal offence punishable by a fine and/or imprisonment.[54] Second, as stated above, registered disabled persons employed in a designated employment do not count for the purpose of determining whether an employer is in compliance with the statutory quota scheme.[55]

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[47] DP(E)A 1944 ss 9(4) and 11(1); Disabled Persons (General) Regulations 1945.

[48] DP(E)A 1944 s 11(1).

[49] DP(E)A 1944 s 11(2).

[50] DP(E)A 1944 s 11(3).

[51] DP(E)A 1944 s 12(1).

[52] SR&O 1946 N° 1257 made under DP(E)A 1944 s 12.

[53] DP(E)A 1944 s 12(2)-(3).

[54] DP(E)A 1944 s 12(4).

[55] DP(E)A 1944 s 9(2).

Record keeping

In order to ensure compliance with the above requirements of the 1944 Act, employers are obliged to maintain certain employment records.[56] These may be used as evidence in any prosecution under the substantive provisions of the Act, must be kept for two years from the date to which they relate, and are open to inspection by the DE. There are criminal sanctions for failure to observe these various obligations. It is not necessary to keep bespoke records for this purpose, provided the employer's general employment records, by use of symbols or otherwise, record the particular items of information detailed below.

The records must show the total number of employees, the names of those employed for not more than 30 hours per week (distinguishing those who work for less than 10 hours), the date of engagement of every employee, and the date of termination of any employee. The number and names of registered disabled persons employed must also be recorded, as well as the names of persons employed where a special percentage quota applies, every reinstated employee, and every person employed under a permit. The name and date of engagement of every person employed in a designated employment must be recorded, together with separate identification of such employees who are registered disabled persons, reinstated persons or employed under a permit. If an existing employee has been moved to designated employment, the date of the move must be recorded.

Sheltered employment

The 1944 Act mandates the provision of facilities, to enable registered disabled persons with severe disabilities, who are unable to obtain employment in the open labour market or to compete on comparable terms with able-bodied persons, to be trained and to work or be employed under special conditions.[57] Sheltered employment provision is undertaken by local authorities, approved voluntary bodies, and Remploy Ltd. A consideration of sheltered employment opportunities is beyond the scope of this study.

COMPANIES ACT 1985

Incorporated employers

The directors of a registered company must prepare a directors' report each financial year under section 234 of the Companies Act (CA) 1985 as amended. The report is laid before the shareholders in general meeting and delivered to the Registrar of Companies. Since 1980, it must disclose, among other things, information concerning the employment, training and

[56] DP(E)A 1944 s 14 and the Disabled Persons (General) Regulations 1945.

[57] DP(E)A 1944 s 15.

advancement of disabled persons (as defined by the 1944 Act).[58] Such disclosure need only be made where the average number of employees employed by the company within the United Kingdom in each week of the financial year exceeded 250.[59] A failure to comply with this requirement is a criminal offence and any director of the company at the relevant time may be liable to a fine.[60] It is a defence, however, to show that all reasonable steps were taken to comply with the requirement.[61]

The Companies Act does not explicitly require a company to have a policy in respect of the employment of disabled persons nor to make operational any such policy as might exist. The directors' report needs only to contain a statement describing *such* policy as the company *has applied* during the financial year. It is merely implicit that the directors should give consideration to the company's policy on disabled employment, and it does not appear permissible merely to state that the company has applied no policy at all. Nevertheless, this has led to some fairly anodyne statements appearing under this heading in directors' reports.[62]

The statement in the directors' report must describe what policy has been applied for giving full and fair consideration to applications for employment by the company made by disabled persons, having regard to their particular aptitudes and abilities.[63] The company's practice in continuing the employment of, and for arranging appropriate training for, employees who have become disabled during the time of their employment with the company must be outlined. This applies as much to disabilities whose causation is unrelated to employment as to work-related disabilities. Information must also be given about company policy on the training, career development and promotion of disabled employees in the company. Part One of the Code of Good Practice, which is addressed to directors and senior managers, makes suggestions for setting objectives for the employment of disabled persons. The Code also provides guidance on the devising, implementation and monitoring of employers' policies

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[58] The obligation to disclose such information derives from the Companies (Directors' Report) (Employment of Disabled Persons) Regulations 1980 (SI 1980 N° 1160) made under s 454(1) of the CA 1948. They came into force on 1 September 1980.

[59] CA 1985 Sch 7, para 9.

[60] CA 1985 s 234(5).

[61] CA 1985 s 234(6).

[62] Doyle, 1987b.

[63] CA 1985 Sch 7, para 9.

towards disabled workers.

Public sector employers

The provisions of the CA 1985 apply only to incorporated employers. Nevertheless, the spirit of the statute is equally applicable to other employers. However, the adoption and implementation of disabled employment policies by public sector employers might be fraught with difficulties. The Local Government and Housing Act 1989 requires that every appointment of a person to a paid office or employment by a local authority or parish or community council must be on merit.[64] While this is made expressly subject to any obligations under the 1944 Act, it might undermine the policy of a few local government employers who have pursued short term policies of recruiting only disabled persons to advertised vacancies. The exception to the 1989 Act in respect of the 1944 Act only permits merit to be ignored as an appointment criterion in respect of *registered* disabled persons and only so long as the employer remains below the statutory quota.

Some public sector employers have used "contract compliance" as a tool of disabled employment policy. This drafting technique makes it a condition of a supply or works contract, granted to a contractor by a public sector employer, that the contractor should observe good employment practices in respect of its workforce. This might include, for example, an insistence that the contractor comply with the quota obligations of the 1944 Act. The provisions of Part II of the Local Government Act 1988 prohibit local and other public authorities from including such non-commercial considerations in public supply and works contracts.

EXTRA-STATUTORY MEASURES

Disabled employment schemes and services[65]

Within the framework provided by the 1944 Act and subsequent legislation are a number of statutory and extra-statutory schemes and measures concerned with advancing the employment status of disabled persons. The newly formed PACTs based in Job Centres provide help to disabled job-seekers and liaise with employers and other organisations, as well as administering the statutory quota scheme. PACTs also promote vocational rehabilitation and training through Training and Enterprise Councils and the Employment Rehabilitation

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[64] Local Government and Housing Act 1989 s 7.

[65] This section draws upon publications of the DE describing its services to disabled people, as well as the following secondary sources: Thompson, 1986; Barnes, 1991; Berthoud *et al*, 1993.

Service,[66] as well as encouraging, advising and assisting employers to improve disabled employment policies and practices. Sheltered employment and sheltered placement provision is made for people with severe disabilities who are unable to obtain or secure employment in the open labour market. At the present time, and subject to changes being introduced in 1994, various special schemes provide financial or practical help and encourage employers to make reasonable accommodations for disabled workers. These include the Job Introduction Scheme, Special Aids to Employment Scheme, Adaptations to Premises and Equipment Scheme, Assistance with Fares to Work Scheme, Personal Reader Service Scheme, Remote Working Scheme, and Business on Own Account Scheme.[67] Mainstream employment and training programmes operated by the DE and its agencies are also open to disabled persons.

Employers who engage a disabled person may have doubts about the disabled employee's ability to meet the full requirements of the job or to perform to the expected level of productivity. Such doubts are not always justifiable and many job descriptions and requirements are not always strictly related to the needs of the job. This may be addressed by discussion with the disabled employee and any mentor (such as a Disability Employment Adviser). One solution to this problem might be to engage the disabled employee on a trial period. The Job Introduction Scheme encourages this by paying a grant of £45 per week towards the remuneration of a disabled worker employed by an employer for a 6 week trial period. The scheme only applies to a position which is expected to last for at least 6 months after the trial period. The employer must pay the disabled employee the normal rate for the job during the trial period. The grant is payable upon the completion of a trial period approved under the scheme before it commenced. Provision is made for a *pro rata* payment if the trial period is shortened for whatever reason. Sickness absence of 1-3 weeks will not count under the scheme, although the trial period may be extended. Such absence for more than 3 weeks will normally terminate the trial period, subject to the employer's wishes.

The DE provides practical and financial assistance to employers to encourage the recruitment of disabled workers. One example is the Job Introduction Scheme. Assistance may also be given to disabled persons. For example, the Fares to Work Scheme subsidises the use of private transport to work by employees whose severe disability prevents them using public transport. Grants of up to £6,000 are available under the Adaptations to Premises and Equipment Scheme to help disabled employees to work effectively and productively. To

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[66] The functions of the ERS are gradually being contracted out to local training agents: Berthoud *et al*, 1993: 39

[67] Research demonstrates that awareness and usage of these special schemes is unacceptably low: Morrell, 1990.

qualify for grant, the adaptations must be for the specific needs of a disabled employee and the employer must employ that employee so long as capable of satisfactorily doing the job.

Usually this cannot assist employers to meet their obligations under the Chronically Sick and Disabled Persons Act 1970, which *requested* employers to make reasonable and practicable provision for the needs of disabled persons using any premises provided by them.[68] This voluntary duty encompassed access to and within the workplace, car parking facilities and sanitary conveniences. The impact of this voluntarist approach was minimal. However, the Disabled Persons Act 1981 took matters a stage further.[69] This inserted a new provision into planning legislation.[70] Local planning authorities are obliged to draw to the attention of a party seeking planning permission for any new development the above statutory provisions relating to disabled people and the Code of Practice for Access of the Disabled to Buildings.[71] The culmination of this evolutionary approach was the Government's decision in 1985 to address the access rights of disabled people via building regulations. Since 1987, reasonable provision must be made in new or substantially altered buildings to allow disabled persons access to and use of the premises, and to provide appropriate sanitary conveniences.[72] These provisions apply to the workplace, but not to existing buildings.

The Special Aids to Employment Scheme provides employers with a wide range of equipment (such as talking calculators, loudspeaker telephone aids, electrically powered wheelchairs, and special tools and workbenches) to assist disabled employees at work. To qualify under this scheme the employee must be a registered disabled person. Assistance can also be given to employers who wish to employ a disabled person working from home via information technologies. The Personal Reader Service enables blind and partially-sighted employees to claim the cost of employing a part-time reader at work. The employee must be registered with the local council as sight-impaired. A grant of £2.25 per hour for up to 15 hours per week is payable quarterly in advance for up to two years. The employee must be handicapped by the sight disability and either be starting a new job or be in danger of losing a present job or be returning to work in a different position or be experiencing restricted career development.

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[68] CS&DPA 1970 ss 4 and 7-8A, as amended by the CS&DP(A)A 1976 ss 1-2.

[69] DPA 1981 s 3.

[70] Now the Town and Country Planning Act 1990 s 76.

[71] British Standards Institute Code of Practice BS 5810 (1979).

[72] See now: Part M of Schedule 1 to the Building Regulations 1991 (SI 1991 N° 2768), as amended by SI 1992 N° 1180, made under the Building Act 1984. See further: Department of Environment and Welsh Office, 1992.

With effect from April 1994, many of the schemes run by the DE are to be replaced by a new and unified scheme entitled the Access to Work scheme.[73] The Job Introduction Scheme will continue to be run separately, but the Business on Own Account Scheme will be discontinued. The Access to Work Scheme will channel existing and new forms of assistance to registered disabled persons and will give priority to the disabled unemployed. However, there will be a ceiling (of a specified amount yet to be announced) of financial help that a disabled person may receive in any five year period. Controversially, the changes in provision have been used to announce that in future employers will be expected to contribute up to 50 per cent of the cost of assistance to disabled employees who have been in their employment for over 6 months. Employers will also have to pay for individual items of equipment or assistance of under £100 in such circumstances. Inevitably these proposals have attracted criticism by disability rights group who suspect the heavy hand of public expenditure cutting is upon these proposals.[74]

Code of Good Practice

The Code of Good Practice on the Employment of Disabled People is issued by the DE.[75] Unlike other codes of practice in employment law, the Code of Good Practice is a voluntary standard. It does not enjoy statutory underpinning nor does it have the force of law. Nevertheless, it furnishes guidance for employers who wish to develop disabled employment policies, to comply with the relevant law and to introduce best practice in employing disabled workers. The Code of Good Practice is also a source of information about financial and other assistance available to promote disabled employability. It furnishes employers with valuable advice on the recruitment and selection of disabled employees.[76] Especial attention is paid to job descriptions and requirements, methods of recruitment, selection procedures, interviewing and health screening. The Code also seeks to heighten employers' awareness of their statutory obligations under the 1944 Act (above) and employment protection legislation (below).

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[73] *Employment Gazette* Vol 101 N° 7 (July 1993) at 299; *IRS Employment Trends* N° 544 (September 1993) at 2.

[74] *IRS Employment Trends* N° 544 (September 1993) at 2.

[75] The Code was originally issued by the MSC in November 1984. A revised version of the Code was issued by the DE in March 1993. Research indicates that the Code has been received by about one-fifth of employers, although within those establishments penetration of the Code to different levels of management appears to be good: Morrell, 1990. Among employers who are aware of the Code, opinion of its contents is highly favourable.

[76] Code of Good Practice paras 5.1-5.21.

EMPLOYMENT PROTECTION LEGISLATION AT LARGE

Once in employment, disabled persons in general enjoy no greater employment protection than do able-bodied employees. Disabled employees must qualify for and may participate in statutory employment rights upon an equal basis with their non-disabled colleagues. In the absence of specific protective legislation there is nothing to prevent an employer giving less favourable treatment to disabled persons on the grounds of their disabilities. However, brief consideration should be given to some of the nuances of disabled employment rights.

Wages

Under the Wages Council Act 1979 employers could be permitted to pay disabled workers, otherwise subject to a wages order, less than the statutory fixed minimum rate.[77] This provision was repealed by the Wages Act 1986.[78] In the absence of a relevant wages order guaranteeing minimum wages, the law does not prevent employers having differential rates of remuneration for disabled and able-bodied employees, unless this is the product of sex-based discrimination.[79] In any event, the statutory minimum wage machinery is in the process of being dismantled following the repeal of its statutory underpinning.[80]

Health and safety

Both at common law and under section 2 of HASAWA 1974 employers have a duty to ensure the safety of their employees and others in the workplace. This duty includes an obligation to provide safe fellow employees. Although there is no evidence to suggest that disabled employees have an inferior safety record in comparison with other employees, some consideration should be given to the health and safety implications of employing disabled persons. PACTs and the Employment Medical Advisory Service of the Health and Safety Executive advise on the health and safety implications of employing persons with particular disabilities. The Code of Good Practice is also a source of reference on this point.[81]

The employer's duty of care towards the disabled employee should not be overlooked. If an employee has been engaged with a known disability, the employer must consider whether any adjustments should be made to that employee's working conditions so as to provide a

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[77] Wages Act 1979 s 16.

[78] Wages Act 1986 s 32(2) and Sch 5.

[79] Under the Equal Pay Act 1970.

[80] Trade Union Reform and Employment Rights Act 1993 s 35.

[81] Paras 4.2-4.3 and 6.3.

safe workplace, a safe system of work, and safe plant and equipment.[82] In the circumstances peculiar to that disabled employee, the fact that the employee might be under a greater risk of injury or a risk of a further disabling injury should be contemplated.[83] The employer's obligations to other employees (and third parties) must be considered. If the evidence supports a conclusion that a disabled employee cannot fulfil the functions of a job (or otherwise work alongside colleagues) without being a danger to others, then it may be permissible to move the employee to other work or, in the extreme, to dismiss.[84]

The employee's duty under section 7 of HASAWA 1974 to have regard for his or her own safety and that of others raises a further issue. It is suggested that a disabled employee who concealed a disability or did not disclose a deteriorating disability might be in breach of this provision. Although unlikely to result in a criminal prosecution of the employee, this would be both a justifiable reason for dismissal and grounds for defending any personal injury claim which the employee might bring against the employer.

Dismissal

Disabled persons, whether registered under the 1944 Act or not, are likely to enjoy better protection from arbitrary dismissal by reliance upon the unfair dismissal provisions in Part V of the 1978 Act. Indeed, a registered disabled employee may be entitled to special consideration by an employer, including reflection upon any personal circumstances, before a decision to dismiss is taken.[85] However, to enjoy statutory protection from unfair dismissal under the 1978 Act, the disabled employee must have two years continuous employment with the dismissing employer. In this case, the employer must have a reason capable of justifying the dismissal and must have acted fairly in deciding to dismiss in reliance upon that reason.[86] The House of Lords decision in *Polkey v AE Dayton Services Ltd*[87] underlines the importance of adopting a fair procedure when dismissing any employee.

An employer who has engaged an employee with a known disability (or retained a newly disabled employee) should be slow to dismiss for incompetence. In these circumstances, the

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[82] *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 (HL).

[83] *Paris v Stepney Borough Council* [1951] AC 367 (HL).

[84] *Harper v National Coal Board* [1980] IRLR 260 (EAT).

[85] *Seymour v British Airways Board* [1983] ICR 148 (EAT).

[86] EP(C)A 1978 s 57.

[87] *Polkey v AE Dayton Services Ltd* [1988] AC 344 (HL).

employee's disability must be taken into account. If the employee is performing to the level of capability reasonably to be expected of a person with that disability, then the employer might not be able to justify the dismissal. On the other hand if, once the disability has been accounted for, the employee's performance is below the expected standard then, provided the employer applies a fair procedure for handling the dismissal, termination of employment may be defensible.

Employees whose health or disability status makes them a safety risk to themselves or their colleagues might be dismissed fairly on grounds of "capability" or "some other substantial reason" provided the employer has acted reasonably in deciding to dismiss.[88] Disability does not inevitably result in ill health absenteeism. If an employee's disability or health status does lead to absences from work, however, then the employer is entitled to act upon the evidence. The usual procedural steps for handling an ill health dismissal should be taken.[89] A disabled employee might be entitled to a degree of sympathetic treatment, especially if the disability or health problem is job-related or was known to the employer at engagement.[90] An employer should consider what, if any, alternative employment is available.[91]

It will be only in exceptional circumstances that an employee's disability will be a relevant factor when deciding to dismiss on the grounds of conduct. A disabled employee subject to a disciplinary dismissal is entitled to the same procedural safeguards as any other employee. The redundancy of a disabled employee is likely to be both a reasonable cause of dismissal under the 1944 Act and a justifiable reason for dismissal under the 1978 Act. In both cases, however, the employer should ensure that the same criteria for selection for redundancy are being applied to disabled and able-bodied employees alike. The Code of Good Practice recommends that employers should consider redeploying redundant disabled employees within the undertaking or assisting them to find employment elsewhere.[92] In the absence of an agreed procedure or universally recognized practice, the fact that an employee is a registered disabled person is a personal circumstance which might be taken into account and given a little weight in the employee's favour when redundancy selection is being undertaken.[93] This

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[88] *Harper v National Coal Board* [1980] IRLR 260 (EAT); *Converform (Darwen) Ltd v Bell* [1981] IRLR 195 (EAT).

[89] *Shook v Ealing London Borough Council* [1986] ICR 314 (EAT).

[90] *Kerr v Atkinson Vehicles (Scotland) Ltd* [1974] IRLR 36 (IT).

[91] *Garricks (Caterers) Ltd v Nolan* [1980] IRLR 259 (EAT).

[92] Paras 6.10 and 6.12.

[93] *Hobson v GEC Telecommunications Ltd* [1985] ICR 777 (EAT); *Forman Construction*

does not necessarily mean that a disabled person should be given automatic preference when retaining employees during a restructuring or redundancy situation.[94]

Employers should give particular care and attention to the question of how to deal with employees who become disabled while in their employment. The Code of Good Practice (Part Two: Section Seven) recommends that employers should attempt to retain the newly disabled employee in suitable employment. There might be good second order reasons for doing so. If the cause of the disability is job-related, then retention of the employee in paid employment will be an important factor in reducing any personal injury compensation the employer (or its insurer) might have to pay. Advice and assistance in retaining and retraining newly disabled workers can be obtained from PACTs and Employment Rehabilitation Centres. Use of the Job Introduction Scheme (referred to above) can be made to provide a trial period in an alternative position for the employee. The Sheltered Placement Scheme might be used to retain indirectly the services of the worker. This provides integrated employment opportunities for severely disabled persons in open employment. Local authorities, voluntary bodies or Remploy Ltd can sponsor a registered disabled person who satisfies the condition of severe disability. The sponsor pays the individual a wage for work done under contract for a host company which provides the work and training. The host company pays the sponsor for the work done by the individual based upon actual output measured against the notional costs of employing an able-bodied worker to do the work. In some cases, however, the employer might have no option but to terminate the employment of the newly disabled worker. Such a dismissal can be justified on the grounds of "capability" and will be a fair dismissal if the employer has acted reasonably in all the circumstances.

PRESSURE FOR REFORM

Reviews of the quota legislation during the 1970s and 1980s appear to posit three fundamental questions.[95] First, should the employment of disabled persons be provided for entirely by voluntary means, or is some form of statutory protection necessary? Second, if statutory protection is necessary should this be in the shape of a quota scheme or some modification thereof? Third, if any form of quota scheme is unacceptable, what other form of statutory protection would be appropriate?

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v Kelly [1977] IRLR 468 (EAT).

[94] *Seymour v British Airways Board* [1983] ICR 148 (EAT).

[95] See, for example: MSC, 1981: para 6.2.

Voluntarism or regulation?

In 1981, the MSC looked at the possible elements and implications of a mainly voluntary approach to disabled employment opportunities.[96] This would include a major programme aimed at educating employers about the ways in which disabled persons could be more effectively integrated into employment. The MSC believed that:

> this kind of policy is the best way of capitalising on the existing goodwill of employers and creating an atmosphere in which positive practices towards disabled people's employment will be developed.[97]

This would be supplemented by existing advice services in Job Centres and employment offices, and by special schemes to provide financial assistance for disabled persons and employers. The MSC also proposed the development of a code of practice setting out clear guidelines on all aspects of the employment of disabled workers and indicating the proportion of employees who should be disabled individuals.[98] However, the MSC doubted whether the voluntarist approach would work without statutory support.[99]

Research in 1978 indicated that disabled people, especially those who were registered as disabled *and* unemployed, strongly supported the retention of special legislation, even with the weaknesses of the existing system.[100] Thirty-five per cent thought that special legislation was the most useful means of helping disabled persons in the labour market, although the remaining 65 per cent favoured special employment services or employer subsidies or publicity and information campaigns or other voluntarist measures in varying degrees.[101] However, when given a free policy choice without prioritisation, disabled respondents overwhelmingly supported special laws to help disabled people find and keep work (92 per cent).[102] The same research indicated that, if disabled people had a choice as to the form that special legislation would take, 39 per cent favoured quota legislation, 37 per cent want anti-discrimination laws and 22 per cent opted for legal obligations upon employers to publish policy and records.[103] Nevertheless, some 86 per cent of disabled

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[96] MSC, 1981: chapter 7.

[97] MSC, 1981: para 7.2.

[98] MSC, 1981: para 7.7.

[99] MSC, 1981: paras 7.10 and 7.11.

[100] MSC, 1979: para 68.

[101] Research Surveys of Great Britain Ltd (RSGB), 1978: Table 9.12.1.

[102] RSGB, 1978: Table 9.11.1.

[103] RSGB, 1978: Table 9.9.1.

persons in the 1978 survey favoured retention of the quota scheme with modifications and reforms.[104]

Anti-discrimination legislation?

The 1978 survey also solicited disabled respondents' views on the introduction of anti-discrimination legislation. Eighty-three per cent of respondents favoured or strongly favoured laws that would give individual disabled people the opportunity to take action against being unfairly treated by employers because of disability.[105] If such legislation was to be introduced, 87 per cent of disabled individuals believed that it should apply to both those seeking work and those in work.[106] Anti-discrimination legislation for disabled persons had not been seriously considered in official circles until the MSC's 1979 review of the quota.[107] In its 1981 review of the quota, the MSC returned once again to what it now termed "equal opportunities legislation".[108] The MSC thought that such a new initiative would highlight the needs of disabled persons and increase public awareness of their problems. Such legislation, unlike the quota, could also protect disabled employees once in employment. Most importantly:

> It would be compatible with the philosophy of the Tomlinson Committee, since it would afford disabled people the right to treatment on the same terms as able-bodied people.[109]

Furthermore, it might induce employers to re-examine employment policies, thus benefitting all disabled persons, regardless of registered status.

Nevertheless, the MSC thought that such legislation would assist persons with lesser disabilities more than those with more serious disabilities. Furthermore, the MSC feared that increased litigation would increase the antagonism of employers toward disabled persons. It was specifically feared that frivolous or malicious complaints would bring the law into disrepute and that the complaints system necessary to make the legislation work would require considerable resources. In particular, it was thought unlikely that disabled individuals would wish to expose themselves to a detailed examination of their medical status by a

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[104] MSC, 1979: para 75.

[105] RSGB, 1978: Table 9.8.1.

[106] RSGB, 1978: Table 9.8.2.

[107] MSC, 1979: paras 78-81.

[108] MSC, 1981: para 8.20.

[109] MSC, 1979: para 79.2.

tribunal or court.[110] There was also concern that anti-discrimination law would produce disputes about whether an individual's disability was an inherent handicap in relation to a particular job and the MSC thought that:

> discrimination may be justified in some instances when a person's medical history or a reduction in his working capacity mean that his employment would pose a particular risk.[111]

This is an issue which will be returned to in Chapter XII below.

Perhaps crucially, the MSC thought that there was insufficient evidence of disability discrimination that would justify such legislation and rejected direct comparisons with other forms of social discrimination.[112] No recommendation for anti-discrimination legislation covering disability was forthcoming.[113] The House of Commons Employment Committee (HCEC) also felt unable to support anti-discrimination legislation, believing there to be a "fundamental difference" between disability and race or sex and the effect these factors have upon the ability to do a job.[114] Instead, the 1981 report recommended that there should be a general statutory duty upon employers obliging them to "take reasonable steps to promote equality of employment opportunity for disabled people", linked to a code of practice, in a model similar to that of the HASAWA 1974.[115] It was proposed that it should be a criminal offence not to comply with this statutory duty. However, it was envisaged that every effort would be made to resolve problems without recourse to litigation and that few cases would go beyond the stage of MSC staff visiting employers whose policies were deficient.[116] In unresolved or persistent cases of breach, there might be a conciliation stage followed by the issuing of an improvement notice. Only if improvement was not forthcoming

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[110] MSC, 1981: para 8.22. Very pertinently in the context of this study, the MSC believed that individual litigation would have a limited effect beyond the circumstances of the individual case.

[111] MSC, 1979: para 80.2.

[112] MSC, 1981: para 8.22.

[113] MSC, 1981: para 8.23. Perhaps significantly, the MSC thought that the legislation would require a body such as the EOC or CRE to support it. The MSC could not recommend such a body be established in the light of the lack of conclusive evidence, the present economic situation and the current public expenditure policy.

[114] HCEC, 1981: para 23.

[115] MSC, 1981: para 8.24 and 8.25. The obligation would be to give disabled persons full and fair consideration for all vacancies, to retain newly disabled employees where reasonable and practicable, and to provide full and fair opportunities for the career development of disabled persons.

[116] MSC, 1981: paras 8.29 and 8.30

would a prosecution be put in train.

Triumph of voluntarism

The Government's attitude to special legislation for disabled workers in Britain has been ambivalent. The problem is that, until comparatively recently, the Government has refused to recognise the phenomenon of discrimination against disabled people. Some concession that the disadvantage experienced by disabled workers in the labour market might transcend the limitations of disability was made in the most recent consultative document. The DE states that "[m]istaken attitudes to or misconceptions about disability (and about older workers) by some employers and others in society will need to be challenged".[117] However, it is clear that the role of legislation in tackling such attitudes and misconceptions is to be a limited one. The consultative document restates the Government's commitment to remove "unnecessary burdens on employers which may inhibit job growth" and indicates that retained legislation in the employment field must be necessary to promote policy objectives, be effective and be acceptable to the taxpayer and businesses.[118]

The most recent consultative document on disabled employment policy acknowledges that anti-discrimination legislation:

> would have the advantage of sending positive messages to employers about people with disabilities and of putting enforcement into their hands. It would also bite on areas other than recruitment. However, a major difficulty is that disability, unlike race or sex, can be relevant to job performance and what to some might seem like discrimination may in reality be recruitment based on legitimate preferences and likely performance.[119]

This final observation is a constant theme in official reactions to the pressure for anti-discrimination law. In reality, however, it does not withstand close scrutiny. Even in sex and race discrimination, the ability to do the job is a relevant factor and employers are allowed to discriminate upon the basis of merit or ability. If a disabled person is refused an employment opportunity because he or she cannot perform the work or is ill-suited to the job, that is not unlawful discrimination and it is not proposed that it should be so.

The consultative document also contends that:

> An anti-discrimination law would be complex to draft and uncertain in its application. There is a danger that faced with a law uncertain in its application, employers would

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[117] DE, 1990: 16.

[118] DE, 1990: 35-6.

[119] DE, 1990: para 5.14.

become more reluctant to hire people with disabilities.[120]

The first part of this argument is a peculiar kind of special pleading, where the wish is father to the thought. It is a self-serving argument that leads to the deliberate drafting of ambiguous and opaque legislation in order intentionally to thwart the aims of reform.[121] It flies in the face of the evidence in Chapters VI to IX of this study, in which successful examples of disability discrimination legislation in the US, Canada and Australia are presented. The argument is also contradicted by the testimony of practising employment lawyers in Britain, who see no such difficulties in devising and writing such legislation.[122] The second part of the contention does have some mileage in it. Undoubtedly new laws prohibiting employment discrimination on the grounds of disability will not be actively courted by employers and business. Certainly, laws that are inadequately drafted will cause confusion and might create difficulties for their intended beneficiaries. However, with careful and well-intentioned draftsmanship, there is no evidence that discrimination laws have made employers *more* reluctant to hire women and ethnic minorities, and this is not the parallel experience of disability discrimination laws elsewhere.

The HCEC, having taken evidence and heard the reactions to the 1990 consultation exercise, concluded that the Government:

> should explore urgently the possibility of equal opportunities legislation for the employment of people with disabilities and report to Parliament on its potential effects and costs in the labour market.[123]

However, earlier this year, the Prime Minister responded that:

> We have no plans to introduce generalised anti-discrimination legislation because we foresee problems in both approach and implementation. However, as I have made clear in the past, we are continuing to work to eliminate unjustified discrimination against people on the ground of their disability. We believe that this is best achieved by education and persuasion backed up by targeted legislation to address specific problems.[124]

It seems likely, therefore, that it will require a change of government before any equal

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[120] DE, 1990: para 5.15.

[121] Examples of such an approach can be seen in the Transfer of Undertakings (Protection of Employment) Regulations 1981, the Equal Pay (Amendment) Regulations 1983 and the Industrial Tribunals (Rules of Procedure) (Equal Value Amendment) Regulations 1983 in respect of two areas of employment law (acquired rights and equal pay for work of equal value) to which the Government was unwilling committed by EC law.

[122] Law Society Employment Law Committee, 1992.

[123] HCEC, 1990: para 23.

[124] HC Deb Vol 217 col *485* (Mr J Major, Prime Minister) 22 January 1993.

opportunities legislation addressing disabled employment rights will be enacted in Britain.[125]

Attempts at law reform

Nevertheless, since 1982 there have been 15 attempts to introduce, by means of private members' bills, anti-discrimination legislation covering disabled people. In the 1981-82 parliamentary session, the Disablement (Prohibition of Unjustifiable Discrimination) Bill was presented.[126] This was a simple 9-line, 3-clause bill that sought merely to prohibit intentional or unintentional "unjustifiable or unreasonable discrimination", on the ground of disability, in the provision of a service, facility or opportunity. It would also have established a regulatory commission to handle individual complaints and to promote the social integration of disabled people. The Bill did not progress beyond a First Reading.[127] The Bill was reintroduced in the following parliamentary session in a slightly more sophisticated form.[128] The Bill sought to prohibit "unjustifiable discrimination" on the grounds of "disablement". The administration and enforcement of the proposed Act would be placed in the hands of the Equal Opportunities Commission (EOC), which would advise the Secretary of State as to the range of activities in which disability discrimination would be unlawful. The Bill attempted to define disability discrimination for the first time by simply adopting the existing definitions of direct and indirect discrimination from the Sex Discrimination Act 1975 and the Race Relations Act 1976. Although the measure was accorded a Second Reading debate, it did not progress further.[129]

In the 1983-84 session, Part I of the Chronically Sick & Disabled Persons (Amendment) Bill again attempted to introduce anti-discrimination measures.[130] The Bill contained a bald prohibition against discrimination "on the grounds of physical, mental or sensory disability in any activity" to which the suggested legislation related. The meaning of discrimination was amplified in a later clause, and included both direct and indirect discrimination, as well as discrimination informed by disability characteristics. A further clause would establish a

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[125] Both the Labour Party and the Liberal Democratic Party have indicated support for such legislation at various times.

[126] HC Bill 173 (1981-82).

[127] HC Deb Vol 27 cols 151-2 and 619 (1st Reading 6 July 1982).

[128] Disablement (Prohibition of Unjustifiable Discrimination) Bill: HC Bill 21 (1982-83).

[129] HC Deb Vol 33 col 269 (1st Reading 1 December 1982); HC Deb Vol 36 cols 1238-97 and HC Deb Vol 37 col 638 (2nd Reading debate adjourned 11 February 1983).

[130] HC Bill 15 (1983-84).

Disablement Commission of 8-15 commissioners (at least half of whom should be disabled persons) to promote the social integration of disabled people. The Commission would also investigate compliance with the law and individual complaints, conciliating where necessary. It was charged with keeping the law under review. The Disablement Commission would be given appropriate powers and the question of enforcement procedures and penalties would be left to subsequent regulations. However, it was envisaged that the Commission would have the power to issue non-discrimination notices and that complaints of employment discrimination would be dealt with in industrial tribunals. In addition, the Bill would make disability discrimination a statutory tort, subject to civil proceedings in the ordinary courts for damages. The Commission would report annually on its activities and make periodic recommendations as to the scope of the law and the persons covered by it, the meaning of discrimination, and measures for avoiding discrimination. It was intended that the scope and breadth of the law would be clarified by regulations, but that the Bill would cover employment, education, provision of goods, facilities and services, insurance, transport, property rights, housing and accommodation, pensions, membership of clubs and associations, and civic rights and duties. Once again, the Bill received a more extensive airing than its predecessors, but failed to proceed beyond Second Reading.[131]

The Bill was reintroduced in the House of Lords.[132] During its attempted progress in the Lords, the definition of disability was expanded upon, effectively reflecting the terminology of disability adopted by the WHO. The Bill was defeated at 3rd Reading stage.[133] Simultaneously, another Bill began its progression in the House of Lords. The Disabled Persons Bill began life as a much simpler bill. It would establish a Disablement Commission of 4-6 (later 8-10) members, whose duties would include the consideration of:

> disadvantages experienced by disabled people which could reasonably be redressed and any discrimination against them which, if proved, should be removed or rectified.[134]

This Bill passed all stages in the House of Lords and was sent to the House of Commons, but

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[131] HC Deb Vol 46 col 388 (1st Reading 20 July 1983); HC Deb Vol 48 cols 1087-1150; HC Deb Vol 49 cols 622-4 and 1165; HC Deb Vol 50 cols 646 and 1360 (2nd Reading debate adjourned 18 November 1983).

[132] Chronically Sick and Disabled Persons (Amendment) (N° 2) Bill: HL Bills 79, 143 and 177 (1983-84).

[133] HL Deb Vol 445 cols 440-1 (1st Reading 28 November 1983); HL Deb Vol 446 cols 415-76 (2nd Reading 16 December 1983); HL Deb Vol 448 Cols 969-1014 (Committee 24 February 1984); HL Deb Vol 449 cols 1425-33 (Report 22 March 1984); HL Deb Vol 450 cols 660-72 (3rd Reading 3 April 1984: Bill not passed).

[134] HL Bills 78, 158 and 196 (1983-84).

made no further headway.[135]

In parliamentary session 1985-86, the Companies (Disabled Employees Quota) Bill sought to make the 3 per cent disabled quota under the 1944 Act to be calculable against the employer's total workforce at any given time. It also tried to raise the maximum fine for breach of the quota provisions from £100 to £5,000 for any one offence, except for record keeping offences, where the fine would be raised from £20 to £1,000.[136] Although not strictly an anti-discrimination measure, the Bill can be seen as part of the continuing battle to keep the disability discrimination issue before Parliament. However, inevitably the Bill made little progress.[137] The following session there was a further attempt to reintroduce the Chronically Sick and Disabled Persons (Amendment) Bill 1983-84 under the title of the Disabled Persons' Rights Bill.[138] This also failed to get off the ground.[139] In the 1990-91 Session the Disability Discrimination Bill was given a First Reading but subsequently not even printed.[140]

The enactment by the US Congress in July 1990 of the Americans with Disabilities Act gave British disability rights advocates renewed inspiration to attempt similar legislation in this country. In the 1991-92 session the Civil Rights (Disabled Persons) Bill was presented,[141] patently fashioned after the American model. For the first time, a comprehensive and carefully drafted proposal for disability discrimination legislation was before Parliament. Despite cross-party support the Bill failed to obtain a Second Reading in the House of Commons, ironically being talked out by a Conservative backbench MP who was himself a person with a record of disability.[142] The Bill was promptly reintroduced in the House of

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[135] HL Deb Vol 445 col 441 (1st Reading 28 November 1983); HL Deb Vol 446 col 476 (2nd Reading 16 December 1983); HL Deb Vol 449 cols 211-31 (Committee 6 March 1984); HL Deb Vol 450 cols 867-71 (Report 5 April 1984); HL Deb Vol 450 cols 1308-14 (3rd Reading 12 April 1984: passed and sent to House of Commons).

[136] HC Bill 219 (1985-86).

[137] HC Deb Vol 102 cols 366-8 (1st Reading 23 July 1986).

[138] HC Bill 99 (1986-87).

[139] HC Deb Vol 111 cols 873-5 (1st Reading 4 March 1987).

[140] HC Bill 78 (1990-91): HC Deb Vol 185 cols 288-90 (1st Reading 6 February 1991: not printed).

[141] HC Bill 24 (1991-92).

[142] HC Deb Vol 200 col 280 (1st reading 4 December 1991; HC Deb Vol 202 cols 1235-63 (2nd Reading 31 January 1992: debate adjourned while Mr R Hayward MP was

Lords,[143] but failed to make progress with the intervention of the General Election.[144] The Bill was again reintroduced in the 1992-93 parliamentary session,[145] and passed all stages of the legislative process in the House of Lords, even surviving a procedural error on Third Reading.[146] The Bill was sent to the House of Commons, where it has been presented for First reading, but it has made no further progress.[147] However, in order to keep the initiative, the sponsors of the Bill have subsequently presented three further Bills applying to Northern Ireland, Scotland and Wales.[148]

CONCLUDING REMARKS

As we shall see in Chapter XIV below, Britain's reliance upon a statutory quota scheme as the main vehicle for the legal regulation of disabled workers' rights has in practice meant that disabled people's employment aspirations rest upon frail foundations. The failure of the quota in terms of both observance and enforcement will be seen as a salutary lesson for those who advocate the reservation of employment for minority groups. As a result, the British system of disabled employments rights now relies heavily upon extra-statutory measures, government exhortations and employer goodwill. It is the triumph of voluntarism over regulation. Nevertheless, as has been recounted, the pressures for reform have been building up over the last decade and, if the quota is incapable of being made operable, then there are many who would favour the introduction of equal treatment legislation and equal opportunity

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addressing the House).

[143] Civil Rights (Disabled Persons) (N° 2) Bill: HL Bill 49 (1991-92).

[144] HL Deb Vol 535 col 346 (1st reading 6 February 1992); HL Deb Vol 535 cols 1473-96 (2nd Reading 21 February 1992).

[145] Civil Rights (Disabled Persons) Bill: HL Bills 13, 25 and 29 (1992-93).

[146] HL Deb Vol 537 col 711 (1st Reading 1 June 1992); HL Deb Vol 538 cols 79-108 (2nd Reading 15 June 1992); HL Deb Vol 538 cols 846-51 (Committee 1 July 1992); HL Deb Vol 539 cols 295-305 (Report 15 July 1992); HL Deb Vol 539 cols 1516-34 (3rd Reading 4 November 1992); HL Deb Vol 540 col 80 (Message from House of Commons 9 November 1992); HL Vol 540 cols 329-30 (3rd Reading Amendment (Privilege) made 12 November 1992).

[147] HC Bills 79 and 82 presented for First Reading (5 November 1992), withdrawn and represented for First Reading (9 and 12 November 1992). It is believed that the Bill has been blocked by Government whips: "News in Brief" *The Times* Saturday 27 February 1993 at page 2. The Bill has cross-party support, as evidenced by over 300 MPs signing Early Day Motion 330, which recognises the necessity of anti-discrimination legislation and calls for the early introduction of a CRDP Bill.

[148] Civil Rights (Disabled Persons) (Northern Ireland) Bill (HC Bill 210: 1st Reading 16 June 1993); Civil Rights (Disabled Persons) (Scotland) Bill (HC Bill 216: 1st Reading 23 June 1993); Civil Rights (Disabled Persons) (Wales) Bill (HC Bill 215: 1st Reading 24 June 1993).

requirements covering disabled persons. Inevitably, British disability rights activists look to abroad for inspiration. In recent years, British employment law has been fundamentally revised by the harmonising effects of EC law. Accordingly, in the following chapter we look to the continent and to the Community to see what lessons, if any, can be learned for the development of disabled employment laws in this country.

CHAPTER V:
DISABLED EMPLOYMENT RIGHTS IN THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

INTRODUCTION

Broadly speaking, approximately 30 million or 1 in 10 Europeans are disabled in the sense that they are restricted in or unable to perform an activity or function considered normal for a human being because of physical, sensory, mental or psychological impairment.[1] As in Britain, so in the other member states of the European Community (EC), disabled people of working age face higher rates and longer periods of unemployment, and suffer sweeping social and economic disadvantages. In Germany, for example, there are estimated to be some 1.38 million severely disabled persons, of whom 37.5 per cent are of working age. Some 1.017 million severely disabled persons are estimated to be in the German labour market, of which 80 per cent were employed under a statutory quota scheme, 7 per cent were otherwise employed, and 13 per cent were unemployed.[2] Undoubtedly, statistics of this nature are repeated across the Community and they can be partly explained by prejudice and unreconstructed negative attitudes among employers and in the labour market generally.[3] Architectural, environmental and occupation barriers too explain in part the unequal status of the disabled European citizen.

The development of a so-called "Social Europe" during the period since the mid-1970s holds out some prospect that disabled workers' rights could be secured by Community-wide initiatives. EC intervention has had a marked effect upon the use of law to redress inequalities that are the product of occupational segregation along gender lines. In particular, it has ensured that women workers enjoy a degree of protection and redress in the diverse areas of equal pay; equal treatment in employment, social security and occupational pension schemes; pregnancy, maternity and child care rights; and, most recently, in sexual harassment in the workplace.[4] European workers and participants in the labour market have also benefitted from action taken in respect of collective redundancies, acquired rights, employer insolvency, employment information, as well as health and safety in general.[5] While

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[1] Mangin, 1983; European Communities (EC), 1991 and 1993.

[2] Commission of the EC, 1988: 7.

[3] See, for example: Ravaud *et al*, 1992 cited in the previous chapter.

[4] See: Council Directives 75/117, 76/207, 79/7, 86/378, 86/613, 92/85 and Commission Recommendation 92/131.

[5] See: Council Directives 75/129, 77/187, 80/987, 89/391, 91/533 and 92/56.

these advances might indirectly improve the lot of disabled employees, it has often been noted that EC law has largely by-passed the employment problems of minority groups. If EC law has barely scratched the surface of race discrimination,[6] for example, what prospects are there that disabled persons will enjoy even formal equality under a market order? We turn now to consider what recognition disability has been given in EC social and employment policy-making.

EUROPEAN COMMUNITY LAW

Social action programmes and disabled people[7]

The early steps of the EC on the path towards better services and opportunities for disabled persons were witnessed in the 1970s. In 1974 the Community established an initial action programme to promote the vocational rehabilitation of disabled persons.[8] In the same year, the Community initiated its first social action programme under which the European Social Fund was established to support vocational training for open employment, with disabled persons recognised as a priority group.[9] Other activities were also begun, especially in respect of research and social security provision.[10] In 1981, the UN International Year of Disabled People, the European Parliament adopted a Resolution on the economic, social and vocational integration of disabled persons.[11] This was followed by an influential opinion on

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[6] Szyszczak, 1992.

[7] This section draws heavily upon Daunt, 1991: Chapter 2. Patrick Daunt was the first Head of the EC Bureau for Action in Favour of Disabled People until 1987. The Bureau was responsible for staffing and guiding the implementation of the action programme. The programme was managed by consultation with organisations of disabled people and representatives of the relevant ministries in member states, and liaison with the various organs of the Community. Daunt's account of the action programme is therefore almost a primary source and assists the penetration of EC decision-making.

[8] Council Resolution of 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons: OJ C 80/30 (9 July 1974). The legal basis for Community competence in this arena would appear to be Arts 128 and 235 of the Treaty of Rome.

[9] Council Resolution of 21 January 1974 concerning a social action programme: OJ C 13/1 (12 February 1974). Moreton argues that only a relatively small proportion of funds has assisted disabled people in Britain. He points out that in 1989/90 the UK Government's special schemes for disabled persons consumed £400 million, while European Social Fund financing in the same area amounted to less than 10 per cent of this figure: Moreton, 1992: 77.

[10] Daunt, 1991: 10.

[11] Resolution of the Parliament of 11 March 1981 concerning the economic, social and vocational integration of disabled people in the EC: OJ C 77/27 (6 April 1981).

the problems of disabled people from the Economic and Social Committee.[12] The Resolution pointed a way forward and demonstrated a concern for the rights of disabled people above and beyond rehabilitation. As the International Year ended, and stimulated by these earlier contributions, the Community agreed a new action programme on disabled people for the next four years.[13]

In the event, the first action programme lasted six years from 1982 to 1987. It covered a wide and inclusive range of disabilities and focused upon two areas. These two areas have continued to be at the forefront of Community action in this field: first, employment, vocational training and rehabilitation and, second, environmental factors, including mobility, transport, access to buildings and facilities, and housing. The focus of this study is employment and, fortuitously, employment was also the obvious choice for policy initiatives by the EC Commission in respect of disabled people. So it was that the EC Recommendation on the Employment of Disabled Persons emerged from the first action programme.

EC Recommendation on the Employment of Disabled Persons

The Council of Ministers adopted the Recommendation on the Employment of Disabled People in the EC in 1986.[14] Daunt records that the decision to bring forward a weak instrument such as a Recommendation, rather than a constraining measure such as a Directive, was taken by the Commission against the advice of its legal service. He notes that:

> The argument put forward... was that a draft Directive on the employment of disabled people, brought forward at a time of high unemployment throughout the Community, would encounter insuperable difficulties in the Council, so that either it would never get through or it would be adopted after considerable delay and in such a truncated form as to be virtually useless. A Recommendation on the other hand would have a fair chance of being adopted within a reasonable time, its weakness of form being also compensated by a relative richness of content; moreover, it would always be possible to bring forward a draft Directive at a later stage, which by focusing on points where the member states had evidently failed to carry out the terms of the

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[12] Opinion of the Economic and Social Committee of 18 April 1981 on the situation and problems of the handicapped: OJ C 230/38 (10 September 1981). See also: Economic and Social Committee of the EC, 1981.

[13] Resolution of the Council and Representatives of the Governments of the Member States of the EC of 21 December 1981 on the social integration of disabled people: OJ C 347/1 (31 December 1981). The Resolution was influenced by a Communication of the Commission to the Council of 14 November 1981 entitled *The social integration of disabled people - A framework for the development of Community action*: OJ C 347/14 (31 December 1981).

[14] Council Recommendation of 24 July 1986 on the employment of disabled people in the EC (86/379/EEC): OJ L 225/43 (12 August 1986).

Recommendation would have a much better chance of success.[15]

Nevertheless, despite this concession and the careful groundwork that had been done to establish the statistical, socio-economic and legislative basis of the proposals,[16] the Council "did all it could at all stages of the process to weaken its content, especially on the question of employment quotas".[17] In contrast, the European Parliament (with the noticeable exception of the British Conservative parliamentarians) was highly critical of the weakness of the Recommendation's form and content.[18]

The Recommendation is addressed to the member states and requires them to take all appropriate measures "to promote fair opportunities for disabled people in the field of employment and vocational training".[19] This principle of fair opportunity is applicable to access to employment and training, retention in employment or training, protection from unfair dismissal, and opportunities for promotion and in-service training. The Recommendation expects governments to adopt policies to assist disabled people: in particular, by taking steps to eliminate negative discrimination and to provide for positive action.[20] Annexed to the Recommendation are guidelines for a framework for positive action to promote the employment and vocational training of disabled people.

The elimination of discrimination involves five recommended actions.[21] First, governments should review existing law and extra-legal provisions to ensure that they do not contradict the principle of fair opportunity regardless of disability. Second, member states are urged to take "appropriate measures to avoid as far as possible dismissals linked to a disability". Third, the principle of equal treatment in employment and training should admit only exceptions justifiable by reference to incompatibility between work-related activities and a particular disability. Fourth, the use of testing before, during and after training should be designed to

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[15] Daunt, 1991: 22.

[16] See in particular the background studies prepared for the Commission: Rouault, 1978; Mangin, 1983; Commission of the EC, 1984; Croxen, 1984; Vogel-Polsky, 1984; Albeda, 1985.

[17] Daunt, 1991: 23. The legal basis of the Recommendation is Art 235 of the Treaty of Rome (supplementary powers of the Community to act on a unanimous proposal).

[18] The opinion of the European Parliament is expressed at OJ C 148/84 (16 June 1986).

[19] Recommendation 86/379 Art 1.

[20] Recommendation 86/379 Art 2.

[21] Recommendation 86/379 Art 2(a)(i)-(v).

avoid disadvantaging candidates with disabilities. Fifth, governments should provide disabled persons with means of redress or of establishing their rights "in accordance with national law and practice". The mandating of positive action on behalf of disabled persons is noteworthy. The Recommendation envisages that member states should fix "realistic percentage targets" for the employment of disabled workers in both public and private enterprises having a *minimum* workforce of 15-50 employees.[22] It is expected that "[m]easures should also be adopted for making these targets public *and achieving them*" (my emphasis). It is recommended that guidelines or codes of good practice for the employment of disabled persons should be adopted, while governments should encourage employers to take measures corresponding with the spirit of such guidelines or codes.[23]

Although the Recommendation sets out a number of *desiderata* for the employment rights of disabled employees, its legal effect is limited. First, the British government is of the view that existing statutory and extra-statutory measures in this country already meet the principle of fair opportunity established by the Recommendation.[24] The DE points to the 1944 Act and to the employment protection regime established by unfair dismissal law as particular evidence of this, although the Department recognises that the Recommendation goes wider than existing legislation here. Second, it should be borne in mind that, under Article 189(5) of the Treaty of Rome, Recommendations do not have binding force. However, in *Grimaldi v Fonds des Maladies Professionelles*,[25] the European Court of Justice has ruled that Recommendations, while not conferring directly enforceable rights upon individuals, are to be taken account of by domestic courts, particularly for clarifying other provisions of national or EC law. Nevertheless, it seems likely that the European Court's ruling only applies where the national legislation in question has been adopted in order to implement the Recommendation. Given the British government's view that the Recommendation merely reflects existing legal and extra-legal standards in the Britain, disabled persons will be unable to seek much comfort from the *Grimaldi* case or the Recommendation itself.

EC Charter of Fundamental Social Rights

Although EC Recommendation 1986 urges member states to take all appropriate measures to promote fair opportunities for disabled people in the field of employment and vocational

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[22] Recommendation 86/379 Art 2(b)(i).

[23] Recommendation 86/379 Art 2(b)(ii)-(iii).

[24] DE, 1986.

[25] [1990] IRLR 400 (ECJ).

training, in the absence of anti-discrimination or equal opportunities legislation the expectation of disabled employees to equality of employment opportunity rests upon frail foundations. Temporary hopes that stronger legal measures would emerge from EC social policy were raised in December 1989 when the member states of the EC agreed the text of a Charter of the Fundamental Social Rights of Workers. Article 26 of the Charter expresses the entitlement of disabled persons "to additional concrete measures aimed at improving their social and professional integration". Among other things, these measures are to give particular attention to "vocational training, ergonomics, accessibility [and] mobility". At first sight, this broad statement of the social rights of disabled persons appeared to have inevitable consequences for disabled employees. However, the detailed implementation of the principle here espoused had to await the adoption of Directives and other legal instruments under the action programmes which underpinned the Charter. As will be seen shortly, little has materialised that offers a prospect of "hard law" promoting the employment rights of disabled persons. Nevertheless, it will be apparent that disabled people at least had a toehold upon the social policy agenda of the Community and that the social action programme, the Recommendation and the Social Charter held out some promise of legal recognition of disabled employment problems.

Subsequent developments

In 1987 proposals were pressed for the establishment of a second action programme to promote the social and economic integration and independent living of people with disabilities.[26] The second action programme was established in 1988 under the title "HELIOS".[27] The HELIOS programme, like its predecessor, set out to take some policy initiatives, to further co-operation with and support for disability-related projects, and to disseminate information about disability issues. The main policy initiative taken was to follow-up progress on the 1986 Recommendation. A report was published in July 1988 containing accounts of progress in each of the 12 member states and a comparative analysis.[28]

The report contains much of interest and is extremely informative. However, it fails to give a true indication of the impact of the 1986 Recommendation in the 12 member states because, by relying upon national reports, it takes the form of up-dating statements of

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[26] COM(87) 342 of 20 July 1987.

[27] Council Decision of 18 April 1988 establishing a second Community action programme for disabled people (HELIOS): OJ L 104/38 (23 April 1988). HELIOS stands for Handicapped People in the European Community Living Independently in an Open Society.

[28] Commission of the EC, 1988.

national measures and policies, and provides little evidence of whether new initiatives have been taken *because of* the Recommendation. In reading the separate national reports, one suspects that the Recommendation, as a weak Community instrument, has had little direct influence upon legal and extra-legal action on behalf of disabled people in the member states since 1986. Rather, the Recommendation provides a convenient peg upon which to hang such new developments as have occurred. Nevertheless, the report furnishes a comprehensive account of the employment status of disabled persons in the Community and of the various statutory and voluntary measures taken to assist them. It strengthens the case for special legislation to eliminate negative discrimination and to encourage positive action.

It is clear from the 1988 report that the 1986 Recommendation has achieved little that would not have already been proposed by individual governments. As much seems to have been recognised by the Council of Ministers in its response to the Commission's report.[29] Daunt summarises this view thus:

> The Council is also surprisingly honest in its assessment of how little the Recommendation itself has in reality achieved. It has, we are told, 'contributed to a review' and 'encouraged new measures' in accordance with its spirit. Even more disarmingly, 'it has offered a Community reference framework for national measures that were being prepared when it was adopted'. It would be difficult to find words which demolish more skilfully than that any faith we may have in the effectiveness of *non-constraining* supranational instruments in the social field.[30]

However, the Council's conclusions do contain a direct invitation to the Commission to bring forward proposals to ensure better co-ordination and greater consistency between the various measures already in place in the member states. This has been interpreted as an invitation to legislate for a Directive on the employment rights of disabled persons, an invitation that has so far been ignored.[31]

Subsequently, the action programme underpinning the Social Charter has provided a fresh impetus to the economic integration of disabled people. First, it provides the basis for a third action programme addressing the rights and circumstances of disabled Europeans: HELIOS II. The third action programme covers the period 1992 to 1996 and was adopted in February 1993.[32] HELIOS II has attracted ECU 37 million (approximately £29.5 million) for the

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[29] Conclusions of the Council of 12 June 1989 on the employment of disabled people in the Community: OJ C 173/1 (8 July 1989).

[30] Daunt, 1991: 151-2 (emphasis in original).

[31] Daunt, 1991: 152.

[32] Council decision establishing a third Community action programme to assist disabled people (HELIOS II 1993-1996): OJ L 56/30 (9 March 1993).

duration of the programme. Like its predecessors, however, it focuses upon exchange of information, promoting co-operation between member states and appropriate organisations for the social integration of disabled persons, and continues the dialogue with disability bodies.

Second, the Charter action programme has led to a draft Directive tackling the mobility requirements of disabled workers.[33] Although the draft Directive springs from Article 26 of the Charter, its legal basis is Article 118A of the EEC Treaty, which allows the Council to legislate in the occupational health and safety field.[34] The preamble to the original proposal made it clear that the draft Directive was designed to assist workers with reduced mobility gain access to employment and to reduce the hazards of their travel to work.[35] The measure was thus a peculiar equal opportunities instrument dressed up in the language of a health and safety regulation. However, the amended proposal less ambitiously seeks to facilitate "the safe travel of workers with reduced mobility to and from their place of work". This appears more like a safety initiative and less like an equal opportunities agenda. If adopted,[36] the draft Directive will apply to workers "with reduced mobility", meaning a person "who has special difficulty in using public transport *for his occupational activities* owing to a serious handicap of a physical or mental origin".[37] The italicised portion of this quotation was added to the original drafting and has the effect of limiting the reach of the draft Directive, which is clearly not intended as a comprehensive transport reform. Nevertheless, member states will be required to take steps to ensure that means of transport are provided that are accessible and interchangeable, and to facilitate the transport of disabled workers.[38] These steps will

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[33] Proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility: OJ C 68/7 (16 March 1991) as amended by OJ C 15/18 (21 January 1992).

[34] See: Commission of the EC, 1992.

[35] This was also restated in Art 1. The European Parliament previously resolved that mobility should be seen as essential in finding and retaining suitable employment for disabled persons: OJ C 281/85 (19 October 1987).

[36] Progress has been painfully slow. The Commission proposal was tabled in February 1991. The Economic and Social Committee gave its opinion in July 1991 and there was a first reading in the European Parliament in December 1991. The amended proposal was re-tabled in January 1992 but has made virtually no headway in discussion by the Council of Ministers since.

[37] Art 2(a) with emphasis supplied.

[38] Art 3. The means of transport covered by this mandate include public transport, transport provided by an employer and special transport services for disabled persons: Art 2(b).

include informing, advising and training disabled workers and transport staff to ensure that disabled workers can travel safely and are able to use the provided transport.[39] Where a worker with reduced mobility cannot travel without a companion or other form of assistance, governments must ensure that additional transport costs are not incurred.[40]

An Annex to the draft Directive lays down in broad detail the minimum requirements that the public transport systems must meet. It is clear from this source that accessibility includes the provision of transport services of sufficient number, frequency and timetabling. Safe access to transport facilities should be guaranteed by appropriate methods, such as lowered floors, lifting platforms, mobile ramps, folding platforms or personal assistance by trained staff. The Annex states that at least "one entrance/exit must be designed to allow workers with reduced mobility to board/alight from the mode of transport safely" and there must be compatibility between the means of transport and the corresponding infrastructure to ensure safe access and egress. Inside transport vehicles, the needs of disabled passengers must be accounted for, particularly in respect of reserved seating, corridors, and toilet and washing facilities. Appropriate signs should be used to indicate accessibility of transport for workers with reduced mobility and to give notice of stops.

It will be clear from the above account that the Community's momentum in establishing the social and economic integration of persons with disabilities in the new Europe has been slowed. In the following section we consider what measures the individual member states have taken to recognise disabled workers' rights to legal protection.

MEMBER STATES OF THE EUROPEAN COMMUNITY

The development of rehabilitation, resettlement and employment rights for disabled Europeans post-1945 has been influenced by four main factors.[41] First, the immediate post-war years witnessed a prolonged economic boom and produced labour market conditions in which there was a severe shortage of labour. This provided the impetus for policies designed to find ways of employing disabled persons who now became a prized commodity in the workforce. Second, the development of the welfare state led to greater financial provision being made

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[39] Art 4. It is envisaged that Arts 3 and 4 must be implemented by 31 December 1999: Art 8(a).

[40] Art 5. This presumably addresses the need for concessions in respect of carers and favourable treatment of guide dogs or palliative devices (such as wheelchairs). It is proposed that this part of the draft Directive will be operational by 31 December 1993 (and not 1994 as originally proposed): Art 8(b) as amended. This deadline is clearly no longer realistic.

[41] Daunt, 1991: 6-8.

for those disabled by industrial and other accidents. The costs of a comprehensive compensation scheme led many countries to seek ways of rehabilitating and resettling disabled individuals in the vocational context. Third, the efforts of voluntary and other organisations actively involved with disabled people raised the profile of individuals with disabilities in society and changed the perception of the majority towards this minority. Slowly, but perceptively, employers and others have come to see that disabled persons are not simply passive recipients of charity but individuals capable of making a contribution in their own right and entitled to do so. Fourth, with the ending of the economic boom of the 1950s, disabled people came to recognise the fickleness of labour market conditions and that economic forces alone could not deliver basic social rights. So it was, from the 1960s onwards, that disabled Europeans began to import the lessons of the independent living and civil rights movements in the US. As in Britain, so in Europe have we seen the growth of organisations of disabled people campaigning for fundamental disability rights.[42]

The majority of the 12 member states of the Community have adopted legal instruments (in some cases, constitutional instruments) which *expressly* refer to the right of disabled persons to equal treatment or recognition in employment.[43] The exceptions are Britain, Denmark, France, Ireland and Luxembourg. The EC Commission has commented:

> The explicit affirmation of the right to equal treatment is necessary to balance existing policies which place all the effort on the individual and present the elimination of the disability (or of its implications) as the solution to the problem of occupational integration. The right to equal treatment puts these policies on a new track and establishes a balance between personal effort and adaptation of the social and vocational environment. It prevents the disabled person from being excluded from certain rights and benefits solely on grounds of his *(sic)* disability, and implies a right to facilities to prevent the disability from becoming an obstacle to occupational integration. Affirmation of the right to equal treatment thus reverses the current underlying philosophy, which is one of assistance.[44]

The equal treatment principle is frequently observable as imbuing access to vocational training and rehabilitation services. However, its application in respect of access to employment opportunities is more variable throughout the member states. More often than not, the application of the equal treatment principle to disabled employment opportunities is expressed

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[42] One such European example is the *Groupement des Intellectuels Handicapés Physiques*, later retitled as the *Groupement pour L'Insertion des Personnes Handicapées Physiques* (the Association for the Integration of Physically Disabled Persons), in France. Another example is Italy's *La Lega per il Diritto al Lavoro degli Handicappati* (the National League for the Right to Work of the Handicapped). For an account of the work of the National League in campaigning for a right to work for disabled people, see Tudor, 1989.

[43] Commission of the EC, 1988: 71 and Table 2.

[44] Commission of the EC, 1988: 71.

in a voluntarist framework of state-provided vocational rehabilitation, training and resettlement services, complemented by state-sponsored policies designed to educate and persuade employers,[45] and supported by stated-provided financial assistance, subsidies, aids and equipment.

We now turn to examine the main components of *legal* measures in respect of disabled employment rights in the 11 remaining member states of the EC.[46] In doing so, it is worth recording in passing that, although British lawyers know much about other common law jurisdictions and increasingly more about EC supranational law, knowledge of the law and legal systems of mainland Europe remains poor. Research and inquiry is not aided by difficulties in gaining physical and linguistic access to primary materials. Accordingly, this section perforce relies upon secondary sources.[47]

Belgium

In Belgium, until 1 January 1991, co-ordination of national policy on the employment of disabled persons was in the hands of the National Fund for the Social Resettlement of the Disabled.[48] On that date the National Fund was wound up and its functions transferred to the National Sickness and Invalidity Insurance Institute and to three community-based organisations. The relevant law on the employment rights of disabled persons applied to physically disabled individuals whose effective employment capacity was reduced by at least 30 per cent (20 per cent in the case of mental disability).[49] However, with the decentralisation of disabled employment policy, the concept of disability measured by degree has been abandoned. Disability is now recognised by the effect that an impairment has upon social and vocational integration.

National provision is made for private sector employers employing no less than 20 persons

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[45] The use of codes of good practice as a substitute for legal measures appears to be almost ubiquitous.

[46] Britain is excluded from this discussion because of the full treatment given to it in Chapter IV above.

[47] This section draws heavily upon the following sources: Commission of the EC, 1988; *European Industrial Relations Review*, 1988; UN, 1990a; WHO, 1990; Council of Europe, 1990; Daunt, 1991; Commission of the EC, 1992. See also (1993) *Social Europe* Supplement 1/93.

[48] Established under the Law of 28 April 1958.

[49] Law of 16 April 1963 on the social reclassification of disabled persons (the Social Resettlement of the Disabled Act 1963) gazetted in *Moniteur Belge* 23 April 1963.

to employ disabled workers as a quota obligation.[60] However, this provision is not in force, although this was to be fixed by Royal Order. In the public sector, a number of jobs in the civil service and certain semi-public bodies are reserved for disabled persons,[61] and local authorities must apply a quota of 1 out of every 55 full-time positions in favour of disabled persons.[62] A disabled applicant for public employment must demonstrate fitness for work and that he or she constitutes no danger to the health or safety of himself or herself or others.[63] If a disabled person is rejected for a position in public employment, the National Fund for the Social Resettlement of the Disabled had to be informed of the grounds for rejection. This function now devolves to the community-based successors of the National Fund.

Belgian disabled employees enjoy no particular protection from dismissal and must rely upon the general principles of unfair dismissal law or collective bargaining arrangements. However, some essential measures to promote disabled employment opportunities have been adopted. First, employers who engage a disabled worker are entitled to a wage subsidy for up to one year.[64] A wage subsidy has also been provided for by national collective bargaining, which establishes the principle that disabled workers are entitled to a guaranteed minimum wage equivalent to that fixed by bargaining or custom.[65] Second, a contribution may be made to the provision of a suitably fitted work bench or to the costs of tools and working clothes.[66] Third, a loan may be made to an employer if merited by the circumstances of the employment of a disabled person.[67] More recently, a new decree has insisted that employers of an

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[60] Law of 16 April 1963 section 21. In principle, the law applied to disabled persons who had registered with the National Fund for the Social Resettlement of the Disabled.

[61] Royal Order of 19 November 1976 (*Moniteur Belge* 19 January 1977). Originally 600 posts were so reserved, but since 1977 1,200 jobs are set aside for this purpose. See also: Royal Order of 5 January 1976 (*Moniteur Belge* 29 August 1972) and Royal Order of 11 August 1972 (*Moniteur Belge* 3 March 1976).

[62] Royal Order of 23 December 1977 (*Moniteur Belge* 13 January 1978) and Royal Order of 6 March 1978 (*Moniteur Belge* 25 March 1978).

[63] Royal Order of 1 December 1964 (*Moniteur Belge* 4 December 1964).

[64] Ministerial Decree of 23 January 1968, as amended (*Moniteur Belge* 3 February 1968).

[65] Collective Labour Agreement N° 26 of 23 April 1977, upon which the force of law has been conferred by Royal Order of 11 March 1977. See further: Ministerial Decree of 3 February 1977 (*Moniteur Belge* 23 February 1977).

[66] Ministerial Decree of 17 March 1965, as amended (*Moniteur Belge* 20 March 1965).

[67] Ministerial decree of 17 November 1965 (*Moniteur Belge* 3 December 1965).

average maximum of 100 workers must take steps to adapt the job of a newly disabled worker or enable that worker to perform another job.[58] The employer is obliged to employ the worker under a contract of indefinite duration for at least one year from the recommencement of work. A wage subsidy may be payable, subject to a medical examination of the employee and a medical report justifying the subsidisation.

Denmark

Denmark does not operate a quota scheme nor does it have a legislative definition of disability. It is not surprising, therefore, that disabled persons enjoy no particular additional protection under Denmark's law of dismissal, and there is no obligation on an employer to re-employ a newly-disabled existing employee. Nevertheless, disabled persons are given priority access to certain jobs in public authorities, subject to the duties of such jobs being within the capacities of disabled persons.[59] Such jobs may not be filled until the recruitment of a disabled person has been considered and negotiated with the placement services.

France

The French quota scheme applies across the public and private employment sectors to undertakings employing at least 20 staff.[60] The scheme applies to workers recognized as disabled, regardless of the extent of disability, by the Board for the Guidance and Occupational and Social Rehabilitation of Disabled Workers,[61] and to victims of industrial accidents resulting in a permanent partial disability of 10 per cent or greater. Recipients of disability pensions are also covered if their working capacity has been reduced by two-thirds or more. From 1991, the quota is set at 6 per cent of full-time or part-time positions (having increased in steps from 3 per cent since 1988). A severely disabled person, and those disabled persons being trained by the employer, count as 1.5 workers for the purpose of calculating compliance with the quota obligation.

Employers may be exempted from the quota scheme in a number of ways. First, an employer might sub-contract production or the provision of services with sheltered workshops or other

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[58] Royal Order of 13 December 1991. This came into force on 20 December 1991.

[59] By a decree of the Ministry of Labour of 18 December 1985.

[60] Law N° 87-517 of 10 July 1987. This replaces legislation dating back to 1924 and 1957. Under the 1957 law, the quota had been set at 10 per cent and affected employers of at least 11 workers. General employment policy towards disabled persons is set out in the Disabled Persons (Policy) Act (Law 75-534 of 30 June 1975).

[61] A disabled worker is a person whose chances of obtaining or holding a job is reduced by inadequacy or reduction of physical or mental capacities.

designated centres of disabled employment. Second, through collective bargaining, French employers might provide plans in respect of disabled persons covering recruitment, integration, training, adaptation to technological change or retention during redundancies. Third, an employer might be exempted from the quota system by paying an annual contribution of up to 500 times the minimum hourly pay per non-employed disabled person to the Development Fund for the Occupational Integration of Disabled Workers. This last exemption also forms the basis for penalising employers who wilfully fail to comply with the quota. For each unfilled quota place, such employers are required to pay an amount equal to the voluntary annual contribution plus a 25 per cent premium. French law provides no particular protection from dismissal for disabled employees, but the employment contract of a worker injured in the workplace is suspended until he or she is restored to full capacity.

In 1990, France introduced additional legislation to protect sick and disabled workers.[62] By amending Articles 187 and 416 of the Penal Code, it is designed to use criminal sanctions and civil proceedings to address discrimination against persons and employees informed by their health status or disability. An employer may not dismiss or take action short of dismissal against employees on the grounds of their health, disability or habits. Such dismissals or actions are treated as null and void, and a defendant is punishable by imprisonment of two months to one year and/or a fine of Francs 2,000-20,000. The exceptional case is where an employee's incapacity to continue work has been certified by a doctor. So an inability to work or continued absenteeism will constitute non-discriminatory grounds. The law also extends to an employer's refusal to recruit someone because of their state of health or disability.

Germany[63]

German employment law requires employers with a workforce of at least 16 employees to maintain a quota of severely disabled employees of at least 6 per cent.[64] Failure to comply with the quota obligation results in a civil penalty of Deutschmark 200 per month (since

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[62] Law N° 90-602 of 12 July 1990 concerning the protection of persons against discrimination by reason of their health or handicap. Reported in *European Industrial Relations Review* (September 1990) at page 7 and in (1990) *Le Monde* 18 April. The law is gazetted in *Journal Officiel de la République Française* 13 July 1990 at 8272. I am grateful to Ian Bynoe, Legal Director of MIND, for a copy of the legislation, and to Adina Halpern (formerly legal assistant at MIND) for her notes of translation of the measure. I remain responsible for any infelicities in recording the substance of this law.

[63] In addition to the sources cited at footnote 47 above, this sub-section draws upon: Brooke-Ross and Zacher, 1983; Brooke-Ross, 1984; Jochheim, 1985; Rasnic, 1992.

[64] *Erstes Gesetz zur Änderung des Schwerbehindertengesetzes*, 1989 *Bundesgesetzblatt*, I 1110; *Gesetz zur Sicherung der Eingliederung Schwerbehinderter in Arbeit, Beruf und Gesellschaft*, 1986 *Bundesgesetzblatt*, I 1421, *ber* 5.1550.

1990) for every job not filled by a severely disabled person and, in serious cases of breach, a criminal fine of up to Deutschmark 5,000 might be exacted. The proceeds of this penalty are ploughed back into positive disabled employment policies pursued by the state.[65] The quota obligation applies to both the private and public sector. A disabled person is an individual who suffers from a functional disability (*Behinderung*), which affects his or her capacity for social integration, as a consequence of the effects of an irregular physical, mental or psychological condition. The disability must have a duration of at least 6 months and limit functional freedom of ability by at least 20 per cent. Severely disabled persons (*Schwerbehinderten*) are those whose disability is measured at 50 per cent or more, whatever the actual effect upon their life activities. A disabled person who is unable to find or retain employment without assistance, and whose disability is measured at 30 per cent or more, is also treated as severely disabled (*gleichstellte*). An individual's status as a severely disabled person is decided upon by federal pension officers upon application for a card known as an *Ausweiss*. Disputes about a person's disability status are heard by a social court rather than a labour court.

A severely disabled person may only be dismissed after careful consideration of means of avoiding dismissal (for example, by reasonable accommodation), and only then with authorisation from the relevant authorities. Under German unfair dismissal law, the fact that an employee becomes disabled does not constitute a valid reason for dismissal. In the case of the onset of severe disabilities, the worker is entitled to expect reintegration in the employer's workplace as a result of the quota scheme, assuming that suitable employment opportunities exist. German employers' legal obligations are amplified and explained by a code of good practice.

Inevitably, problems for the German legal system in general, and for disability laws in particular, have been created by the unification of the former German Federal Republic and the German Democratic Republic (GDR). In a recent regional labour court decision,[66] it was held that where a public institution takes over an institution of the former GDR, but fails to make adequate provision for the employment of the quota of severely disabled persons formerly employed under the obligations of GDR law, each case has to be decided separately as to whether or not the refusal to employ is based on a reasoned use of discretionary

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[65] It is reported that in 1983 some Deutschmark 230 million was paid by way of penalty by three-quarters of the employers who are bound by the quota scheme and that the remaining quarter employed far more disabled workers than their quota obligation: WHO, 1990: 129.

[66] Case N° 12 Sa 56/92 [1993] *Neue Justiz* 192 (*Landesarbeitsgerich Berlin*).

powers. Otherwise, the disabled employees have a right to continued employed. Furthermore, the legal provisions making it obligatory for public authorities to employ a quota of severely disabled persons does not infringe the principle of equal treatment in the Articles 12(1) and 33(2) of the German Constitution (*Grundgesetz*).

Greece

The term "disabled person" is regarded as a pejorative one in Greece, and the phrase "persons with specific needs" is preferred.[67] Such individuals are defined as:

> persons between the ages of 15 and 65 who have a limited capacity for occupational activity deriving from any permanent impairment or deficiency of a physical or mental nature.

There was a legally established quota of 3 per cent of "persons with specific needs" operating in both the public and private sectors; however, this was raised to 5 per cent in 1991.[68] The quota applies to undertakings and departments employing at least 50 workers. Curiously, the law provides that disabled persons shall be recruited as lawyers in public bodies employing at least 3 lawyers, and 20 per cent of vacant positions for ancillary staff in the public sector are to be reserved for disabled persons.[69] Also in the public sector, 5 per cent of vacant posts must be reserved and all vacant telephonists' jobs are reserved for blind applicants.[70] Disabled persons are also entitled to 6 extra days paid annual holiday.[71]

Ireland

In the Irish Republic, a disabled person is defined by reference to a disadvantage for a given individual resulting from an impairment or disability which limits or prevents the accomplishment of a role that is normal for the individual concerned. Since 1977, a 3 per cent quota of disabled persons has applied to the public service as a matter of government decision. In order to seek the benefits of the quota scheme, a disabled person must be registered with the National Rehabilitation Board as a person who, because of disability, is substantially disadvantaged in obtaining or retaining employment. The quota scheme does not apply to private employers. Otherwise, Irish law is wholly silent upon the question of disabled

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[67] Law 1648 of 1986.

[68] Joint Decision 30965 of the Ministers of National Defence and of Labour (14 May 1991).

[69] Law 1648 of 1986.

[70] Law 1735 of 1987.

[71] Ministerial Decree 2065/89.

workers and their rights.[72]

Italy[73]

The Italian quota programme applies to "sheltered" workers. This is a broad category that includes disabled persons, widows, orphans and refugees.[74] A disabled person for this purpose is one whose capacity for work is diminished as a result of physical, mental or sensory impairment, whether the cause of impairment is congenital or otherwise.[75] A system of registration is in existence. The quota scheme requires employers with over 35 employees to engage 15 per cent of the workforce from the pool of "sheltered" workers and approximately 12 per cent of engagements must be applied to disabled persons. Within that quota, there is a specific quota rate for different categories of disabled person, with provision for virement between different categories. The categories include the war disabled, disabled civil servants, occupationally disabled persons with up to one-third work incapacity, non-occupationally disabled persons with similar work incapacity, and deaf mutes. Blind persons attract reserved occupations as telephonists, masseurs and masseur-physiotherapists. An employer who cannot integrate a disabled worker into the workplace (for example, because of production or environment) must recruit other "sheltered" workers instead. Breach of the quota scheme results in a fine, the proceeds of which are directed to vocational training. A disabled worker may be dismissed if, because of disability, he or she is unable adequately to carry out the duties of employment. Under the quota scheme, dismissal of a disabled worker on health grounds is only allowed if there is a danger to the safety of the installation or a risk to co-workers' health.

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[72] However, the Irish Congress of Trade Unions has adopted a Disabled Person's Charter asserting the right to meaningful training and employment without discrimination or stereotyping: *European Industrial Relations Review* N° 1989 (July 1990) at page 7.

[73] This account also draws upon Tudor, 1989: 42-4.

[74] Act N° 482 of 2 April 1968. The Act consolidates pre-existing legislation from as early as 1940.

[75] The Act makes fine distinctions and appears to exclude "civil invalids" suffering from *mental* disability (article 5), whereas such exclusion does not apply to war, service or work invalids. In a warning judgment, the Italian Constitutional Court indicated that the constitutional legality of this exclusion was doubtful: *Riganti, Zucchetti and Cannata v Plada Plasmon spa and Fontana Luigi di Veduggio spa* (Decision N° 1088 of 1988) (1989) I *Foro Italiana* 980 and (1991) 9 ILLR 113. Subsequently, the exception has been declared unconstitutional by the Court: (Decision N° 50 of 2 February 1990) (1990) II *Rivista Italiana di Diritto del Lavoro* 269 and (1992) 10 ILLR 71. This decision has legislative effect, but reforming legislation was passed in 1992 (Act N° 104 of 5 February 1992).

Luxembourg

Disabled employment law in Luxembourg applies to disabled persons who have suffered war disabilities, industrial accident, and physical, mental or psychological impairment. In terms of their aptitude to obtain and retain employment, taking account of previous work experience, their capacity must be reduced by at least 30 per cent. The Luxembourg quota system applies in both the private sector and public employment. In the private sector, employers with at least 50 staff must apply a 2 per cent quota of disabled employees, while employers with 25-50 staff must give priority to disabled applicants for suitable positions.[76] A disabled person identifies himself or herself as an intended beneficiary of the quota legislation by registration. In the public sector, the quota reserves a minimum of 2 per cent of jobs for disabled persons who can meet statutory training and admission criteria. Breach of the quota law is subject to a maximum fine of Luxembourg Francs 10,000. Luxembourg's dismissal law does not extend particular protection to disabled persons. However, a worker disabled at work is entitled to be given priority in re-engagement.

Reform of the 1959 law was proposed in 1989 by extending the coverage of the quota to persons with mental or sensory disabilities and increasing the public sector quota to 5 per cent. It was also proposed that in the private sector all enterprises with 25 personnel must employ at least one disabled employee, that for companies with at least 50 staff the quota would be 2 per cent and for companies with over 300 employees the quota would be 4 per cent.[77] However, it was not until 1991 that reform in these terms was achieved.[78] In addition, the 1991 law prohibits the payment of wages to disabled workers lower than legally or collectively agreed provisions, unless there is proof that their performance is less than an able-bodied worker, in which case they may be paid in proportion to performance.

The Netherlands

The Dutch law on the employment of disabled persons requires both sides of industry, through collective bargaining or acting in concert, to adopt measures of occupational reintegration with the objective of ensuring that employers maintain a 5 per cent quota of disabled workers.[79] Since 1 July 1989, employers who have failed to satisfy these

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[76] Act of 28 April 1959.

[77] *European Industrial Relations Review* N° 184 (May 1989) at page 7.

[78] Law of 12 November 1991.

[79] Disabled Workers Employment Act 1986 (*Wet Arbeid Gehandicapte Werknemers*). Research into the attitudes of Dutch employers towards the new law showed that about two-thirds of employers did not want to recruit any more disabled persons and about one-fifth said

requirements are obliged to employ between 3 and 7 per cent of their workforce as disabled persons. The quota varies according to sector, industry or public service department. A failure to observe the quota will result in periodic levies on defaulting employers, while those exceeding the quota will qualify for financial assistance. The beneficiaries of these measures are persons in receipt of disability benefits or pensions and those benefitting from special measures for carrying out their work. The Dutch legislation envisages a number of alternative means by which employers can satisfy their obligations to disabled workers. These include the establishment of re-training and re-employment measures, re-defining job standards so as to avoid exclusion of disabled applicants, reserving jobs for disabled persons, making adaptations to work positions and making other accommodations to promote disabled employability, considering alternative work and reassignment, and making use of state-provided funds to compensate for the costs of accommodation, including wage dispensation regulations. Dutch employees may not be dismissed on ill-health grounds, without the agreement of a regional employment office, where the illness lasts for over 2 years. Account must be taken of possible accommodations in the workplace, including reassignment to other work. Judicial interpretation of these provisions ensures that a partially incapacitated worker cannot be dismissed if he or she is able to carry out the work within his or her capacities. If not so capable, the worker may volunteer for other work commensurate with his or her disability and the employer must make a reasonable offer of alternative duties.

Portugal

Portugal has not adopted a quota scheme, but has preferred to promote disabled employment opportunities through education, persuasion, employment measures and financial assistance. Article 71 of the Constitution of the Portuguese Republic provides:

> The State is committed to pursue a national policy for the prevention, treatment, rehabilitation and integration of disabled people, to develop pedagogic methods whereby society may be made aware of the duty to respect and assist the disabled and assume responsibilities for the effective exercise of their rights, without prejudice to the rights and duties of parents or guardians.

Generally speaking, a disabled person is an individual who, as a result of an injury, deformity or infirmity, whether congenital or acquired, is permanently impaired in relation to their occupation. However, employers of more than 20 workers are required to give priority to the re-engagement of workers permanently incapacitated by an accident at work. Employers of more than 10 employees are required to retain in employment any industrially-injured worker with temporary incapacity of less than 50 percent. Otherwise, dismissal of a disabled person may only take place for good cause and disabled employees are given preference for retention

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that they would not employ any disabled person: *European Industrial Relations Review* N° 176 (September 1988) at page 7.

during redundancies.[80]

Spain

Positive action on behalf of disabled Spaniards in the labour market takes the form of a quota scheme. Public and private enterprises employing more than 50 permanent employees are subject to a 2 per cent quota of *registered* disabled persons.[81] The quota is enforced by the Labour and Social Security Inspectorate and non-compliance is an administrative infringement punishable by a fine. The law applies to disabled persons whose capacity for integration into working life is diminished by a foreseeably permanent impairment of physical, psychological or sensory abilities. In addition, discrimination is forbidden in recruitment or employment because of a reduction in physical, psychological or sensory capacity, provided the worker can perform the job and otherwise meet its requirements. An infringement of this prohibition may be visited with a fine of between Pesetas 50,000 to 500,000. Any regulation, collective agreement, contract or unilateral decision that discriminates against disabled persons in any or all aspects of employment is null and void. In the public sector, and especially in the civil service, disabled persons enjoy the general protection of the principle of equal treatment, and selection on merit and ability. However, in principle, 3 per cent of civil service posts are reserved for disabled staff.[82] Workers who suffer a permanent, but partial, disability are entitled to be re-employed by the employer, if necessary with accommodation for his or her residual capacity.[83] If the worker regains full capacity, he or she is entitled to be re-engaged in the first vacancy in the relevant job category.

CONCLUDING REMARKS

It will be clear from the foregoing account that the primary legal tool employed to assist disabled person in the labour markets of the European countries is a quota system. By the mid-1980s, most European disabled quota schemes were following the path of the British quota: a path of under-achievement and non-enforcement. The exceptional case was the German scheme, which is generally agreed to be a relative success, and which gives the lie to the assertion made by British employers that quotas are not compatible with commercial

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[80] Legislative Decree N° 84/76 of 28 November 1976.

[81] Registration is with an employment office. The legislation is contained in Act 13/82 of 7 April 1982 on the social integration of disabled people and derives its power from Art 49 of the Spanish Constitution of 1987, which reflects Spain's commitment to the Universal Declaration of Human Rights.

[82] Royal Decree 198 of 1987.

[83] Royal Decree 1451/83 of 11 May 1983.

competitiveness. Since then, however, other countries - most notably France, the Netherlands and Greece - have taken fresh initiatives to introduce new quota obligations or to strengthen existing quota provisions. The central feature of these recent developments is the fact that these quota schemes apply both in the public and the private sector. It seems fruitless to expect private sector employers to meet compulsory quotas unless the public sector, with whom the private sector is increasingly in competition, is similarly obligated and can demonstrate the lead in good practices.

While EC law has largely failed to provide a supranationally-imposed solution to unequal treatment of disabled workers, the above account of individual member states' attempts to protect disabled persons in the labour market presents some evidence of how a fresh approach to disability rights might be informed in Britain. The use of public sector quotas, a greater willingness to enforce those quotas and the imaginative use of fines and/or levies to deter or punish transgression or subsidise other positive policies seem worth a second glance. However, there is little empirical evidence readily available, beyond civil servants' national reports, to gauge how successful these European models really are in practice. The suspicion remains that, as in Britain, legal instruments fashioned nearly a century ago and in the unusual combination of circumstances resulting in the aftermath of world war - labour shortages and the influx of large numbers of war disabled ex-service personnel into local labour markets - have long ceased to serve their purpose. With the exception of France, European states have yet to embrace legislation that enshrines the anti-discrimination principle and, like Britain, voluntary action on disabled employment appears to be favoured over legal regulation in most European governments.

The prospects for a Community-level equal treatment directive for the benefit of disabled persons are not good. As was noted in Chapter I, Article 2 of the Social Chapter Agreement annexed to the EC Protocol on Social Policy calls for the EC to support and complement the activities of member states in, *inter alia*, "the integration of persons excluded from the labour market". While this is capable of being applied to disabled persons, the ambit of this laudatory phrase has yet to be determined. Furthermore, Britain is not a signatory to the Protocol, although it is part of the European Union Treaty signed at Maastricht in February 1992. While the health and safety competence of the EC might provide a future platform for Community legislation for the rights of disabled workers, any *social policy* initiatives in that regard will be undoubtedly the subject of British abstention. It is not surprising, therefore, that British disability rights activists have been fascinated by developments in the US since the mid-1970s. In the following two chapters, we examine the application of discrimination theory and law to disabled persons under US constitutional, federal and state jurisdictions.

CHAPTER VI:
DISABLED EMPLOYMENT RIGHTS IN THE UNITED STATES (1): THE SEARCH FOR CIVIL RIGHTS

INTRODUCTION

The enactment of employment rights for disabled persons in the United States (US) must be placed in the context of a society whose constitution commits it to the principles of equality and human dignity. The Civil Rights Act 1866 provided a cause of action for discrimination on the basis of colour.[1] Private employment discrimination on grounds of race or nationality was addressed by Title VI of the Civil Rights Act 1964, although this applied only to recipients of federal funds and grants.[2] Title VII of that Act established the principle of non-discrimination and equal treatment in employment irrespective of race, colour, gender, nationality and religious belief.[3] Women also enjoyed protection from sex-based discrimination in employment remuneration under the Equal Pay Act and Fair Labor Standards Act.[4] However, none of these civil rights measures protected disabled people.

Prior to the Rehabilitation Act 1973 (RA 1973), legislation affecting disabled persons had been piecemeal.[5] Most of these laws secured services and assistance for disabled people, rather than civil rights, or targeted only certain sections of the disabled constituency.[6] Moreover, the law and the legal system often conspired against the best interests of disabled persons. In one case,[7] for example, a minor excluded from school on grounds of mental disability was injured in an industrial accident. His claim for compensation was denied because he was below the legal age of employment and had not completed his schooling. This was a classic "Catch-22" situation. In another case,[8] the plaintiff had satisfied all

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[1] 42 USC §1981.

[2] 42 USC §2000d.

[3] 42 USC §2000e.

[4] 29 USC §§201-219.

[5] Earlier federal legislation guaranteeing equal rights for disabled people included the Act of June 10, 1948 to assist disabled war veterans and, in particular, prohibiting employment discrimination based on physical handicap within the federal civil service. See also: Architectural Barriers Act 1968.

[6] *Georgetown Law Journal*, 1973: 1502.

[7] *In re Morton* (1922) 137 NE 62 (Ind App Crt) cited in Burgdorf and Falcon, 1980: 319.

[8] *Chavich v Board of Examiners of Board of Education of City of New York* (1965) 258 NYS2d 677 (SC NY App Div).

requirements for a license as a music teacher, but failed physical and medical examinations because of his blindness. Regulations issued by the local government employer in question required at least 20/30 vision in one eye, with or without glasses. The court upheld the reasonableness of the employer's requirements and the majority refused to accept that the question whether the plaintiff had the ability to perform satisfactorily the duties of a teacher should be left to the determination of the individual school. The minority had argued against a blanket disqualification of blind applicants and in favour of a case-by-case assessment; a dissent that "anticipates the tone of later decisions".[9]

CONSTITUTIONAL PROTECTION[10]

Part of the difficulty for disabled persons, trying to achieve basic civil rights through litigation, was the absence of a convenient legal peg upon which to hang an argument. In *King-Smith v Aaron*,[11] however, such a peg was available. The visually-impaired plaintiff was a well-qualified linguist and certified teacher, but was refused entry on the eligibility list for public school employment on the grounds of her disability. Her subsequent action against members of the board of education alleged a denial of due process of law and of the equal protection of the law under the Fourteenth Amendment and civil rights legislation.[12] At first instance, her claim was excluded because of a conflict with state law, the plaintiff having relied upon a violation of the Pennsylvania School Code as an alternative cause of action. Under the doctrine of abstention, the federal court preferred the matter to be dealt with under the state law in order to discourage federal litigation. That view was reversed by the federal appellate court, which - while not determining the merits of the claim - remitted the case for a hearing. The outcome of the substantive claim is unknown, but the appellate decision represented a positive approach to disability rights claims based upon constitutional and civil rights considerations.[13]

The Fourteenth Amendment's guarantee of equal protection and due process of law has been used as a basis to challenge employment discrimination generally and disability discrimination in particular. The font and origins of the Fourteenth Amendment are beyond the scope of this

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[9] Burgdorf and Falcon, 1980: 325.

[10] See generally: Burgdorf and Falcon, 1980; Schoenfeld, 1980.

[11] (1970) 317 FSupp 164 (WD Penn), reversed at (1972) 455 F2d 378 (3rd Circ).

[12] 42 USC §1983 and §1985.

[13] See also *Parolisi v Board of Examiners of City of New York* (1967) 285 NYS2d 936; *Heumann v Board of Education of City of New York* (1970) 320 FSupp 623 (SD NY).

study, as is its developing jurisprudence. In principle, however, the equal protection analysis should apply to disabled employment opportunities. Nevertheless, there are few (if any) cases in which the analysis has been applied successfully to disabled persons.[14] Indeed, the Supreme Court specifically rejected the contention that classifications that disadvantaged individuals with mental retardation should be subjected to heightened judicial scrutiny under the equal protection clause.[15]

Due process theory has been more fertile ground. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law". The denial of an employment opportunity by a public agency should fall within the scope of this formula, requiring the plaintiff to be accorded procedural due process, with an opportunity for notice and a hearing.[16] While the formula may protect disabled persons while *in* employment, a disabled applicant *for* employment has no property interest capable of protection. Is there a liberty interest at stake here? In *Bevan v New York State Teachers Retirement System*,[17] by way of illustration, a public school teacher developed vision impairment but, following sick leave and rehabilitation, sought to return to work. Despite a favourable, if qualified, medical examination, a decision was taken to retire the plaintiff compulsorily, solely on the grounds of his blindness. He opposed his involuntary retirement and challenged it before the court. Accepting that he possessed constitutionally protected interests in liberty and property as a tenured teacher, the court recognised that his specific interest in continued employment was safeguarded by due process. It required that he be given a hearing before dismissal or enforced retirement. The employer's education regulations violated the due process clause. The question to be decided by the employer, at a proper hearing, was not whether the plaintiff was blind, but whether he was physically incapable of performing the duties of a public school teacher.

In *Gurmankin v Costanzo*,[18] the plaintiff was blind and a certified teacher. She was refused

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[14] See, however, *Duran v City of Tampa* (1977) 430 FSupp 75 and (1978) 451 FSupp 954 (MD Fla), discussed at note 20 below, where the court refers to the plaintiff's equal protection rights, but may have intended a reference to due process. Not the least of the problems in using the Fourteenth Amendment in disability discrimination cases is the need to show purpose or intent to discriminate: *Washington v Davis* (1976) 426 US 229.

[15] *Cleburne v Cleburne Living Center* (1985) 473 US 432.

[16] See, for example: *Board of Regents v Roth* (1972) 408 US 564; *Perry v Sindermann* (1972) 408 US 593.

[17] (1973) 345 NYS2d 921 (SC NY).

[18] (1977) 556 F2d 184 (3rd Circ); *cf Coleman v Darden* (1977) 13 EPD 6788 (DC).

employment by a school district whose medical and personnel policy excluded blind teachers from teaching sighted pupils. That policy created an irrebuttable presumption that blind persons could not be competent teachers and thus violated her due process rights. Although she was not an employee, as a certified teacher she had a legitimate expectation of equal employment opportunity, which had been denied her solely because of her disability. The federal appellate court found in her favour.[19] The failure of a city's authorities to hire the plaintiff as a police officer because of a history of epilepsy was also the subject of an action under the Fourteenth Amendment in *Duran v City of Tampa*.[20] The plaintiff had been automatically excluded prior to the final stages of selection, and even before an occupational medical examination, on the ground of his disability. This was despite the fact that his condition had been stable over a number of years and medication had been discontinued for some time. The court declared itself to be predisposed against irrebuttable presumptions that were inextricably linked with public employment opportunities and which were without factual basis. The defendant was ordered to provide the plaintiff with a physical examination and to ignore the prior *history* of epilepsy as a disqualifying medical condition. Subject to his passing that examination, the city was ordered to employ the plaintiff as a police officer (with seniority rights backdated) and to compensate him for loss of earnings.

A further constitutional argument in support of disabled employment rights could be mounted under the Thirteenth Amendment. This provides that "[n]either slavery nor involuntary servitude... shall exist within the United States". Although clearly designed to liberate the black slaves after the Civil War, Burgdorf and Falcon have argued that the amendment can be utilised to assist other oppressed peoples.[21] They cite numerous examples of cases in which this provision has been applied beyond racial questions. The Thirteenth Amendment, unlike the Fourteenth Amendment, applies both to state action and to private acts of discrimination. Its obvious application in respect of disabled persons is to regulate forced labour practices in state institutions, but Burgdorf and Falcon also contend that it is broad enough to address employment discrimination against disabled persons generally. This expansive interpretation of the Thirteenth Amendment remains untested.

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[19] See further: Richman, 1978; Sluzas, 1981.

[20] (1977) 430 FSupp 75 and (1978) 451 FSupp 954 (MD Fla).

[21] Burgdorf and Falcon, 1980: 355-360.

FEDERAL LEGISLATION: THE REHABILITATION ACT 1973

Introduction

Despite several bills that attempted to amend Title VII of the Civil Rights Act 1964 to include disabled people,[22] it was not until the RA 1973 that the civil rights of disabled people were addressed and, even then, in a limited manner.[23] The main body of the Act was concerned with reforms of federal and state vocational rehabilitation programmes. The civil rights component was relegated to three sections comprising miscellaneous provisions. Nevertheless, it was an Act that broke the mould that shaped orthodox thinking on disabled people and triggered a powerful movement for comprehensive disability rights. In modelling the legislation on race and sex discrimination legislation, disability became a legally acknowledged civil rights issue. The Act takes a cross-disability approach in recognizing the common social problems encountered by people of varying and various disabilities. In adopting an imaginative and broadly conceived definition of disability the Act comprehends the argument that disability is often a social construct rather than a purely medical status. By bringing disabled people within the protection of the anti-discrimination principle, the law conceded that disadvantage and handicap are the products of society's attitudinal and structural barriers, and less the result of personal limitations caused by impairment and disability.

The declared purpose of Congress in enacting the RA 1973 (and its subsequent amendments) is the development and implementation of comprehensive and coordinated programmes of vocational rehabilitation and independent living for individuals with disabilities.[24] This is to be achieved through research, training, services and the guarantee of equal opportunity. The Act aims to maximise the employability, independence and integration into the workplace and the community of disabled persons. Title V of the 1973 Act specifically addresses disabled employment discrimination in federal employment (section 501), by federal contractors (section 503), and in programmes or activities receiving federal assistance (section 504).[25]

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[22] Flaccus, 1986b: 263.

[23] Pub L N° 93-112, 87 Stat 355 (1973). The relevant sections are §§2, 7, 501, 503 and 504 of Title V. These sections have been subsequently amended on a number of occasions: Pub L 93-516, 88 Stat 1617 (1974); Pub L 93-651, 89 Stat 2-3 (1974); Pub L 95-602, 92 Stat 2955 (1978); Pub L 98-221, 98 Stat 17 (1984); Pub L 99-506, 100 Stat 1807 (1986); Pub L 100-259, 102 Stat 29 (1988); Pub L 100-630, 102 Stat 3303 (1988); Pub L 101-336, 104 Stat 376 (1990). The relevant sections are now codified as amended at 29 USC §§701, 706, 791, 793 and 794. See generally: Cook, 1977; Richards, 1985; Percy, 1989; Drimmer, 1993.

[24] 29 USC §701 as amended.

[25] 29 USC §§791, 793 and 794.

These provisions are underpinned by administrative regulations. The section 501 regulations are published by the EEOC as part of the general provisions fostering equal employment opportunities in federal government,[26] whereas the section 503 regulations are those proclaimed by the OFCCP to ensure compliance with the affirmative action obligations of government contractors.[27] The US Department of Justice has been designated as the federal department responsible for coordinating the implementation of section 504.[28] The coordinating regulations[29] apply to federal departments or agencies empowered to extend federal financial assistance, and they in turn must issue regulations consistent with the Department of Justice model in order to implement section 504 in respect of the programmes and activities to which they provide assistance.[30] Various section 504 regulations have been issued, the most important of which are those issued by the Department of Labor,[31] the Department of Health and Human Services,[32] and the Department of Justice itself.[33]

Section 501

Section 501(b) of the RA 1973 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.[34] The terms of this mandate are reproduced in Text Box 3. The affirmative action plan must be submitted to the Inter-agency

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[26] 29 CFR Part 1613.

[27] 41 CFR Part 60-741.

[28] By virtue of Executive Order 12250 (45 *Federal Regulations* 72995, 2 November 1980). The Department of Health, Education and Welfare originally had this responsibility. For a fascinating account of the background to the regulations, see: Scotch, 1984.

[29] 28 CFR Part 41.

[30] 28 CFR §§41.2 and 41.4(a).

[31] 29 CFR Parts 32 and 33.

[32] 45 CFR Parts 84 and 85.

[33] 28 CFR Part 42.

[34] 29 USC §791(b).

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

Text Box 3: Section 501(b) (US) RA 1973

Committee on Handicapped Employees,[35] and to the Equal Employment Opportunities Commission (EEOC). A valid plan must describe the extent to which the special needs of disabled employees are being met, as well as the methods being used to achieve this objective. Once adopted, a disability affirmative action plan has to be updated annually. It is subject to annual review by the EEOC, which may approve it if satisfied that the plan provides sufficient assurances, procedures and commitments to provide adequate employment opportunities for disabled individuals.[36]

The section has been interpreted as including a non-discrimination component,[37] although this is not made explicit in the statutory language.[38] Consequently, federal agencies must structure their procedures and programmes, so as to afford equal employment opportunities for disabled individuals, and federal employers' actions in this regard are subject to judicial review. The regulations enacted to implement section 501 provide that federal agencies shall give full consideration to the hiring, placement and advancement of qualified disabled persons and shall not discriminate against them, and that the federal government "shall become a model employer of handicapped individuals".[39] Federal employers are mandated to make reasonable accommodations for disabled persons, unless this would impose undue hardship on the operation of programmes, and this has been construed as requiring the taking of measures that involve more than a *de minimis* cost.[40] The use of discriminatory employment

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[35] Established by section 501(a): 29 USC §791(a). The Inter-agency Committee provides a focus for federal (and other) employment of disabled individuals and periodically reviews the adequacy of employment practices in the executive branch of government with respect to such persons, ensuring that their special needs are being met. As a result of such review, and following consultations with the EEOC, the Inter-agency Committee is to make recommendations to Congress for necessary or desirable legislative and administrative changes. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation are made available to the Inter-agency Committee.

[36] Regulations governing equal employment opportunity in federal government have been promulgated at 29 CFR §1613.201 *et seq*. See also the regulations concerned with access to postal services, programmes and facilities (39 CFR §255.1 *et seq*) and concerning disabled veterans' affirmative action programmes (5 CFR §§720.301-.307).

[37] See for example: *Gardner v Morris* (1985) 752 F2d 1271 (8th Cir); *Ryan v Federal Deposit Insurance Corporation* (1977) 565 F2d 762 (DC Cir); *Rhone v US Department of the Army* (1987) 665 FSupp 734 (ED Mo); *Di Pompo v West Point Military Academy* (1991) 770 FSupp (SD NY).

[38] Mayerson, 1991b: 501.

[39] 29 CFR §1613.703. As to the scope of federal employment, see 29 CFR §1613.701(b) and 5 USC §105.

[40] 29 CFR §1613.704; *Prewitt v US Postal Service* (1981) 662 F2d 292 (CA Miss)

criteria or pre-employment enquiries is also regulated,[41] while federal employers must not discriminate against qualified disabled applicants or employees by allowing their facilities to be physically inaccessible.[42]

Compliance with section 501 is enforced by the EEOC. The EEOC section 501 regulations require federal employers to adopt procedures for handling disability discrimination complaints. The section provides the exclusive remedy for federal employees subjected to disability discrimination, so that, for example, there are no separate causes of action for breaches of constitutional rights or the infliction of a tort.[43] Before 1978, however, federal employees could not bring a disability discrimination action against a federal agency, but could only obtain judicial review of an agency's action.[44] Now section 505(a)(1) extends identical remedies, procedures and rights to federal employees the subject of disability discrimination claims as apply to federal employees with sex or race discrimination claims under Title VII.[45] This provision also allows a court to order an equitable or affirmative action remedy, subject to the reasonableness of the cost of any necessary workplace accommodation and the availability of alternative, appropriate relief.

Section 503

Section 503 of the RA 1973 introduces statutory contract compliance as a tool for ensuring disabled equal employment opportunities.[46] Its provisions are reproduced in Text Box 4. Regulations that cover federal contractors under section 503 have been enacted by the Office of Federal Contract Compliance Programs (OFCCP).[47] This section has also been interpreted

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[41] 29 CFR §§1613.705 and 1613.706.

[42] 29 CFR §1613.707. A building or facility is deemed accessible if in compliance with the Architectural Barriers Act 1968. Where necessary, federal employers must make reasonable accommodation in order to make the workplace accessible and avoid leasing buildings that are inaccessible: *Rose v US Postal Service* (1983) 566 FSupp 367 (DC Cal) *reversed* 774 F2d 1355; *Bey v Bolger* (1982) 540 FSupp 910 (DC Pa).

[43] *Boyd v US Postal Service* (1985) 752 F2d 410 (CA Wash); *Connolly v US Postal Service* (1984) 579 FSupp 305 (DC Mass); *Rattner v Bennett* (1988) 701 FSupp 7 (D DC) *Di Pompo v West Point Military Academy* (1991) 770 FSupp (SD NY).

[44] *Shirley v Devine* (1982) 670 F2d 1188 (DC Cir); *Coleman v Darden* (1979) 595 F2d 533 (10th Cir), *certiorari denied* (1979) 444 US 927.

[45] 29 USC §794(a)(1).

[46] 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.

[47] 41 CFR Part 60-741.

Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Text Box 4: Section 503(a) (US) RA 1973

as implying a non-discrimination component, although this is not made explicit in the statutory language.[48] Section 503 extends the non-discrimination principle, as it applies to disabled persons, into the private sector by using the federal government's purchasing power in such a way as to improve disabled employment opportunities.[49] Where section 503 does apply, 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 employment qualified disabled persons.[50] The terms of the model affirmative action clause are reproduced in Chapter XVI, where there is a more detailed discussion of contract compliance.

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 that exceed $2,500 and that are entered into by a federal contractor in order to carry out the main contract.[51] Although transactions involving less than $2,500 are not covered by section 503, federal agencies and contractors must not procure supplies or services in less than usual quantities in order to avoid section 503 obligations.[52] There is a presumption that section 503 should apply to open-ended contracts and indefinite quantity contracts, unless there is reason to believe that the amount to be ordered under the contract in any one year will not exceed $2,500.[53] The commercial scope of the affirmative action obligation is equally wide. Any contract (or agreement or modification thereof) made with a department, agency, establishment or instrumentality of the US (including wholly-owned government corporations) will be affected where its subject-

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[48] *Moon v US Department of Labor* (1984) 747 F2d 599 (11th Cir) *certiorari denied* (1985) 471 US 1055; *EE Black Ltd v Marshall* (1980) 497 FSupp 1088 (D Haw). See: Mayerson, 1991b: 501.

[49] *Rogers v Frito-Lay Inc* (1977) 433 FSupp 200 (DC Tex), *affirmed* 611 F2d 1074, *certiorari denied* 101 SCt 246, 449 US 889.

[50] 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.

[51] 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.

[52] 41 CFR §60-741.3(a)(1).

[53] 41 CFR §60-741.3(a)(2).

matter involves the furnishing of supplies or services or use of real or personal property including lease arrangements.[54] Contracts for services will include, by way of illustration, contracts for utilities, construction,[55] transportation, research, insurance and fund depository, irrespective of whether the government is the purchaser or seller; but does not include employment contracts or federally-assisted contracts.[56]

The provisions of section 503 may be waived by executive action in the national interest with respect to any contract.[57] The OFCCP, at the request of a contractor, can waive the application of section 503 in respect of those parts of the contractor's business or facilities that are separate and distinct from those activities that relate to the performance of the contract.[58] Furthermore, when "special circumstances in the national interest so require", a federal agency, with the agreement of the OFCCP may waive the application of section 503 to any contract.[59] This exemption also permits block waiver in respect of groups or categories of contracts, provided the national interest ground is satisfied (but it would be impracticable to act upon a request for individual waiver) and substantial convenience in administering section 503 would be served. There is also a national security exemption.[60]

Only those employees of the contractor-employer who are engaged on work under the federal contract are covered and not the whole of that contractor-employer's workforce.[61] A disabled individual who believes that he or she has been the subject of a violation of the affirmative action clause in a federal contract may complain to the Department of Labor under section 503(b).[62] The Department will investigate the complaint, through the OFCCP, and

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[54] 41 CFR §60-741.2.

[55] Broadly defined and including functions incidental to construction.

[56] 41 CFR §60-741.2.

[57] Exemption regulations have been promulgated at 31 CFR §202.1 *et seq.*

[58] Provided that the waiver does not interfere with or impede the effectuation of the legislation: 41 CFR §60-741.3(a)(5). Provision is made for the circumstances in which waiver can be withdrawn: 41 CFR §60-741.3(c).

[59] 41 CFR §60-741.3(b)(1).

[60] 41 CFR §60-741.3(b)(2).

[61] *OFCCP v Western Electric* (1981) No 80-OFCCP-29 (US Department of Labor).

[62] 29 USC §793(b).

take action accordingly.[63] If the investigation uncovers a breach of section 503, conciliation is attempted before a formal hearing disposes of the complaint.[64] The OFCCP may order a federal contractor to comply with an affirmative action clause and to remedy an instance of discrimination by, for example, making an employment offer and paying lost wages. In addition, the OFCCP might seek judicial enforcement of the relevant contractual provision by seeking an injunction in the ordinary courts. Furthermore, progress payments due under a contract may be withheld, the contract terminated and/or the contractor debarred from receiving future contractual opportunities.[65]

Section 504

Section 504 of the RA 1973 prohibits discrimination against otherwise qualified disabled individuals in all programmes and activities administered by recipients of federal financial assistance.[66] The section "was enacted with little debate and most likely little understanding of its critical role in the development of civil-rights policy".[67] The substance of the section may be found in Text Box 5. This prohibition against disability-based discrimination also applies to programmes or activities conducted by any federal agency. The section does not require, however, small providers to make significant structural alterations to existing facilities to ensure programme accessibility if alternative means of service provision are available.[68] The section is amplified by federal regulations promulgated under the Act.[69]

The Supreme Court originally limited coverage of section 504 by reducing its scope to the actual programmes and activities for which the employer was receiving federal financial

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[63] 41 CFR §60-741.26.

[64] 41 CFR §60-741.28.

[65] Whether section 503 affords a disabled complainant a private cause of action is discussed in Chapter XVI below.

[66] RA 1973 §504(a); 29 USC §794(a). See generally: Tucker, 1989a.

[67] Jones, 1991b: 29.

[68] 29 CFR §794(c).

[69] 28 CFR Part 41 (Department of Justice); 29 CFR Part 32 (Office of the Secretary of Labor); 45 CFR Part 84 (Department of Health and Human Services). These are primary examples of various administrative regulations implementing section 504 and modelled upon the 1978 Department of Health, Education and Welfare regulations (now the Department of Health and Human Services regulations).

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Text Box 5: Section 504(a) (US) Rehabilitation Act 1973

assistance, rather than the whole of the recipient's enterprise.[70] By virtue of the 1988 amendments to the Act, the scope of programmes and activities is now broadly defined to include "all of the operations of" relevant entities.[71] The section extends to departments, agencies, special purpose districts and other instrumentalities of a state or local government, as well as to those entities of states or local governments which distribute federal financial assistance and state or local government departments or agencies to which assistance is itself extended. Colleges, universities, post-secondary institutions and public systems of higher education are covered, as are local educational agencies, systems of vocational education and other school systems. Entire corporations, partnerships, sole proprietorships and other private organisations are within the section's ambit if assistance is extended to such entities as a whole or they are principally engaged in providing education, health care, housing, social services or parks and recreation. In the case of any other corporation, partnership, private organisation or sole proprietorship, the legislation applies to their entire plant or other comparable, geographically separate facilities to which federal assistance is extended. Finally, any other entity established by two or more of the above entities will be caught if any part of it receives federal financial assistance.

Unlike section 503, section 504 provides a private right of action, although this is not made explicit. It seems reasonably clear after *Consolidated Rail Corporation v Darrone*[72] that section 504 does permit a private right of action, but compensatory relief (as opposed to injunctive or equitable relief) is not always available. Thus while back pay may be available as a remedy in intentional discrimination cases, compensatory damages for future losses are not. The question is whether compensatory relief is available in indirect discrimination or disparate impact cases? The Supreme Court in *Alexander v Choate*[73] assumed that a cause of action existed in such cases, but the question of remedies was not addressed. In contrast, compensatory relief is available under Title VII of the Civil Rights Act 1964 in indirect

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[70] *Grove City College v Bell* (1984) 465 US 555. This was a case based upon analogous provisions of civil rights legislation, but is clearly applicable to §504 as was made clear in *Consolidated Rail Corporation v Darrone* (1984) 465 US 624 (section 504 is also programme-specific). The decision was refined by the Court in *US Department of Transportation v Paralyzed Veterans of America* (1986) 106 SCt 2705. Federal funds given to airport operators to build runways and support air traffic control systems was not federal financial assistance *indirectly* received by commercial airlines who obtained an economic benefit from this expenditure. The airlines were not covered by section 504 by these means.

[71] 29 USC §794(b).

[72] (1984) 465 US 624.

[73] (1985) 469 US 287.

discrimination cases as well as intentional discrimination cases.[74]

Under the model regulations, the concept of discrimination is explained and the classification of "handicap" expanded. The regulations recognize the need to eliminate architectural, communicational and other barriers, and to take affirmative action to ensure the application of the non-discrimination principle in the disability context. The preamble to the model regulations makes this clear:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely, or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity... These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs... provide no basis for exemption from section 504 or this regulation... But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

This explains the underlying theory which informs all subsequent disability rights legislation. The application of the non-discrimination principle to disability discrimination will be explored in greater detail in Chapter X below.

Individual with handicaps

As originally drafted, the RA 1973 protected the employment rights of the "handicapped individual". Amendments made in 1986 substituted the term "individual with handicaps". The Americans with Disabilities Act 1990, *discussed in the following chapter, prefers to use the* expression "individual with a disability". These differences reflect the growing awareness in the US of the negative power of labels and the preference 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.

The original definition of the protected class under section 7 of the RA 1973 stated:

> The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to... this

[74] 42 USC §2000e-5(g); *Griggs v Duke Power Co* (1971) 401 US 421.

Act.[75]

This was amended in the 1974 amendments by adding:

> For the purposes of titles IV and V of the Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.[76]

The 1978 amendments resulted in the following expanded definition:

> Subject to the second sentence of this paragraph, the term 'handicapped individual' means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[77]

Further amendments were wrought in 1986, resulting in a redesignated sub-section and the substitution of the term "individual with handicaps" for "handicapped individual".[78] Further textual changes were made in 1988, at which time exclusionary provision was made for contagious diseases and infections.[79] Finally, the 1990 amendments introduced further refinements in the light of the Americans with Disabilities Act of that year.[80] The current version of the relevant definitional section is reproduced in Text Box 6.

Thus, for the purposes of the anti-discrimination provisions of the 1973 Act, the protected class embraces any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, or has a record of such impairment, or is regarded as having such impairment.[81] A similar definition is to be found in the various

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[75] RA 1973 §7(6) (Pub L 93-112).

[76] 29 USC §706(6)(B) inserted by Pub L 93-516 and Pub L 93-651.

[77] 29 USC §706(7)(B). The sub-section was renumbered and the additional text added by Pub L 95-602.

[78] 29 USC §706(8)(B), as a result of the amendments of Pub L 99-506.

[79] 29 USC §706(8)(C) added by Pub L 100-259.

[80] 29 USC §706(8)(B)-(D) as amended by Pub L 101-336.

[81] 29 USC §706(8)(B). The definition in the ADA 1990 is in virtually identical terms: 42 USC §12102(2).

...

(B) Subject to subparagraphs (C) and (D), the term 'individual with handicaps' means... any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(C) (i)... [It] does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude... an individual who-

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

...

(v) For purposes of sections 793 and 794 of this title as such sections relate to employment, the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) 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.

Source: 29 USC §706(8)

Text Box 6: (US) RA 1973 definition of "individual with handicaps"

regulations.[82] This definition dates from the 1974 amendments but, by virtue of the amendments made in 1978, and refined in 1990, the definition does not extend to protect individuals currently engaging in the illegal use of drugs where an employer discriminates because of such use. However, rehabilitated drug users, participants in supervised drug rehabilitation programmes and persons erroneously treated as drug users are protected, provided they are not currently using illegal drugs.[83] Individuals who are alcoholics are also excluded from protection if their current use of alcohol prevents them from performing their employment duties or would pose a direct threat to property or safety while in employment.[84] Excluded from the Act's protection also are individuals with a currently contagious disease or infection which constitutes a direct threat to the health and safety of others or which results in their inability to perform the duties of the job.[85]

The definition of an "individual with handicaps" is amplified by the model regulations, which also illustrate the disabilities covered by the section.[86] 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;

while a "mental impairment" constitutes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities". A person who has a "record of... impairment" is explained as one 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",[87] while a person who is regarded as having an impairment is one who:

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[82] 28 CFR §41.31(a); 29 CFR §32.3; 29 CFR §1613.702(a); 41 CFR §60-741.2; 45 CFR §84.3(j)(1).

[83] 29 USC §706(8)(C)(i)-(ii) and (22). An employer may adopt and administer reasonable policies and procedures, including drug testing, to ensure that the individual is no longer engaged in the illegal use of drugs.

[84] 29 USC §706(8)(C)(v). This provision purports to apply only to §§793 and 794.

[85] 29 USC §706(8)(D).

[86] 28 CFR §41.31(b)(1); 29 CFR §32.3; 29 CFR §1613.702(b); 41 CFR §60-741.2; 45 CFR §84.3(j)(2)(i). See *School Board of Nassau County, Florida v Arline* (1987) 480 US 273 in which the Supreme Court makes a broad interpretation of the definition of a handicapped individual.

[87] 28 CFR §41.31(b)(3); 29 CFR §32.3; 29 CFR §1613.702(d); 41 CFR §60-741.2; 45 CFR §84.3(j)(2)(iii).

> (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 [physical] impairments defined... but is treated... as having such an impairment.[88]

The term "major life activities" is illustrated as meaning "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working".[89] It is clear from the 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 handicap, they are likely to experience difficulty in securing, retaining or advancing in employment.[90] The qualification of a *substantial limitation* upon a major life activity is not otherwise explained in the scheme of regulations.

Otherwise qualified standard

A complainant under section 504, as well as satisfying the definitional requirements of being an individual with handicaps, must also be "otherwise qualified" within the meaning of the legislation. The implementing regulations explain that, in the context of employment, this denotes "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question".[91] So an inability to perform non-essential elements of a job should not disqualify a disabled person from protection. In *Southeastern Community College v Davis*,[92] the Supreme Court held that an otherwise qualified disabled person "is one who is able to meet all of a program's requirements in spite of his handicap".

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[88] 28 CFR §41.31(b)(4); 29 CFR §32.3; 29 CFR §1613.702(e); 41 CFR §60-741.2; 45 CFR §84.3(j)(2)(iv). Transvestism is not a "handicap": Pub L 100-430 §6(b)(3), 42 USC §3602 (note) overturning *Blackwell v US Department of Treasury* (1986) 639 FSupp 289 (D DC); nor is sexual orientation or preference: *Blackwell v US Department of Treasury* (1987) 830 F2d 1183.

[89] 28 CFR §41.31(b)(2); 29 CFR §32.3; 29 CFR §1613.702(c); 41 CFR §60-741.2; 45 CFR §84.3(j)(2)(ii).

[90] 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.

[91] 28 CFR §41.32; 45 CFR §84.3(k)(1). The Department of Labor §504 regulations are worded slightly differently, but to the same effect:

> Qualified handicapped individual means... an individual with a handicap who is capable of performing the essential functions of the job or jobs for which he or she is being considered with reasonable accommodation to his or her handicap:

29 CFR §32.3.

[92] (1979) 442 US 397 at 406.

In *Alexander v Choate*,[93] the Supreme Court explained that the *Davis* decision did not mean that an employer might not be required to make reasonable accommodation so as to assist a disabled person to become otherwise qualified. What was required was a balancing between the rights of disabled persons to social integration and the legitimate interests of employers to preserve the integrity of their undertakings and activities.

Section 503 also contains an explicit "otherwise qualified" requirement. However, the regulations promulgated under section 503 take a slightly different approach. They require the disabled person to be capable of performing the particular job, with reasonable accommodation, but at the same time insist that any qualifications should be job-related and consistent with business necessity and safety.[94] Section 501 does not contain an "otherwise qualified" condition, but the implementing regulations assume that the non-discrimination principle only applies to qualified handicapped persons.[95] Again, the concept of being "otherwise qualified" means that the individual can, with or without reasonable accommodation, perform the essential functions of the job without endangering the health or safety of the individual or others but, in addition, must also meet either the experience and/or educational requirements of the position or the criteria for appointment under one of the special appointing authorities for handicapped persons.[96]

Reasonable accommodation

The "otherwise qualified" standard is somewhat ameliorated by the imposition of a duty upon employers to make reasonable accommodation.[97] Thus, disabled persons might qualify for protection in a number of ways. First, they might be able to perform all the elements of the job without accommodation. Second, without accommodation, they might be able to perform all the elements of the job, except those which are non-essential. Third, they might be able to perform all the elements of the job with reasonable accommodation. Fourth, they might be unable to perform all the elements of the job, despite reasonable accommodation, yet be

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[93] (1985) 469 US 287 at 300.

[94] 41 CFR §§60-741.2 and 60-741.6(c).

[95] 29 CFR §1613.703. The "otherwise qualified" standard has been applied to section 501 even though it is not explicit in the language of that section: *Stevens v Stubbs* (1983) 576 FSupp 1409 (D Ga) (protection is afforded only to those who can do the job in spite of handicap, rather than those who could do the job but for handicap).

[96] 29 CFR §1613.702(f).

[97] 28 CFR §§41.32 and 41.53; 29 CFR §32.3; 29 CFR §§1613.702(f) and 1613.704; 41 CFR §§60-741.2 and 60-741.6(d); 45 CFR §84.3(k) and 84.12.

able to perform the essential elements with reasonable accommodation.

The term "reasonable accommodation" is not defined in the Department of Justice model section 504 regulations. They simply provide that:

> A recipient [of federal funds] shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.[98]

However, the Department of Health and Human Services section 504 regulations exemplify reasonable accommodation as including:

> Making facilities used by employees readily accessible to and usable by handicapped persons, and... job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.[99]

The Department of Labor section 504 regulations are to like effect,[100] as are the regulations under section 501.[101]

STATE CONSTITUTIONAL AND LEGISLATIVE PROTECTION

Although the federal RA 1973 ensured that the civil rights of disabled people were at least recognized in law, it was a far from complete framework for disabled equal employment opportunities. Some of its weaknesses and lacunae will be discussed in later chapters. However, for present purposes, it will suffice to summarise the flaws in the federal legislation. First, it applied only in the public sector to employment by the federal government, under federal contracts and in organisations receiving federal funding or assistance. It did not purport to tackle directly the employment rights of disabled persons in the private sector. Second, there were some doubts about whether the Act provided a private right of action to an aggrieved individual. Third, judicial interpretation of the statute often narrowed the protection available under it to disabled workers. Fourth, and finally, the scope and impact of remedies for breach of the federal law were limited. Accordingly, many commentators turned to see whether state laws and constitutions could be recruited to assist disabled persons achieve civil rights.[102]

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[98] 28 CFR §41.53. See to like effect: 45 CFR §84.12(a).

[99] 45 CFR §84.12(b).

[100] 29 CFR §§32.3 and 32.13.

[101] 29 CFR §1613.704. The section 503 regulations do not amplify the meaning of reasonable accommodation.

[102] See, in general: Bassen, 1977; Nicolai and Ricci, 1977; Leap, 1979; *Law and Contemporary Problems*, 1982; Sales *et al*, 1982; Flaccus, 1986a and 1986b; Kaufman,

Incidence of state disability discrimination laws

Writing in 1974, Weiss found that only 21 states and the District of Columbia had legislation covering equal employment opportunities for disabled persons in the public and private sectors.[103] He observed at least four weaknesses in the coverage of state law. First, state laws provided only uncertain remedies for disability-based employment discrimination. Second, they often relied upon the rather passive enforcement strategies of local civil rights commissions, and thus were not strictly enforced. Third, such laws were "uneven in scope and quality", especially in defining disability and the protected class. Fourth, many disability discrimination laws contained exceptions which arguably codified many of the existing prejudices which disabled persons have to encounter. For example, a refusal to hire a disabled applicant might often be justified by reference to safety grounds, the well-being of the disabled person or inconvenience to co-workers, as well by contentions equating disability and inability. Weiss commented that:

> The problem with these exceptions is that they focus on disability as a classification to justify discrimination. The purpose of fair employment laws should be to force the employer to focus on the capacity of the *individual* to do the job regardless of the class to which he belongs.[104]

The point about these exceptions is that, if they existed in any case, the plaintiff would not be qualified for the job and thus would not have been discriminated against on an irrational ground; yet it was not thought necessary to write such exceptions into anti-discrimination laws in general.

Weiss also noted that twenty-nine states had passed a "Model White Cane Law".[105] Addressed to the civil rights of blind persons, the model law espoused equal rights for all physically disabled people in public employment in the following terms:

> It is the policy of this State that the blind, the visually handicapped, and the otherwise physically disabled shall be employed in the State Service, the service of the political subdivisions of the State, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied unless it is shown that the particular disability prevents the performance of the work involved.[106]

However, the model law "is unimpressive in both reach and enforceability... [and] does not

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1987; Perlin, 1987; Collins, 1988.

[103] Weiss, 1974: 460.

[104] Weiss, 1974: 462 note 29 (emphasis in original).

[105] Weiss, 1974: 464-5.

[106] Quoted by Weiss, 1974: 465 n^{43}, citing TenBroek, 1966: 918. The author of the Model White Cane Law was Professor Jacobus TenBroek himself.

cover the private sector".[107] The law is no more than a policy statement, which lacks the underpinnings of enforcement and remedies.

In a later survey of state laws addressing disability employment discrimination, Flaccus found that 43 states (including as a state, for this purpose, the District of Columbia) had enacted laws prohibiting private employment discrimination against disabled people.[108] Arkansas rather vaguely dealt with the issue as a statutorily-enacted policy statement, which might not give rise to a cause of action. Five other states prohibited disability discrimination in employment by state agencies and recipients of state funds. Only 2 states (Delaware and Wyoming) had no legislation of this kind. Of the 49 states with disability discrimination laws, all but 3 (Alaska, North Carolina and Tennessee) had laws which applied to trade unions and employment agencies as well as employers. Furthermore, unlike Title VII of the Civil Rights Act, the majority of the states applied the law to nearly all employers, regardless of the size of their workforces. Nevertheless, Flaccus concluded that state laws were restrictive in other ways. The definition of disability (or "handicap") was frequently very narrow. Many statutes required the disabled person to be able to perform all aspects of the job in order to qualify for protection from discrimination. It was also common for such statutes to omit any requirement of reasonable accommodation on the employer.

Protected class

Thirty-five states included mental impairment within the definition of disability (although 7 were restricted to mental retardation and only 17 expressly covered mental illness). Flaccus also found restrictions in the way that physical impairment was defined. Ten statutes excluded particular physical impairments, such as alcoholism and drug use or handicaps caused by illness or, in one case, handicaps first manifested in adulthood. Six statutes included only specified impairments, thus inviting courts to apply the *expressio unius est exclusio alterius* tool of construction. Five statutes excluded future problems (such as asymptomatic orthopaedic conditions) where a physical abnormality produces no present disability but suggests a greater risk of future ill health absence or work-related injury.[109]

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[107] Weiss, 1974: 465.

[108] Flaccus, 1986b. See also Flaccus, 1986a: 109-14.

[109] Flaccus (1986b: 281 and 286) notes that cases of back or orthopaedic discrimination based on a perception of future problems represent the largest category of applications filed under §503 of the RA 1973. In *Burgess v Joseph Schlitz Brewing Co* (1979) 298 NC 520, 259 SE2d 248, a case under NC Gen Stat §§143-422.1 to 143-422.3, the North Carolina Supreme Court refused to find as handicapped a person with glaucoma who had 20-20 vision with glasses, stating that the term disability "refers to a present non-correctible loss of function which substantially impairs a person's ability to function normally".

Sixteen statutes excluded perceived handicaps (only 18 states expressly included perceived handicaps). Two statutes were otherwise generally restrictive. Hawaii addressed only handicaps which are continuous and non-reversible, thus apparently excluding curable conditions such as some forms of cancer.[110] Indiana limited coverage to persons who have had their status as disabled persons certified by a state agency.[111] Overall, Flaccus concluded that only 17 states defined the protected class as broadly as federal legislation.[112]

Ten states did not provide a statutory definition of handicap, leaving it to judicial decisions or administrative regulations to fill the void. Flaccus notes the divergent results that can arise from this omission. For example, in a decision under the Illinois Equal Opportunities for the Handicapped Act, the Illinois Supreme Court refused to rule that uterine cancer was a handicap under the statute, reasoning that only conditions that were generally believed to impose severe burdens on major life activities were protected.[113] In contrast, the Washington Supreme Court adopted a dictionary definition of handicap as "a disadvantage that makes achievements unusually difficult, especially a physical disability that limits the capacity to work".[114]

Otherwise qualified or ability to work standards

Only 7 states did not have an ability to work requirement in the nature of the "otherwise qualified" standard in federal legislation. Ten states required a disabled applicant to be able to perform reasonable, regular or essential tasks of the job. These statutes submit employers' job qualification requirements to judicial or administrative scrutiny for reasonableness and necessity. Eleven states required that all job tasks be performed, but the employer must show that, as a result of disability, job performance was significantly interfered with. In other words, this group of statutes requires the disabled person to be able to perform all job tasks but only to an adequate or reasonable performance level. Fifteen states required the disabled

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[110] Haw Rev Stat §378-1.

[111] Ind Code Ann §22-9-1-13(c).

[112] Flaccus, 1986b: 292.

[113] *Lyons v Heritage House Restaurants Inc* (1980) 89 Ill2d 163, 432 NE2d 270 interpreting Ill Ann Stat ch 38 §65-22. This Act has subsequently been replaced by the Illinois Human Rights Act which defines "handicap" in broad terms: Ill Ann Stat ch 68 §1-103(I).

[114] *Chicago, Milwaukee, St Paul & Pacific Railway v Washington State Human Rights Commission* (1977) 87 Wash2d 802, 557 P2d 307 construing Wash Rev Code Ann §§49.60.010-.330 and utilising *Webster's Dictionary*.

person to demonstrate their ability to perform all the elements of the position, despite the disability (7 of which further require the disabled person to show that the disability is unrelated to ability to do the job). Such provisions allow discrimination against a disabled person who, although qualified for the job, is only able to perform it to an adequate and reasonable level, but where a non-disabled person's job performance would exceed that level. The ability to work requirement may be an aspect of defences or it may be part of the *prima facie* case which the plaintiff must make in order to establish membership of the protected class. Flaccus found that 10 states made it part of the plaintiff's *prima facie* case: 9 states required the handicap to be unrelated to the ability to perform the job and 1 state made ability to work part of the definition of handicap.[115]

Reasonable accommodation

Only 25 states required employers to make reasonable accommodation to disabled people, either by way of statutory expression or by regulations, guidelines or decisions. The reasonable accommodation requirement almost invariably goes hand-in-hand with ability to work requirements which are couched in terms of reasonableness and necessity. Only half of the remaining states which imposed a restrictive ability to work requirement on the disabled person also imposed a reasonable accommodation burden on the employer. Flaccus argues that in those cases:

> a reasonable accommodation requirement makes restrictive ability to work requirements substantially less restrictive, and a failure to require reasonable accommodation significantly undermines any statute which otherwise has a moderately nonrestrictive ability to work requirement.[116]

However, she was unable to assess whether or not this argument was borne out in practice in the absence of state judicial interpretation or statutory amplification of the term "reasonable accommodation".[117] Her conclusion was that few of the reasonable accommodation requirements of state disability discrimination laws were as generous as those to be found under federal law. Only 11 states defined the term, of which 5 adopted the definition contained in federal regulations.[118] Six states applied a narrower concept of

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[115] Flaccus, 1986b: 311.

[116] Flaccus, 1986b: 305.

[117] Flaccus (1986b: 306) noted that the Louisiana statute did not require *any expenditure* by a private sector employer making reasonable accommodations; that the Minnesota law limited the obligation to employers with workforces exceeding 50 employees and put a cap of $50 per disabled person on reasonable accommodation expenditure; and that the Virginia code limited expenditure to $500 for employers with less than 50 employees: La Rev Stat Ann §46:2253(4)(a)(19); Minn Stat Ann §363.03; Va Code §51.01-41(c).

[118] The Department of Health and Human Services regulations exemplify reasonable

reasonable accommodation, typically omitting requirements to make structural modifications and to provide readers and interpreters, possibly on the grounds of relative expense. In any event, all the reasonable accommodation provisions are subject to an "undue hardship" exception, often determined by reference to the employer's size, the cost of the accommodation and the number of potential beneficiaries. Flaccus contends that, with an undue hardship defence, there is no reason to place further limitations upon the type of accommodations to be considered.[119]

Bona fide occupational qualification defences

Of the 8 states which had no "ability to work" requirement, 6 had a *bona fide* occupational qualification (BFOQ) defence. Eleven other states also had a BFOQ defence. This is not a defence known under the RA 1973, but is a feature of other civil rights legislation. Under Title VII of the Civil Rights Act 1964, a BFOQ defence is permitted in sex, nationality and religious discrimination.[120] A two-part test is to be applied: the employer must show that (1) all or substantially all of the protected class would be unable to safely and efficiently perform the duties of the job and (2) the qualifications excluding the protected class are job-related. The BFOQ defence only applies in cases of intentional exclusion of the protected class and is subject to a strict "reasonable business necessity" standard. Sixteen of the states with a BFOQ defence in their disability discrimination statutes adopted a similar framework for the defence as it appears under general civil rights laws. However, given that the RA 1973 has no BFOQ defence, Flaccus raises objections to its appearance in state legislation:

> Each job applicant must be evaluated as an individual, not as part of a handicapped class. One of the primary goals of anti-discrimination legislation is to eliminate the widespread use of generalizations about a specified class of people as a basis for discrimination. This is equally applicable to the area of handicap discrimination. The fact that one person's epilepsy substantially interferes with his ability to do a job does not mean that every epileptic would be so impaired. If a BFOQ defense *(sic)* is allowed at all, it should be construed narrowly and limited to situations where there is factual proof that all or substantially all of the protected class could not perform the job qualification and that the job qualification is necessary for the essential

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accommodation as including

> making facilities used by employees readily accessible to and usable by handicapped persons, and... job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions:

45 CFR §84.12(b).

[119] Flaccus, 1986b: 309.

[120] 42 USC §2000e-2(e), as explained in *Weeks v Southern Bell Telephone and Telegraph Co* (1969) 408 F2d 228 (5th Cir) and *Diaz v Pan American World Airways* (1971) 442 F2d 385 (5th Cir), *certiorari denied* (1971) 404 US 950.

performance of the work.[121]

Otherwise, the BFOQ defence might be used by employers to exclude disabled workers for irrelevant factors like customer preference or co-worker resistance.

Efficacy of state laws

Then there is the question of remedies. Nine states expressly provided for a private cause of action alongside or replacing administrative remedies. In the remaining states, administrative enforcement and relief appeared fairly comprehensive (except for one state which limited relief to conciliation and another which provided only for a criminal fine). Thirty-nine states provided for damages awards and injunctive relief. Eighteen states provided for the award of legal fees (15 of which permitted a successful employer-defendant to recover). Seven states limited back pay to 2 years prior to the complaint, while 3 other states put some other cap on damages that may be recovered.[122]

Flaccus concluded that, taking all factors into account, only twelve states adequately addressed the problem of employment discrimination against disabled people in private employment.[123] She commented that "where state and federal coverage overlap, the federal statutes are generally more helpful to the handicapped person than the state statutes".[124] Nearly all state laws cover private employers, but adopt a narrower definition of disability and a more restrictive requirement of ability to work than is found in the federal legislation. She argued that Title VII would be the logical provision upon which to construct a federal prohibition on employment discrimination against disabled persons. Only two refinements would be needed: an ability to work requirement and a reasonable accommodation requirement.

CONCLUDING REMARKS

By the late 1970s and early 1980s, the US had a federal and state legal framework within which questions of disability discrimination could be addressed. Disability had thereby become a civil rights issue. However, it will be apparent from the discussion in this chapter that federal laws failed to touch disability discrimination in the private sector, while state laws constituted a piecemeal and uncertain catalogue of legal protections for disabled Americans.

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[121] Flaccus, 1986b: 313.

[122] South Carolina had an upper limit of $5,000, Virginia put a 6 months limit on back pay and Maryland measured the 2 years limit from the date of the judgment order.

[123] Flaccus, 1986b: 321.

[124] Flaccus, 1986b: 265.

In the following chapter, we examine the run up to the development of comprehensive disability rights law in the US and the eventual enactment by the federal government of omnibus disability discrimination legislation extending to both public and private employment in 1990.

CHAPTER VII:
DISABLED EMPLOYMENT RIGHTS IN THE UNITED STATES (2): THE AMERICANS WITH DISABILITIES ACT 1990

INTRODUCTION

The achievements of the RA 1973 were remarkable but ultimately restricted. Section 501 only affected federal employment in the executive branch. Section 503 failed to provide a private right of action and, although applying to the private sector, did so only by affecting employers contracting with the federal government. While section 504 did provide a private right of action, its remedy in damages was very limited. Furthermore, only employers in receipt of federal funds and grants needed to take cognisance of it. Moreover, these rights only applied in the employment field and did not address disability discrimination at large. State fair employment laws were generally regarded as an inadequate alternative to carefully crafted federal disability rights legislation. Weicker recounted how this lack of disabled civil rights in private employment, public accommodations, transport, and state and local activities and services led to pressure for new civil rights legislation.[1] Calls were made for the amendment of the Civil Rights Act 1964 to include disabled persons as a protected class.[2] Between 1979 and 1987, a number of bills were introduced into Congress with a view to extending the Civil Rights Act 1964 to disabled persons.[3] However, all this activity failed to bear fruit.

Background to reform

Perhaps the turning point was the year of 1984. The National Council on the Handicapped, which had been established in 1978 under Title IV of the RA 1973, was re-established as an independent federal agency to review federal laws and programmes affecting disabled persons.[4] It received repeated evidence of disability discrimination.[5] Such evidence was

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[1] Weicker, 1991. See also Flaccus, 1986a. For an analysis of disability rights policy prior to 1990, see: Percy, 1989; Drimmer, 1993.

[2] White House Conference on Handicapped Individuals, 1977; Burgdorf and Bell, 1984. Some disability rights legislation had reached the statute book since the RA 1973: Education of All Handicapped Children Act 1975; Education of the Handicapped Act 1990; Developmental Disabled Assistance and Bill of Rights Act 1975; Voting Accessibility for the Elderly and Handicapped Act 1984; Air Carrier Access Act 1986; Handicapped Children's Protection Act 1986; Protection and Advocacy for Mentally Ill Individuals Act 1986.

[3] Jones, 1991a: 472; 1991b: 27. In 1977, sources close to the executive branch of government had recommended that all titles of the Civil Rights Act 1964 should be amended to include disability as a prohibited ground of discrimination: White House Conference on Handicapped Individuals, 1977.

[4] Subsequently renamed as the National Council on Disability. See: 29 USC §781.

reinforced by survey data,[6] which also demonstrated support for a new civil rights initiative. Meanwhile, much energy had to be expended to maintain the civil rights already achieved by disabled people under the RA 1973. Amending legislation was passed to overturn Supreme Court decisions unfavourable to the civil rights of disabled people.[7] Finally, in its first and landmark report in 1986, the Council recommended far-reaching legislative reform to prohibit comprehensive disability discrimination.[8]

The full civil rights of persons with disabilities and their claims to equality under the law were eventually recognized by the enactment of the Americans with Disabilities Act 1990 (ADA 1990).[9] A draft bill contained in the second report of the National Council on the Handicapped in 1988 formed the basis of the ADA bill first introduced into Congress in April 1988.[10] The original bill addressed broad types of prohibited discrimination, including employers' practices, and then described broad forms of prohibited discrimination universally applicable to employers, service providers, housing operators, transportation concerns, etc. There were no separate employment provisions in the bill, so that employment-specific measures would be left to regulations to be issued under the statute.[11] The second ADA bill took a different approach and was structured according to distinctive issues, such as

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[5] National Council on the Handicapped, 1988.

[6] Louis Harris and Associates, 1986; 1987. The Harris polls found that three-quarters of disabled Americans supported anti-discrimination and civil rights legislation for disabled people: Louis Harris and Associates, 1986: 112.

[7] The Civil Rights Restoration Act 1987 *overturned Grove City College v Bell (1984) 465* US 555. The Handicapped Children's Protection Act 1986 overturned *Smith v Robinson* (1984) 468 US 992, while the Air Carrier's Access Act 1988 reversed *US Department of Transportation v Paralysed Veterans of America* (1986) 477 US 597. Nevertheless, the Fair Housing Amendments Act 1988 did mark one advance by extending the civil rights of disabled people into private sector housing.

[8] National Council on the Handicapped, 1986. See also to like effect: Presidential Commission on the Human Immunodeficiency Virus Epidemic, 1988.

[9] As amended by the Civil Rights Act 1991 and codified as amended at 42 USC §12101 *et seq*. The ADA 1990 drew upon the RA 1973 and the disability provisions of more recent general civil rights legislation in the shape of the Civil Rights Restoration Act 1987 and the Fair Housing Amendments Act 1988. See generally: Tucker, 1989b; Weicker, 1991; West, 1991a; Jones, 1991a; Jones, 1991b; Tucker, 1992.

[10] National Council on the Handicapped, 1988.

[11] Senate Bill 2345 (100th Congress, 2nd Session, 1988). In this bill, the obligation to make reasonable accommodations for a disability was not subject to the "undue hardship" standard of section 504, but rather the question was whether the essential nature of the employer's business would be fundamentally altered or its existence threatened.

employment, allowing sophisticated and differential treatment of each.[12] It was introduced into Congress in May 1989. After much debate and modification,[13] the ADA 1990 was eventually signed into law on 26 July 1990.

Aims and objectives of the legislation

The Act prohibits discrimination on the ground of disability in employment, housing, public accommodations, education, transport, communications, recreation, institutionalization, health services, voting and access to public services.[14] Although this study is primarily concerned with disability discrimination in employment, the impact on disabled persons of architectural barriers and lack of access to public transport should not be overlooked when considering equal employment opportunity. The ADA requires all new public transport to be accessible to disabled people and existing public rail systems must be made accessible during the course of time. Architectural barriers in existing buildings must be removed where "readily achievable" or alternative steps must be taken to ameliorate the effect of the barrier. New construction projects (and alterations to existing buildings) must be designed and built to be accessible to persons with disabilities. Rights to mobility and physical access are now seen as essential elements of the right to work.

The avowed intention of the ADA 1990 is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities".[15] To that end, the Act furnishes "clear, strong, consistent, enforceable standards" confronting disability-based discrimination, while it seeks to ensure that the federal government plays a central role in enforcing those standards.[16] In a magisterial phrase, the ADA 1990 strives:

> to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas

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[12] Senate Bill 933 and House of Representatives Bill 2273 (101st Congress, 1st Session, 1989).

[13] For a history of negotiations and compromises which led to the eventual enactment of the ADA 1990 see: Feldblum, 1991a and 1991c. As to the constitutional implications, see: Mikochik, 1991b.

[14] For an overview of the non-employment provisions of the ADA 1990 see: Burgdorf, 1991; Cook, 1991; Tucker, 1992. For a broader perspective upon the Act and its underlying policies, see the various contributions in West, 1991c.

[15] 42 USC §12101(b)(1). For a detailed analysis of the Act, see: Bureau of National Affairs, 1990.

[16] 42 USC §12101(b)(2),(3).

of discrimination faced day-to-day by people with disabilities.[17]

As legislation fashioned upon the model of Title VII of the Civil Rights Act 1964,[18] the ADA has been described as:

> the most comprehensive piece of disability rights legislation ever enacted, and the most important piece of civil rights legislation since the 1964 Civil Rights Act. This legislation will transform the landscape of American society, and will have a profound effect on what it means to be disabled.[19]

In the words of one commentator, as "equality commands respect for the diverse cultures of our land, so the ADA also demands accommodation to the varied ways disabled people live their lives".[20] However, nothing in the Act engineers equality of employment outcomes, reverse discrimination in favour of disabled individuals, or the mandating of quotas. Although the ADA is an emancipating statute for disabled people, in one view it is also an extension of civil rights for all Americans. A former Attorney-General of the United States, instrumental in the passage of the Act, argued that all citizens stand to benefit from *any* extension of civil rights in favour of minority groups by enabling a wider contribution to the well-being of the economy and society at large.[21] The Act has thus been designated as "social legislation to end barriers, not an instrumentality for continuous and acrimonious litigation".[22]

Interpreting the legislation

The application and interpretation of the ADA are assisted by four sources. The first two are contained within the Act itself. They consist of a recital of Congressional findings,[23] which

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[17] 42 USC §12101(b)(4).

[18] The remedies and procedures of the Civil Rights Act 1964 are applicable to any violation of the employment provisions of the ADA: 42 USC §12117(a) incorporating §§705-710 of the Civil Rights Act 1964 (42 USC §§2000e-4 to 2000e-9). As a result, individual claims can be brought before the courts as well as enforcement action being taken by the relevant administrative agencies. A successful plaintiff under the ADA would be entitled to an injunction and back pay, but compensatory or punitive damages would not be available.

[19] Mayerson, 1991a: 1.

[20] Mikochik, 1991a: 372.

[21] Thornburgh, 1991. For example, the EEOC has calculated that the ADA regulations would result in productivity gains of more than US$164 million: Jones, 1991a: 498.

[22] Thornburgh, 1991: 384.

[23] 42 USC §12101(a). Congress suggested that there are 43 million disabled Americans. For the purposes of the employment provisions, the more realistic figure is probably 19.1 million disabled adults of working age: Yelin, 1991: 138 and n[5].

are reproduced in Text Box 7, and a statement of the legislative purpose.[24] The third source is the legislative history of the ADA as contained in a number of Congressional committee reports on the passage of the ADA through the parliamentary process.[25] Although the substantive provisions of the 1990 Act were more comprehensive than those of the RA 1973, Congress charged the EEOC with the task of drafting implementing regulations.[26] Regulations were published on the first anniversary of the Act being signed into law and have subsequently been codified.[27] These regulations, having the force and effect of law, and issued by the EEOC under powers delegated by the Act, represent the fourth source of application and interpretation.[28] In addition, it is expressly provided that the ADA is not to be interpreted as providing inferior standards to those already set by the RA 1973 and its regulations.[29] The ADA does not pre-empt the RA 1973. Equally, the 1990 Act does not limit any other federal, state or local law which provides an equal or superior degree of protection to disabled workers.[30] This would appear to apply to both legislative and common law protection. The EEOC makes it clear that an employer may not argue that a lesser anti-discrimination standard under a state law excuses a failure to meet a higher standard under the ADA and *vice versa*.[31]

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[24] 42 USC §12101(b).

[25] US Senate, 1989; US House of Representatives, 1990a and 1990b.

[26] 42 USC §12116.

[27] 29 CFR Part 1630 originally published at 56 *Federal Regulations* 35734 (26 July 1991).

[28] Shaller and Rosen (1992: 405) comment that the regulations fail to provide specific rules or guidance on many key issues, including the Act's effect on existing collective agreements, insurance, workers' compensation, and burdens of proof.

[29] 42 USC §12201(a):

> Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the RA of 1973 or the regulations issued by Federal agencies pursuant to such title.

See also: 29 CFR 1630.1(c)(1).

[30] 42 USC §12201(b):

> Nothing in this Act shall be construed to invalidate or limit the remedies, rights and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act...

See also: 29 CFR 1630.1(c)(2).

[31] 29 CFR §1630.1 appendix. It is clear that compliance with the RA 1973 and state fair employment laws will not necessarily assure compliance with the ADA 1990. The ADA will be interpreted in the light of precedents and regulations under the RA 1973 and applies a standard at least as stringent as the earlier law (if not more so).

The Congress finds that-

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Text Box 7: (US) ADA 1990: Congressional findings

Employment provisions of the ADA 1990 outlined [32]

The employment provisions in Title I of the ADA came into force on 26 July 1992.[33] The ADA 1990 prohibits a "covered entity" from discriminating against qualified individuals with disabilities. For this purpose, a "covered entity" means "an employer, employment agency, labor organization or joint labor-management committee".[34] However, the legislation does not apply to all employers.[35] Until July 1994, only employers who employ twenty-five or more employees are within the scope of the ADA 1990. After that date, only employers whose workforce includes fifteen or more employees need take cognisance of this law.[36] Employers were effectively given a two year period in which to prepare for the new legal regime, while the federal authorities were given a breathing space in which to prepare the detailed regulations and technical assistance plans which underpin the legislation.

Until the ADA, federal law provided little or no protection from disability discrimination in employment in the private sector. As has been seen, Title V of the RA 1973 applied only to federal employers, federal contractors and recipients of federal funds. Nevertheless, the employment provisions in Title I of the ADA are largely derived from the standards set by section 504 of the RA 1973 and its supporting regulations. Section 504 may have lacked the broad application of the ADA, but the 1990 statute effectively extends the existing federal provision into the private sector. Title I of the ADA addresses disability discrimination in private employment, but does so by borrowing from the non-discrimination concepts of section 504 of the RA 1973. In particular, employers in both the federal and private sectors must now make "reasonable accommodation" for qualified disabled individuals, subject to an "undue hardship" defence. The availability of new technology aids the making of such accommodations, but employers must also consider adapting existing machinery and equipment, restructuring jobs and making the workplace more accessible so as to promote the employability of disabled workers.

MEANING OF DISABILITY

In order to enjoy the protection of the ADA 1990, a person must have a "disability" within

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[32] See generally: Postol and Kadue, 1991.

[33] Pub L 101-336 §108. Within one month of the Act coming into force, the enforcement authority (EEOC) received 248 charges: *HR Focus* (November 1992) at 10.

[34] 42 USC §12111(2); 29 CFR 1630.2(b).

[35] It is estimated that the ADA 1990 will cover 3.9m business establishments and 666,000 employers (Creasman and Butler, 1991: 52).

[36] 42 USC §12111(5). See also: 29 CFR §1630.2(e).

the meaning of the statute. The Act defines "disability", with respect to an individual, as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.[37]

These are terms which are almost identical to the definition of "handicap" under the relevant provisions of the RA 1973. The use of the word "disability" rather than "handicap" reflects modern terminology preferred by disabled persons themselves and nothing of substance hangs on the change of phraseology. The definition is broad and no attempt is made to list possible disabilities.[38] The key concept is that of an "impairment". The EEOC regulations define "physical or mental impairment" as meaning:

> (1) any physiological disorder or condition, cosmetic disfigurements, 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; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[39]

The temptation to list exhaustively the kinds of conditions which will be counted as impairments is also resisted in the regulations.

It is not enough to demonstrate the existence of an impairment. It must also be shown to present a substantial limitation on one of the individual's major life activities.[40] Once again, the concept of "major life activities" is not defined in the Act, but the regulations state that this means functions such as walking, seeing, hearing, speaking, breathing, learning, working, caring for one's self and carrying out manual tasks.[41] A "substantial limitation" on a major

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[37] 42 USC §12102(2); 29 CFR §1630.2(g). LaPlante comments that "persons who consider themselves disabled but are not considered by others to be so are implicitly included in the ADA definition": 1991, 57. This is doubtful, for reasons explored in Chapters X and XI.

[38] Congress did illustrate what disabilities might be included (Jones, 1991a: 479): orthopaedic impairments, visual impairments, speech impairments, hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, Human Immunodeficiency Virus infection, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction and alcoholism.

[39] 29 CFR §1630(h).

[40] 42 USC §12102(2); 29 CFR §1630.2(g).

[41] 29 CFR §1630.2(i). Two further activities were referred to as major life activities in a Department of Justice Memorandum - procreation and intimate personal relations -thus encompassing AIDS and HIV as possible impairments: Memorandum of Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, 27 September 1988.

life activity may be measured in two ways.[42] First, individuals are "substantially limited" if they are unable to perform a major life activity which an average person could perform. Second, and alternatively, individuals may be "substantially limited if significantly restricted as to the condition, manner or duration under which they can perform a major life activity as compared to an average person. Three factors are relevant: (1) the nature and severity of the impairment; (2) the actual or expected duration of the impairment; and (3) the actual or expected permanent or long term impact of the impairment.[43]

Individuals who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" are expressly covered. Persons with a "record of... an impairment" (as already defined) are also within the statute's purview. This protects a person who has a history of impairment or who has been misdiagnosed or misclassified as so impaired.[44] The ADA also includes individuals who are "regarded as having... an impairment." This means that the person in question:

> (1) has a physical or mental impairment that does not substantially limit major life activities but that is treated... as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) has none of the impairments defined... but is treated... as having such an impairment.[45]

All three branches of the definition of the protected class are imported from the equivalent provisions of the RA 1973 and its supporting regulations.

For the purposes of the employment provisions of the ADA, disabled individuals within the Act's protection do not include individuals "currently engaging in the illegal use of drugs", if that is the basis upon which an employer has discriminated.[46] Individuals with "psychoactive

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[42] 29 CFR §1630.2(j)(1).

[43] 29 CFR §1630.2(j)(2). There are additional considerations in respect of substantial limitations on *working*, which are discussed in Chapters XI and XII: 29 CFR §1630.2(j)(3).

[44] 29 CFR §1630.2(k). Under the ADA regulations, the fact that someone has been classified as disabled under some other statute, regulation or programme does not give rise to a presumption that they satisfy the definition of disabled for ADA purposes: 29 CFR §1630.2(k) appendix.

[45] 29 CFR §1630.2(l).

[46] 42 USC §§12114(a); 29 CFR §1630.3(a):

> For purposes of this title, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

The term "illegal use of drugs" means:

> [T]he use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under

substance use disorders" resulting from current illegal use of drugs are expressly excluded from the classifications of "disability".[47] The term "use" includes possessing or distributing illegal drugs. However, rehabilitated drug users (or participants in a supervised rehabilitation programme) are not excluded from the definition of disabled person provided they are no longer engaging in drug use.[48] Similarly, an individual who is erroneously regarded as engaging in the use of illegal drugs is not excluded from qualifying as a disabled person. Nevertheless, the ADA does permit employers to adopt or administer reasonable policies or procedures designed to ensure that rehabilitating or rehabilitated drug users are no longer engaging in the illegal use of drugs.[49] This might include workplace drug testing (which, for this purpose, does not constitute a medical examination triggering the rules which apply thereto), although Congress was careful to clarify that the legislation is not intended to encourage, prohibit or authorize drug testing or the making of employment decisions based thereupon.[50] An employer can lawfully prohibit the illegal use of drugs and the use of alcohol in the workplace and adopt requirements that employees shall not be under the influence of alcohol or engage in the illegal use of drugs in the workplace.[51]

A further group of individuals are expressly outside the legislation.[52] Transvestitism,

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supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law:

42 USC §12111(6)(A); 29 CFR §1630.3(a)(2). The term "drug" means a controlled substance, as defined in §202 of the Controlled Substances Act: 42 USC §12111(6)(B); 29 CFR §1630.3(a)(1). See also: 42 USC §12210(a) and (d).

[47] 42 USC §12211(b)(3).

[48] 42 USC §12114(b); 29 CFR §1630.3(b):

> Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drug.

See also: 42 USC §12210(b).

[49] 42 USC §§12114(b) and 12210(b); 29 CFR §1630.3(c). There are special rules covering transportation workers: 42 USC §12114(e); 29 CFR §1630.16(c)(2).

[50] 42 USC §12114(d); 29 CFR §1630.16(c)(1).

[51] 42 USC §12114(c); 29 CFR §1630.16(b).

[52] 42 USC §§12208 and 12211; 29 CFR §1630.3(d)-(e).

homosexuality and bisexuality are not classified as disabilities under the ADA. Similarly, certain other conditions are not treated as within the meaning of disability: transsexualism, paedophilia, exhibitionism, voyeurism, gender identity disorders (not resulting from physical impairments), other sexual behaviour disorders, compulsive gambling, kleptomania or pyromania. Burgdorf comments:

> These exclusions seem wholly inconsistent with the overall tenor of the Americans with Disabilities Act, which encourages participation and decision-making based upon individualized determinations of actual ability and not preconceived assumptions and stereotypes...
>
> ...[I]t is arguable that the members of Congress relied upon nothing other than their own negative reactions, fears and prejudices in fashioning the list of excluded classes.[63]

Such exclusions are not found explicitly in comparable laws of other jurisdictions, although it is possible that judicial activism will regard these classifications as beyond the reach of disability discrimination legislation.

QUALIFICATION FOR EMPLOYMENT

Not all disabled persons otherwise within the scope of the ADA 1990 are protected from employment discrimination. The subject of discrimination must be "a *qualified* individual with a disability".[64] This is denoted by 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".[65] In deciding what functions of a job are "essential", consideration is to be given to the employer's judgement, so that the court must not simply substitute its view for that of the employer; but equally, 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 to be considered evidence of the job's essential functions.[66] The use of the word "essential" suggests that the law is concerned with job tasks which are

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[63] Burgdorf, 1991: 452 and 519. He suggests that the exclusion of these groups was part of the political bargaining designed to placate vocal critics of the legislation at large. Burgdorf is thus critical of legislating "by consensus": Burgdorf, 1991: 520.

[64] 42 USC §12112(a); 29 CFR §1630.4 (my emphasis).

[65] 42 USC §12111(8). The ADA regulations are more expansive:

> Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position:

29 CFR §1630.2(m). *Cf* 45 CFR §84.3(k)(1).

[66] 42 USC §12111(8); 29 CFR §1630.2(n)(3).

fundamental rather than marginal.[57] The EEOC regulations under the ADA assist employers to understand their obligations as far as "essential functions" are concerned. A job function might be regarded as essential if (1) performance of the function is the reason the position exists at all; or (2) performance of the function could only be re-distributed amongst a limited number of employees; or (3) the position has to be filled by someone with particular expertise or ability to perform what is a highly specialised function.[58]

ANTI-DISCRIMINATION PRINCIPLE

General rule and its construction

The prohibition on discrimination applies to all aspects of the employment relationship. The Act provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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.[59]

The EEOC regulations expand this prohibition in order to outlaw discrimination in the following areas:

> (a) Recruitment, advertising, and job application procedures; (b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (c) Rates of pay or any other form of compensation and changes in compensation; (d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; (e) Leaves of absence, sick leave, or any other leave; (f) Fringe benefits available by virtue of employment, whether or not administered by [the employer]; (g) Selection and financial support for training... (h) Activities sponsored by [employers], including social and recreational programs; and (i) Any other term, condition, or privilege of employment.[60]

A particular issue with regard to insurance benefits arises here. The ADA 1990 allows a degree of latitude to existing insurance practices which are otherwise consistent with state laws, but this flexibility must not be used to circumvent the purpose of the legislation.[61] This means that insurers must determine a disabled person's insurability solely according to actuarial principles or claims experience. An employer cannot refuse to hire a qualified applicant because its employer's liability insurance policy does not cover that person's particular disability or because the engagement would lead to increased insurance premia.

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[57] 29 CFR §1630.2(n)(1).

[58] 29 CFR §1630.2(n)(2).

[59] 42 USC §12112(a).

[60] 29 CFR §1630.4.

[61] 42 USC §12201(c); 29 CFR §1630.16(f).

Similarly, an employer will need to be careful in considering a disabled employee's eligibility for an occupational health or pension scheme.

What is meant by "discriminate" here? The Act provides an inclusive definition reproduced in Text Box 8. An employer must not limit, segregate or classify job applicants or employees in a way that adversely affects their opportunities or status because of their disability.[62] For example, it would be unlawful to segregate disabled employees in a separate work area. Employers must not participate in a contractual or other arrangement or relationship - such as with an employment agency, trade union, pension scheme or training organization - that has the effect of subjecting a qualified applicant or employee with a disability to prohibited discrimination.[63] The use of "standards, criteria or methods of administration" that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control will amount to unlawful discrimination.[64] Employers and others must not discriminate against a qualified individual because of that individual's known relationship or association with a disabled person. The employer must know both of the association and of the other's disability.[65] For example, an employer who provides health insurance benefits which cover employees' dependants may not reduce an employee's entitlement to such benefits simply because he or she has a disabled dependant. Similarly, an employer who refused to hire an applicant with a disabled child would be discriminating unlawfully if that refusal was based upon an assumption that the applicant may be absent from work periodically to look after the child.[66]

The use of qualification standards, employment tests or other selection criteria will amount to discrimination if they screen out disabled applicants, unless they are job-related and

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[62] 42 USC §12112(b)(1); 29 CFR §1630.5.

[63] 42 USC §12112(b)(2); 29 CFR §1630.6.

[64] 42 USC §12112(b)(3); 29 CFR §1630.7.

[65] 42 USC §12112(b)(4); 29 CFR §1630.8.

[66] Shaller and Rosen, 1992: 407.

[T]he term "discriminate" includes-

(1) 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;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration-
   (A) that have the effect of discrimination on the basis of disability; or
   (B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
   (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Source: 42 USC §12112(b)

Text Box 8: The meaning of discrimination: (US) ADA 1990

consistent with business necessity.[67] Employment tests must be selected and administered carefully so as to ensure that the test results accurately reflect the skills, aptitude or other factors which the tests purports to measure and not the impaired sensory, manual or speaking skills of an individual with such disabilities.[68] In other words, employment tests must only measure what they purport to measure. Shaller and Rosen comment that, as a result, a heavy burden is imposed on employers to demonstrate the job-relatedness and business necessity of selection criteria which have a disparate impact upon disabled applicants and to show that there are no reasonable alternatives which would not so discriminate.[69] If employers know that an applicant has a disability which impairs manual, sensory or speaking skills, they must consider whether a reasonable accommodation should be made in the administration of the test, and an applicant may be asked whether such an accommodation is necessary.[70]

Medical examinations and inquiries

The Act augments the meaning of unlawful discrimination by extending it to include medical examinations and inquiries.[71] The relevant provisions are reproduced in Text Box 9. Job applicants may not be subjected to medical examinations or pre-employment inquiries to identify their status as a disabled person or to discover the extent of any disability.[72] However, pre-employment inquiries are permitted only to the extent necessary to ascertain an applicant's ability to do the job.[73] Nevertheless, once an employment offer has been made to an applicant, but before employment has begun, the employer may make it a

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[67] 42 USC §12112(6); 29 CFR §1630.10.
The term "qualification standards" means:

> the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired:

29 CFR §1630.2(q).

[68] 42 USC §12112(b)(7); 29 CFR §1630.11 (unless it is those very skills that the test purports to measure).

[69] Shaller and Rosen, 1992: 420.

[70] 29 CFR §1630.11 appendix.

[71] 42 USC §12112(1):

> The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

[72] 42 USC §12112(2)(A); 29 CFR §1630.13(a).

[73] 42 USC §12112(2)(B); 29 CFR § 1630.14(a).

(1) *In general.*
The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.
(2) *Preemployment.*
(A) *Prohibited examination or inquiry.*
Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.
(B) *Acceptable inquiry.*
A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.
(3) *Employment entrance examination.*
A covered entity may make require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if-
(A) all entering employees are subjected to such an examination regardless of disability;
(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-
(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and
(C) the results of such examination are used only in accordance with this title.
(4) *Examination and inquiry.*
(A) *Prohibited examinations and inquires.*
A covered entity shall not require a medical examination and shall not make inquires of an employee as to whether such employee is an individual with a disability or as to the mature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
(B) *Acceptable examinations and inquiries.*
A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.
(C) *Requirement.*
Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Text Box 9: Medical examinations/inquiries under (US) ADA 1990

condition of employment entrance that the applicant submit to a pre-placement medical examination.[74] Such a pre-placement medical examination is lawful, provided that all new employees would be subject to it regardless of disability. Once in employment, disabled employees are safeguarded from being required to undergo medical examination, or respond to inquiries, designed to elicit information about their disabled status.[75] Such examinations or inquiries are lawful, however, if job-related and consistent with business necessity.[76] This does not prevent voluntary medical examinations or the compilation of voluntary medical histories as part of an occupational health programme in the workplace, nor does it prevent employers checking an employee's ability to carry out job-related functions.[77] The information gleaned from a pre-placement or post-placement examination must be treated as a confidential medical record and used only in accordance with the spirit of the legislation. Exceptionally, supervisors and managers may be party to the findings of the examination if there are any consequent restrictions on a disabled worker's work or duties, or accommodation is proposed. Similarly, first aid and safety personnel may need to be given disability-specific information about an individual if the need for emergency treatment might arise.[78]

DUTY TO MAKE REASONABLE ACCOMMODATION

Borrowing a concept from section 504, the ADA deems it to be discrimination if an employer fails to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified disabled applicant or employee.[79] A person is qualified for employment if he or she can perform the essential functions of the job with or without reasonable accommodation.[80] Although the term "reasonable accommodation" is not substantively defined in the body of the Act, it is a concept borrowed from the section 504 regulations and illustrated within the ADA 1990:

> The term 'reasonable accommodation' may include- (A) making existing facilities used

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[74] 42 USC §12112(3); 29 CFR §1630.14(b).

[75] 42 USC §12112(4)(A); 29 CFR §1630.13(b).

[76] 42 USC §12112(4)(A); 29 CFR §1630.14(c).

[77] 42 USC §12112(4)(B); 29 CFR §1630.14(d).

[78] 42 USC §12112(3)(B), (3)(C) and (4)(C); 29 CFR §1630.14(b), (c) and (d). Information may also need to be made available to government officials carrying out compliance inspections in respect of the Act.

[79] 42 USC §12112(b)(5)(A); 29 CFR §1630.9(a). *Cf* 45 CFR §84.12(b).

[80] 42 USC §12111(8); 29 CFR §1630.2(m).

> by employees readily accessible to and useable by individuals with disabilities; and (B) 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.[81]

The EEOC regulations under the ADA define reasonable accommodation as the making of modifications or adjustments in the application process and workplace environment which ensure that disabled applicants are not discriminated against on the basis of disability and that they enjoy employment privileges and benefits equal to other employees.[82] An employer may not deny employment opportunities to a qualified disabled person where the denial is based upon the need to make reasonable accommodation.[83] Therefore employers are obliged by law to reasonably accommodate disabled persons.

Under the RA 1973, the duty to provide reasonable accommodation is subject to an "undue hardship" exception, although this was not defined in the Act or its regulations.[84] Similarly, an exception is made under the ADA if the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.[85] "Undue hardship" is judged by the test of whether the accommodation would require significant difficulty or expense, taking into account various factors.[86] The factors to be considered are reproduced in Text Box 10, and include the nature and cost of the necessary accommodations; the overall financial resources of the facility; the overall financial resources

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[81] 42 USC §12111(9); 29 CFR §1630.2(o). *Cf* 45 CFR §84.12.

[82] 29 CFR §1630.2(o)(1). Employers must provide reasonable accommodation to ensure equal opportunity in the application process, to enable disabled persons to perform essential job functions (sufficient to meet the job-related needs of the disabled individual), and to permit disabled employees equal participation in the benefits and privileges of employment (such as the use of canteens, rest areas, etc.): 29 CFR §1630.2(o) appendix and §1630.9 appendix.

[83] 42 USC §12112(b)(5)(B); 29 CFR §1630.9(b).

[84] See, for example: 45 CFR §84.12(a).

[85] 42 USC §12112(b)(5)(A); 29 CFR §1630.9(a).

[86] 42 USC §12111(10)(A): "The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in [the following] subparagraph". See also: 29 CFR 1630.2(p)(1). Compare the reasonable accommodation requirement as to religion under Title VII of the Civil Rights Act 1964 as applied by the Supreme Court in *Trans World Airlines v Hardison* (1977) 432 US 63 as implying only a *de minimis* obligation on an employer. The ADA regulations explain that an accommodation which would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business would constitute "undue hardship": 29 CFR §1630.2(p) appendix.

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Source: 42 USC §12111(10)(B)

Text Box 10: Undue hardship defence under (US) ADA 1990

of the employer and the number, type and location of the employer's facilities; and the type of operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness, administrative or fiscal relationship of the facilities in question.[87] The burden of proof will be upon the employer to demonstrate undue hardship.[88] 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 seek the advice of specialist agencies.

DEFENCES

In general

It is implicit in the Act and explicit in the ADA regulations that, in cases of direct discrimination or unequal treatment, an employer's action may be justified as motivated by a legitimate, non-discriminatory reason. For example, the dismissal of a disabled employee on the grounds of misconduct or incompetence is a defensible dismissal because it is not an employment decision based upon disability.[89] An employment decision or the use of qualification standards, tests or selection criteria which screen out disabled persons might be defended on the basis of reasoning which is job-related and consistent with business necessity. However, it must be shown that no reasonable accommodation could be made that would enable the disabled person to perform the required essential functions of the job.[90]

Employers may discriminate against otherwise qualified disabled individuals if the individuals pose a direct threat to the health or safety of themselves or other individuals in the workplace. In other words, employers may use freedom from future safety risk as a qualification standard.[91] A direct threat to health or safety means that there must be a significant risk of substantial harm which cannot be eliminated or ameliorated by reasonable accommodation.[92] The determination of a direct threat to health or safety must be made on

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[87] 42 USC §12111(10)(B); 29 CFR §1630.2(p)(2).

[88] *Prewitt v US Postal Service*, 662 F2d 292.

[89] 29 CFR §1630.15(a) and appendix. Employment decisions based upon reasoning that an employer's insurance policy does not cover disability or that the employment of a disabled person will lead to increased insurance or workers' compensation costs are not considered to be founded upon legitimate, non-discriminatory reasons.

[90] 42 USC §§12112(b)(6) and 12113(a); 29 CFR §§1630.15(b)(1) and 1630.15(c).

[91] 42 USC §12113(b); 29 CFR §1630.15(b)(2).

[92] 42 USC §12111(3); 29 CFR §1630.2(r)

a case-by-case basis and must be predicated upon the individual's *present* condition.[93] The regulations, but not the Act, envisage that this defence may operate where the disabled person's *own* health or safety is directly threatened. Many disabled persons and disability rights organizations argued against the inclusion of this expanded defence in the regulations, reasoning that it promoted paternalism and negative stereotyping.[94] In the event, those arguments were unsuccessful.

A number of defences are implicit in the legislation but made explicit in the regulations. First, it is a defence to disability discrimination based upon a refusal or failure to make a reasonable accommodation that the accommodation would pose an undue hardship for the employer's business.[95] Second, an employer may defend a uniformly applied standard, criterion or policy which indirectly discriminates against disabled persons by showing it to be job-related and consistent with business necessity, and not amenable to reasonable accommodation.[96] Third, an employer might be able to defend a discriminatory employment decision or action on the grounds that it is required, necessitated or prohibited by federal law or regulation, unless the defence is a mere pretext, or the other law or regulation does not actually compel the discriminatory action, or that the law can be complied with in a non-discriminatory way.[97]

Food handling

Particular provision is made for jobs involving food handling. The Secretary of Health and Human Resources is mandated to publish a list of infectious and communicable diseases which are transmitted through food handling.[98] An employer may discriminate against disabled individuals whose disability consists of a listed infectious or communicable disease and where there is a risk of the disease being transmitted through food handling. Clearly this only applies where the job in question involves food handling. Before the defence can be relied upon, the employer must show that the risk cannot be eliminated by reasonable

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[93] 29 CFR §§1630.2(r) and appendix.

[94] Shaller and Rosen, 1992: 430.

[95] 42 USC §§12111(10) and 12112(b)(5); 29 CFR §1630.15(d).

[96] 29 CFR §1630.15(c).

[97] 29 CFR §1630.15(e) and appendix.

[98] 42 USC §12113(d)(1).

accommodation.[99] This means that an employer may refuse to assign or continue to assign a disabled person with a listed infectious or communicable disease to a job involving food handling, unless reasonable accommodation can eliminate the risk of transmission. This was an amendment made to the ADA during its passage through Congress, but arguably adds little to the application of the general principle that a risk to the health or safety of others renders an individual unqualified.[100]

The amendment was prompted by the prospect of hardship for restaurants and other food retailers required to protect the civil rights of HIV-infected persons. Although there is no evidence that this disease is transmissible through food handling, it was the potential for public misperception which led to the compromise amendment. This a curious example of a particular provision in statute, generally designed to eliminate discrimination based upon ignorance, being shaped by a desire to accommodate misunderstanding. The debate and amendments surrounding this provision almost obstructed the passage of the ADA 1990. The fear of the restaurant and catering industry was that customers would boycott establishments where it was known or suspected that an HIV-positive employee was working. It also raises the question of how far an employer can take account of customer preference when deciding to discriminate on the ground of disability. For example, airline customers might prefer female flight attendants and that preference was historically employed by airlines to exclude male applicants for in-flight positions. By the same logic, an airline might seek to exclude applicants with a visible disability, such as facial disfigurement or physical deformity: not because the applicant is incapable of discharging the essential elements of the job, but because of the airline's perception of customer preference and pure aesthetics. Just as customer preference for female flight attendants did not justify sex discrimination,[101] it is doubtful whether this would be a defence to disability discrimination.

CONCLUDING REMARKS

The ADA 1990 provides a template for comprehensive disability discrimination legislation that may serve as a pattern for similar legislative interventions to protect the civil rights of disabled people in other countries. It is clear that the Act and its supporting regulations have already excited much attention in other jurisdictions. In Britain, for example, disability rights reformers both within and outside the legislature have held up the American experience as

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[99] 42 USC 12113(d); 29 CFR §1630.16(e).

[100] Jones, 1991a: 482.

[101] Under Title VII of the Civil Rights Act 1964: *Diaz v Pan American World Airways* (1971) 442 F2d 385 (5th Cir).

a paradigm for future British developments and, as was noted in Chapter IV, attempts have been made to introduce draft legislation here that is directly modelled upon the ADA 1990. While the US framework is undoubtedly one that merits close examination, reformers should take care lest they attempt a transplant of an experiment that might not fit the British experience.[102] As a direct descendant of Title VII of the Civil Rights Act 1964, from which the British sex and race discrimination legislation can also trace its pedigree, it is tempting to assume that the ADA 1990 can be imported into the British jurisdiction with only minor adjustments and amendments. This may prove to be true, but it should be remembered that our anti-discrimination statutes have developed subsequently in quite different ways from their American counterparts, despite their common genetic heritage. Accordingly, before examining further the lessons of the ADA 1990 for disabled employment rights here, it is proposed to look for additional examples of legal approaches to disability discrimination. Given its cultural and geographical proximity to the US, and its shared common law history with Britain, Canada represents an alternative source of comparative material of interest. So it is to Canada that we turn in the next chapter.

[102] For example, the various civil rights bills for disabled people that have been introduced into Parliament since 1990 have paid too little attention to the need to translate some of the terms and concepts of the ADA so as to more closely fit the British employment culture.

CHAPTER VIII:
DISABLED EMPLOYMENT RIGHTS IN CANADA

INTRODUCTION

Despite the similarities of their legal cultures, discrimination law in the US and Canada has developed in quite distinct ways. The anti-discrimination principle in Canada emerges as a component part of legislation protecting human rights in general. As a result of the 1982 repatriation of the Canadian Constitution, the Canadian Charter of Rights and Freedoms provides a constitutional framework within which the rights of all Canadians are cloaked with legal protection.[1] The key provision, in the context of the present discussion, is section 15 of the Charter, which provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or *mental or physical disability*.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or *mental or physical disability*.[2]

In the words of one commentator, by virtue of this enactment Canada has "conferred on its disabled citizens perhaps the most comprehensive statements of human rights to be found in any nation in the world".[3] However, despite this optimistic view, it is clear that the Charter is only a catalyst for change and that the chemistry of disability rights requires further legal ingredients in order to prevent discrimination and promote equality of opportunity.[4] In practice, therefore, the Charter is less important than the human rights codes and statutes of the Canadian federal and provincial jurisdictions. We examine each jurisdiction in turn.

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[1] Canadian Constitution (Constitution Act 1982) Part I.

[2] Emphasis supplied. See: Tarnopolsky, 1983; Lepofsky, 1992. For a discussion of the position of disabled people under the Charter, see: Lepofsky, 1983 and 1985; Lepofsky and Bickenbach, 1985.

[3] Hahn, 1987a: 365. Hahn presents an interesting discussion of the political processes by which disabled people were eventually included within the Charter.

[4] See generally: Tarnopolsky and Pentney, 1985 and supplements. Most recently, the Canadian Supreme Court has appeared to require plaintiffs under the Charter to show that they are not differently situated from those who are not harmed by alleged discriminatory actions or measures: *Hess v Regina* [1990] 2 SCR 906. Lepofsky comments (1992: 181) that: "To disabled persons seeking equality under section 15, this would entail an unfair constitutional presumption of their difference from able-bodied persons". See also: *McKinney v Board of Governors of the University of Guelph* [1990] 3 SCR 229 (correlating age with ability and stereotyping the elderly with incapacity).

FEDERAL JURISDICTION

The failure of Canadian common law to fashion a remedy for social discrimination mirrors the experience of the common law in Britain.[5] Even the enactment of the Canadian Bill of Rights in 1960, guaranteeing fundamental civil liberties and protection from legally sanctioned discrimination, omitted to address discrimination by reason of disability. Instead the lead was taken in the years after 1960 by provincial legislatures enacting human rights statutes, as will be seen below. In the federal jurisdiction, however, the Canadian Human Rights Act, first enacted in the mid-1970s, now includes disabled persons within its compass.

Canadian Human Rights Act

The Canadian Human Rights Act espouses the principle of individual equal opportunity without discrimination.[6] The purposive section of the Act provides:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on... [*inter alia*] disability...[7]

The Act proscribes a number of grounds of discrimination and prohibits certain discriminatory practices. Disability is one of the proscribed grounds of discrimination.[8] For this purpose, "disability" denotes "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug".[9]

The Act addresses both direct and indirect employment discrimination. It is a discriminatory practice for an employer to base an employment decision upon an individual's disability. This covers all incidents of the employment relationship by providing:

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[5] Lepofsky, 1992: 168.

[6] (Can) HRA (RSC 1985 c H-6, as amended by RSC 1985 (1st Supp) c 31 and SC 1986 c 40). The Act came into force on 12 December 1988. The Act was first enacted as SC 1976-77 c 33.

[7] (Can) HRA s 2.

[8] (Can) HRA s 3(1):

> For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, *disability* and conviction for which a pardon has been granted are prohibited grounds of discrimination.

(emphasis supplied).

[9] (Can) HRA s 25. For example, an HIV-infected person has been treated as within the Act's protection: *Fontaine v Canadian Pacific Ltd* (1989) 89 CLLC ¶17,024 (Can) HRC; (1991) 91 CLLC ¶17,008 (Can) FCA.

> It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.[10]

This extends to both unintentional and adverse effect discrimination.[11] The Act has been interpreted as covering constructive dismissals, as well as extending to protect an individual working for the defendant employer while technically the employee of a third party,[12] and to an individual who was an army cadet enroled on a three week parachuting course.[13] The prohibition on discriminatory practices also extends to employment application forms and advertisements:

> It is a discriminatory practice (a) to use or circulate any form of application for employment, or (b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry, that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.[14]

Discriminatory employment policies and practices are described as follows:

> It is a discriminatory practice for an employer... (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.[15]

For example, a failure to consider reassignment of a newly disabled employee to other work may be discriminatory.[16]

An employer might defend an employment decision based on disability if it can be shown to

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[10] (Can) HRA s 7. See also s 9 which deals with discrimination by trade unions and employee organizations. Disability-based discrimination in pension funds or plans is prohibited by s 21.

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

[12] *Fontaine v Canadian Pacific Ltd* (1989) 89 CLLC ¶17,024 (Can) HRC; (1991) 91 CLLC ¶17,008 (Can) FCA.

[13] *Attorney-General of Canada v Rosin* [1991] 1 FC 391, (1991) 91 CLLC ¶17,011 (Can) FCA.

[14] (Can) HRA s 8.

[15] (Can) HRA s 10. See also ss 12 and 14 prohibiting the harassment of an individual on a prohibited ground and the publication of discriminatory notices. See further s 59 (prohibiting victimisation of individuals exercising rights under the Act).

[16] *Boucher v Correctional Services of Canada* (1988) 9 CHRR D/4910, (1988) 88 CLLC ¶17,000 (Can) HRT; *cf Rivard v Department of National Defence* (1990) 90 CLLC ¶17,018 (Can) HRT; *Villeneuve v Bell Canada* (1985) 85 CLLC ¶17,016, (1986) 86 CLLC ¶17,016 (Can HRT), affirmed (1987) 9 CHRR D/5093 (Can FCA).

have been informed by the need for a "*bona fide* occupational requirement". The Act provides:

> It is not a discriminatory practice if... any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement...[17]

There must be an honest, genuine requirement which is real and substantial, and which is related to the actual duties of the job.[18] A *bona fide* occupational requirement will include a need to avoid posing a significant safety risk to the disabled individual, fellow employees and others.[19] An employer will clearly need to rely upon medical evidence rather than uninformed assumptions.[20] However, provided the assessment of the evidence is made in good faith, it is the employer's judgement which ultimately seems to count.[21]

The Canadian Human Rights Act permits a degree of positive action in favour of disabled persons. An employer may adopt and implement a policy or plan to prevent, to eliminate or to reduce disadvantages that are likely to be or are suffered by disabled individuals:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the... disability of members of that group, by improving opportunities respecting... employment in relation to that group.[22]

The Canadian Human Rights Commission is charged with making general recommendations concerning the objectives of such initiatives and to provide advice and assistance in connection therewith.[23] A proposal to adapt services, facilities, premises, equipment or

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[17] (Can) HRA s 15(a). This section also includes exceptions based on the age of an individual (e.g. in respect of retirement or pensions).

[18] *Ward v Canadian National Express* (1982) 82 CLLC ¶17,012 (Can) HRT; *cf Husband v Canadian Armed Forces* (1991) 91 CLLC ¶17,030 (Can) HRT. The defence has been made out in a number of cases which are discussed in more detail in Chapter XII.

[19] *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 XII.

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

[21] *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.

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

[23] (Can) HRA s 16(2). The Commission was established under Part II of the Act and is given various powers and duties in respect of enforcement, research, education, review and

operations to accommodate the needs of disabled persons may be submitted to the Commission for approval as appropriate for meeting the needs of disabled persons. Once approved, the implementation of the plan contained in such a proposal will not constitute grounds for a complaint of disability discrimination in respect of matters within the scope of the plan.[24] Provision is made for the enactment of regulations prescribing standards of accessibility to services, facilities or premises.[25] Where these standards are met, access cannot constitute the basis for a complaint of disability discrimination, but a variation from the regulatory standard is not automatically deemed to be evidence of discrimination. Furthermore, where an employer seeks approval to implement a plan to accommodate the needs of disabled persons, the fact that it does not meet the regulatory access standards is not a sufficient ground for rejecting the plan.[26]

Employment Equity Act

The federal Employment Equity Act 1985 (EEA) was enacted to promote equal employment opportunities in the workplace and to take positive action to promote the employment rights of certain designated minorities, including disabled persons.[27] The purposive intent of the statute is:

> to achieve equality in the work place so that no person shall be denied employment opportunities or benefits for *reasons unrelated to ability* and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, *persons with disabilities* and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires *special measures and the accommodation of differences*.[28]

The principle of "employment equity" recognizes that it is not enough to prohibit discrimination in the form of unequal treatment of disabled persons; special measures and reasonable accommodation are also required.

The Act is addressed to employers who employ 100 or more employees and who are engaged

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reform.

[24] (Can) HRA s 17. A reasoned notice must be issued when an application is not granted: s 17(4). Provision is made for rescission of approval and for opportunities of concerned parties to make representations before decisions are made under ss 17-18: s 19.

[25] (Can) HRA s 24.

[26] (Can) HRA s 19(2).

[27] RSC 1985 (2nd Supp), c 23, which came into force on 12 December 1988.

[28] EEA 1985 s 2 (emphasis supplied).

in federal work, or a federal undertaking or business.[29] It applies to "designated groups", which includes "persons with disabilities", but without further definition in the statute. However, regulations made under the Act define "persons with disabilities" as persons who:

> (i) have any persistent physical, mental, psychiatric, sensory or learning impairment; (ii) consider themselves to be, or believe that an employer or a potential employer would be likely to consider them to be, disadvantaged in employment by reason of an impairment referred to in subparagraph (i); and (iii) for the purposes of section 6 of the Act, identify themselves to an employer, or agree to be identified to an employer, as persons with disabilities...[30]

The principle of employment equity as it applies to disabled persons requires employers covered by the legislation to identify and eliminate employment practices resulting in discriminatory employment barriers, and to institute positive policies and practices (including reasonable accommodation) to promote the proper representation of disabled persons in employment positions in proportion to their representation in the workforce or the employer's catchment area or labour market. The importance of this mandate warrants its reproduction in Text Box 11 below.[31] This process must be carried out in consultation with bargaining agents or employee representatives. Employment practices authorised by law do not need to be eliminated and, when taking positive action to ensure proportional representation of disabled persons, the employer may define the appropriate labour market by reference to geography or skills and qualifications.

The Act requires the employer to prepare an annual plan which sets goals to be achieved in implementing employment equity and a timetable within which the goals are to be achieved.[32] The employer must file an annual report with the Minister of Employment and Immigration indicating the employer's industrial sector, location, total workforce and number of disabled persons employed; what occupational groups the employer has and the degree of representation of disabled persons in each occupational group; the salary ranges of employees and the degree of representation of disabled persons in each range (and sub-division); and 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

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[29] EEA 1985 s 3.

[30] Employment Equity Regulations 1986 (SOR/86-847, as amended by SOR/90-454). The definition quoted is contained in s 3(b) of the Regulations. The "purposes of section 6 of the Act" are discussed below (see text following footnote 32).

[31] EEA 1985 s 4. See further: Employment Equity Programs Exclusion Approval Order 1989 (SOR/89-30); Employment Equity Programs Regulations 1989 (SOR/89-30).

[32] EEA 1985 s 5(1). The employer must retain a copy of the plan for at least three years following the year to which the plan refers: s 5(2).

An employer shall, in consultation with such persons as have been designated by the employees to act as their representatives or, where a bargaining agent represents the employees, in consultation with the bargaining agent, implement employment equity by

(a) identifying and eliminating each of the employer's employment practices, not otherwise authorized by law, that results in employment barriers against persons in designated groups; and

(b) instituting such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment with the employer that is at least proportionate to their representation

    (i) in the work force, or

    (ii) in those segments of the work force that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw or promote employees.

Text Box 11: Section 4 (Can) Employment Equity Act 1985

illness, injury or labour dispute), with the degree of representation of disabled persons in those numbers.[33] A failure to comply with this reporting requirement is a criminal offence punishable under section 7 by a fine of up to $50,000. Copies of these reports are sent to the Canadian Human Rights Commission, are open to public inspection, and are also consolidated and analyzed for parliamentary scrutiny.[34]

Fair Wages and Hours of Labour Act

The Fair Wages and Hours of Labour Act applies to federal contracts made with the Government of Canada. Regulations made under the Act apply to federal contracts for the construction, remodelling, repair or demolition of any work.[35] Every such federal contract must contain a clause prohibiting discrimination by the federal contractor in the hiring and employment of workers to perform work under the contract.[36] However, discrimination against disabled persons is not amongst the prohibited grounds of discrimination under this enactment. The Fair Wages Policy Order 1978, which applies to federal contracts for the construction or remodelling of public buildings (widely defined), to the use of federal funds for such purposes, and to federal procurement contracts for manufacture and supply, also utilizes contract compliance as a means of promoting the non-discrimination principle.[37] However, discrimination on the ground of disability is not included within the protection of the Order. Nonetheless, following the initiatives taken in the Employment Equity Act, the federal government has implemented the Federal Contractors Programme. An employer with over 100 employees who bids for federal contracts for the supply of goods and services valued at at least $200,000 must observe the principle of employment equity in its workforce. The sanctions available where the principle is being ignored include the eventual exclusion of that employer from tendering for federal contracts. The Department of Employment and Immigration has the right to review the employer's records in order to assess efforts being made, levels of compliance and results achieved.

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[33] EEA 1985 s 6(1). The accuracy of the report must be certified and signed by the employer and records used in compiling the report must be retained for at least three years: s 6(2)-(3). See further: Employment Equity Regulations 1986.

[34] EEA 1985 ss 8-10.

[35] Fair Wages and Hours of Labour Regulations 1978 (CRC 1978 c 1015) s 3 which came into force on 15 August 1979.

[36] Fair Wages and Hours of Labour Regulations 1978 s 9.

[37] Fair Wages Policy Order 1978 (CRC 1978 c 1621) effective 15 August 1979.

PROVINCIAL JURISDICTION

Introduction

As in the US, so in Canada, the limitations of federal legislation are apparent. Large sectors of *private* employment remain unregulated by federal human rights legislation, while private employers might be indifferent to employment equity principles unless contracting with organs of the federal government. Accordingly, for many disabled Canadians, the protection from employment discrimination and the promotion of employment rights will be determined by provincial laws. The employment rights of disabled persons in the Canadian provinces of British Columbia,[38] Manitoba,[39] New Brunswick,[40] Newfoundland,[41] Nova Scotia,[42] Ontario,[43] Prince Edward Island,[44] Saskatchewan[45] and Yukon Territory[46] are generally addressed by a series of Human Rights Codes or Human Rights Acts. In Alberta the source of protection is the Individual's Rights Protection Act,[47] in Québec it is the Charter of Human Rights and Freedoms,[48] and in the Northwest Territories the law is to be found in the Fair Practices Act.[49] Such legislation constructs an omnibus anti-discrimination framework which applies, *inter alios*, to disabled persons and, *inter alia*, to employment.

The human rights legislation of many of the Canadian provinces recognizes the inherent

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[38] (BC) HRA (SBC 1984 c 22 as amended by 1985 c 51, 1989 c 40 and 1989 c 53).

[39] (Man) HRC (RSM 1987 c H175 as enacted by SM 1987 c 45).

[40] (NB) HRA (RSNB 1973 c H-11 as amended by SNB 1976 c 31, 1979 c 41, 1983 c 30, 1985 c 30, 1986 c 4, 1986 c 6, 1986 c 8, 1987 c 6 and 1987 c 26).

[41] (New) HRC (RSN 1990 c H-14 derived from SN 1988 c 62).

[42] (NS) HRA (RSNS 1989 c 214 as amended by SNS 1991 c 12).

[43] (Ont) HRC (RSO 1990 c H19).

[44] (PEI) HRA (RSPEI 1988 c H-12 as amended by SPEI 1989 c 3).

[45] (Sask) HRC (SS 1979 c S-24.1 as amended by 1980-81 c 41, 1980-81 c 81 and 1989 c 23).

[46] (YT) HRA (SYT 1987 c 3). It contains a small bill of rights in Part 1 of the Act, but Part 2 of the Act contains wide-ranging prohibitions on discrimination.

[47] (Alb) IRPA (SA 1972 c 2 and revised at RSA 1980 c I-2 as amended by SA 1985 c 15, 1985 c 33, 1988 c E-10.2, 1990 c 23, 1991 c S-0.5).

[48] (Queb) CHR&F (RSQ 1977 c C-12 as amended by SQ 1978 c 7, 1979 c 63, 1980 c 11, 1980 c 39, 1982 c 17, 1982 c 21, 1982 c 61, 1989 c 51, and 1990 c 4).

[49] (NWT) FPA (RSNWT 1988 c F-2), effective on 15 July 1991, replaces the former Fair Practices Ordinance (RSNWT 1974 c F-2).

dignity, equality and inalienable rights of all persons regardless of their status. The influence of the Universal Declaration of Human Rights is evident, as is that of the Canadian Charter of Rights and Freedoms. This debt is acknowledged, for example, in the preamble to Manitoba's Human Rights Code.[50] The preamble recognizes the right of individuals to be treated on the basis of personal merit and to enjoy equal opportunity. To protect this right, unreasonable discrimination must be restricted, stereotypes or generalizations must be challenged, and reasonable accommodations made for those with special needs. The Manitoba legislature notes that past discrimination has resulted in serious disadvantage and that affirmative action and special programmes must be designed to overcome historic disadvantage. Education is also seen as essential to eradicate discrimination based on ignorance, and human rights protection must take precedence over provincial law.

This raises the question of how far disability discrimination which is enshrined in existing laws may be countered. Alberta's laws, for example, are made expressly subject to the principles of its human rights legislation and, so far as any laws contradict that legislation, are rendered inoperative.[51] Prince Edward Island's human rights statute also takes precedence over all other provincial laws which must be read subject to it.[52] The Québec Charter similarly takes precedence over other provincial laws,[53] as does human rights legislation in the Yukon Territory.[54] Furthermore, the Canadian Supreme Court, in a series of judgments, has recognised the quasi-constitutional nature of provincial human rights codes. They take precedence over other legislation in the absence of contrary indications, must be purposively interpreted so as to give effect to their anti-discrimination edict, and statutory exceptions will be given a narrow construction.[55]

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[50] (Man) HRC preamble. *Cf* the preamble to (Alb) IRPA; (NB) HRA; (NS) HRA; (NWT) FPA; (Ont) HRC; (PEI) HRA; (Queb) CHR&F. See also: (NS) HRA s 2; (Sask) HRC s 3; (YT) HRA preamble and s 1.

[51] (Alb) IRPA s 1, subject to express declaration to the contrary. No distinction is made between laws enacted before or after the Act. In this respect, see: Physical Disabilities Assistance Programs Continuation Regulations 1980 (Alb Reg 347/80).

[52] (PEI) HRA s 1(2).

[53] (Queb) CHR&F ss 50-53.

[54] (YT) HRA ss 35-36.

[55] *Ontario Human Rights Commission v Etobicoke* [1982] 1 SCR 202; *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 536. See Lepofsky, 1992: 172.

Protected class

British Columbia was the first jurisdiction to protect the rights of disabled people when, in 1977, the provincial Supreme Court held that a general prohibition against discrimination "without reasonable cause" extended to a physically handicapped plaintiff.[56] The New Brunswick legislation was the first to be amended in 1976 to add physical disability as an explicit discriminatory ground, and subsequently all provincial jurisdictions have moved to include individuals with physical disabilities within the protected class. The addition of mental disability to human rights legislation followed during the 1980s. As a result all provincial jurisdictions now address the question of discrimination against persons with physical *or* mental disabilities. For example, Newfoundland's Human Rights Code[57] prohibited discrimination on the ground of physical disability in 1981 and extended this protection to mental disability in 1984.[58]

The identification of disability as an unlawful ground of discrimination varies from province to province. The laws of Alberta, British Columbia, New Brunswick, Newfoundland, Nova Scotia and Yukon Territory law apply to "physical or mental disability".[59] Manitoba outlaws discrimination based upon the "characteristics" of an individual, but defines the applicable "characteristics" as including "physical or mental disability".[60] Ontario and Québec simply prohibit discrimination because of "handicap".[61] Prince Edward Island prefers the terminology of "physical or mental handicap",[62] while Saskatchewan and the Northwest Territories apply the law simply to discrimination because of "disability".[63] Little hangs upon the primary terminology selected to identify the protected class, but of greater significance is the secondary definition of who is included within that identified class.

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[56] *Jefferson v BC Ferries Service* (1977) unreported. See: SBC 1973 c 119. For a historical account of legal developments in this area see: Tarnopolsky, 1982.

[57] (New) HRC (RSN 1990 c H-14, which is derived from SN 1988 c 62 which repealed and replaced RSN 1970 c 262).

[58] SN 1981 c 29 and 1984 c 31.

[59] (Alb) IRPA s 7(1); (BC) HRA s 8(1); (NB) HRA s 3(1); (New) HRC s 9(1)(a); (NS) HRA s 5(1)(o); (YT) HRA s 6(h).

[60] (Man) HRC s 9(2)(l).

[61] (Ont) HRC s 5(1); (Queb) CHR&F s 10.

[62] (PEI) HRA s 1(1)(d).

[63] (Sask) HRC s 9; FPA (NWT) s 3(1).

In British Columbia, Manitoba, Québec and the Northwest Territories, "disability" is not defined. In contrast, in Alberta "physical disability" is defined to mean:

> 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.[64]

The New Brunswick definition is in almost identical terms, except with the inclusion of diabetes as an example of a disability, and of a cane and crutch as illustrations of a remedial device or appliance.[65] The Nova Scotia legislation adds to this extended definitional model by including a "loss or abnormality of psychological, physiological or anatomical structure or function" and any "restriction or lack of ability to perform an activity."[66] This is one of the more expansive disability definitions of provincial legislation. The Ontario definition also includes "an injury or disability for which benefits were claimed or received under the Workers' Compensation Act".[67] Under the New Brunswick statute, the term "mental disability" denotes:

> (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...[68]

Other provincial definitions are in similar terms.[69] Alberta law is rather more expansive in respect of "mental disorder" which is explained as:

> 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.[70]

In Yukon Territory a "mental disability" includes any mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness or learning disability.[71] Prince Edward Island does not supply a particular definition of mental disability.[72]

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[64] (Alb) IRPA s 38(i). The definition has been held to extend to HIV and AIDS: *STE v Bertelsen* (1989) 89 CLLC ¶17,017 (Alb HRC).

[65] (NB) HRA s 2. See also to like effect: (New) HRC s 2(l); (Ont) HRC s 10(1); (PEI) HRA s.1(1)(l); (Sask) HRC s 2(d.1)(i); (YT) HRA s 34.

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

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

[68] (NB) HRA s 2.

[69] (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.

[70] (Alb) IRPA s 38(e.1). See also to like effect: (Sask) HRC s 2(i.1).

[71] (YT) HRA s 34.

Discrimination upon the basis of "characteristics or circumstances" related to disability is outlawed by some provinces.[73] In Nova Scotia, for example:

> a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic... [as defined] that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.[74]

This province also addresses discrimination based upon "an actual or perceived" disability and "previous dependency on drugs or alcohol."[75] Ontario prohibits discrimination where a "person has or has had, or is believed to have or have had" a disability.[76] In Prince Edward Island, the anti-discrimination principle applies to "a previous or existing disability".[77]

Meaning of discrimination

As in the other major common law countries, the legal concept of discrimination in Canada is largely derived from the disparate treatment and adverse impact analysis of the US Supreme Court in *Griggs v Duke Power Co.*[78] That analysis is so well understood in North America that the Canadian provincial human rights statutes usually merely enact a general prohibition on employment discrimination on account of disability. However, there is some embellishment of the basic concept of discrimination in some of the provinces. For example, the Ontario Human Rights Code simply specifies that "[e]very person has a right to equal treatment with respect to employment without discrimination because of... handicap",[79] but then introduces the concept of "constructive discrimination". The right not be subjected to employment discrimination is infringed where:

> a requirement, qualification or factor exists that is not discrimination on a prohibited

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[72] (PEI) HRA s.1(1)(l).

[73] See for example: (Man) HRC s 9(2)(l).

[74] (NS) HRA s 4.

[75] (NS) HRA s 3(l).

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

[77] (PEI) HRA s 1(1)(l).

[78] (1971) 401 US 424.

[79] (Ont) HRC s 5(1). Unusually, the term "equal" is statutorily defined and means "subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination": (Ont) HRC s 10(1). There is a right not to have reprisals taken or threatened against persons exercising their rights under the Code, and any direct or indirect infringement of these rights is contrary to the legislation: (Ont) HRC ss 8-9.

> 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...[80]

Discrimination because of association with a disabled person is also unlawful in Ontario.[81]

The Yukon Territory legislation provides that it is "discrimination to treat any individual or group unfavourably" on the ground of "physical or mental disability" or "actual or presumed association with other individuals or groups whose identity or membership is determined by" disability.[82] Furthermore, any "conduct that results in discrimination is discrimination", and the Act terms this "systematic discrimination".[83] In British Columbia, the intention of the discriminator is explicitly an irrelevant consideration when a question of prohibited discrimination arises.[84] Unlike other provinces, Nova Scotia prohibits discrimination by simply listing the areas of prohibited discrimination in the same section as the prohibited grounds of discrimination. As pertinent to this study, the relevant provision reads:

> No person shall in respect of... employment... discriminate against an individual or class of individuals on account of... physical disability or mental disability; ...an irrational fear of contracting an illness or disease; [or] ...that individual's association with another individual or class of individuals having characteristics referred to [above].[85]

The Québec Charter provides:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on... a handicap or the use of any means to palliate a handicap,[86]

and discrimination arises where "such a distinction, exclusion or preference has the effect of nullifying or impairing such right".[87] Additionally, every disabled individual has the right to

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[80] (Ont) HRC s 11(1). This concept is broadly similar to the concept of indirect discrimination in British equal opportunity legislation.

[81] (Ont) HRC s 12. The "discrimination by association" prohibition is rather undermined by the exception which allows an employer to grant or withhold employment or advancement in employment to a person who is the spouse, child or parent of an employee: s 24(1)(d). Discrimination by association is also prohibited by (PEI) HRA ss 1(1)(d) and 13.

[82] (YT) HRA s 6(h) and (l). The prohibition on discrimination covers employers, trade unions and other associations: s 34. Vicarious liability is also provided for: s 32.

[83] (YT) HRA s 11. Harassment is also covered: s 13.

[84] (BC) HRA s 13(1.1).

[85] (NS) HRA s 5(1).

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

[87] Harassment and the publication of discriminatory notices are also proscribed: (Queb) CHR&F ss 10.1 and 11.

be protected from exploitation.[88]

In Manitoba, discrimination which is manifested in differential treatment not based upon personal merit is generally outlawed. This umbrella definition of discrimination is unusual and unique. It is expressed in the following terms:

> In this Code, 'discrimination' means (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit...[89]

This definition of discrimination does not rely upon the proscription of identified grounds of discriminatory conduct. However, almost for the avoidance of doubt, the definition continues to identify the formula for discrimination with which we are more familiar. Discrimination is then further defined as being:

> differential treatment of an individual or group on the basis of any [applicable] characteristic...; or... differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any [applicable] characteristic...; or... failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any [applicable] characteristic...[90]

Finally, the Code encompasses what the marginal note calls "systematic discrimination". That is any act or omission resulting in prohibited discrimination, regardless of the form which it takes and regardless of the intention of the discriminator.[91]

Discriminatory employment practices

Having identified the meaning of discrimination and the identity of the protected class, most human rights statutes then define the scope of prohibited employment discrimination. This varies from province to province in the breadth of its description, and the prohibition on disability-based employment discrimination is expressed in a number of ways. In Yukon Territory, for example, "no person shall discriminate... in connection with any aspect of employment or application for employment".[92] Alberta's law states that:

> No employer or person acting on behalf of an employer shall (a) refuse to employ or

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[88] (Queb) CHR&F s 48.

[89] (Man) HRC s 9(1)(a).

[90] (Man) HRC s 9(1)(b)-(d).

[91] (Man) HRC s 9(3). Harassment based upon an applicable characteristic is also unlawful: s 19.

[92] (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).

> refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of the... *mental disability, physical disability*... of that person or of any other person.[93]

The human rights statutes of British Columbia, New Brunswick, Newfoundland, Northwest Territories and Prince Edward Island follow suit in virtually identical language.[94] The Saskatchewan Code takes the form of a short bill of rights and one of the rights protected is the "right to engage in occupation":

> Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of his or their... disability...[95]

The right to carry on an occupation without disability-based discrimination is then amplified by a prohibition on employment discrimination in a form similar to the Alberta formula above.[96]

In Québec the application of the non-discrimination principle in the context of employment is dealt with in the following way:

> No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.[97]

The Manitoba legislation places an interdiction upon employers discriminating "with respect to any aspect of an employment or occupation...", including:

> the opportunity to participate, or continue to participate, in the employment or occupation;... the customs, practices and conditions of the employment or occupation;... training, advancement or promotion;... seniority;... any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, 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; and... any other benefit, term or condition of the employment or occupation.[98]

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[93] (Alb) IRPA s 7(1) with emphasis added.

[94] (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). Victimisation of an individual who has relied upon their legal rights is also unlawful in some provinces: for example, (PEI) HRA s 15.

[95] (Sask) HRC s 9.

[96] (Sask) HRC s 16(1).

[97] (Queb) CHR&F s 16.

[98] (Man) HRC s 14(1)-(2). The latter phrase would seem to expressly cover the position which arose in the federal case of *Fontaine v Canadian Pacific Ltd* (discussed at footnote 9 above).

Employment or occupation as used here means:

> work that is actual or potential, full-time or part-time, permanent, seasonal or casual, and paid or unpaid; and... work performed for another person under a contract either with the worker or with another person respecting the worker's services.[99]

In seeking to comply with the prohibition upon employment discrimination, 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.[100] The implication is that the Code requires a levelling-up of employment standards and conditions rather than a levelling-down.

A prohibition on disability-based discrimination in employment remuneration is implicit in many of the provincial statutes. Separate equal pay provisions are to be found elsewhere in Canadian provincial human rights legislation, but are nearly always concerned with gender-based pay discrimination. As terms and conditions of employment are invariably covered by the anti-discrimination principle in any case, separate protection from disability-related pay discrimination might appear otiose. However, in some provinces, such discrimination is addressed explicitly. In Yukon Territory, for example, particular provision is made for "equal pay for work of equal value" in employment by the provincial government and municipalities. The prohibition on discrimination in pay is not restricted to sex-based discrimination.[101] Prince Edward Island also makes express provision for the prohibition of discrimination in pay. An employer may not discriminate between employees:

> by paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort, and responsibility and which is performed under similar working conditions...[102]

The provision requires pay inequality to be remedied by raising the rate of pay of the employee discriminated against.[103] However, the Act goes on to describe those situations where discriminatory pay is permitted. That is where the remuneration differential is based upon a seniority system, a merit system or a system that measures earnings by quantity or quality of production or performance, except where such systems are themselves based upon

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[98] (Man) HRC s 14(13). An exception is provided in respect of employees providing personal services in private residences: s 14(8)-(9).

[100] (Man) HRC s 14(12).

[101] (YT) HRA s 14.

[102] (PEI) HRA s 7(1). Note also s 7(3).

[103] (PEI) HRA ss 7(2) and (4).

discrimination.[104] Like Prince Edward Island, Québec's Charter specifically addresses unequal pay based upon discriminatory grounds at large. Section 19 requires:

> Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place. A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel.[105]

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.[106]

In provincial human rights laws, discriminatory publication of notices, signs, etc is usually banned,[107] as is discrimination in employment advertisements.[108] Pre-employment screening for disability is controlled in several provinces. In Ontario, for example, no employment application form may be used or inquiry made in connection with an employment applicant which "directly or indirectly classifies or indicates qualifications" according to a person's disability.[109] In Alberta, while discrimination in employment applications and job advertisements is unlawful, so too are discriminatory pre-employment inquiries:

> No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant, (a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the... physical disability, [or] mental disability... of any person, or (b) that requires an applicant to furnish any information concerning... physical disability, [or] mental disability...[110]

In Québec employment application forms may not be used to solicit information about disability; nor may employment interviewers ask disability-related questions.[111] Pre-

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[104] (PEI) HRA s 7(1)(a)-(c).

[105] Salary and wages includes "compensations or benefits of pecuniary value connected with the employment": (Queb) CHR&F s 56(2).

[106] (Queb) CHR&F s 46.

[107] (Alb) IRPA s 2; (BC) HRA s 2; (Ont) HRC s 13.

[108] (BC) HRA s 6; (NB) HRA s 3(4); (Ont) HRC s 23(1); (Sask) HRC s 19; (NS) HRA s 8(2)-(3) (subject to the exceptions in s 6: s 8(3); (PEI) HRA s 12.

[109] (Ont) HRC s 23(2). The asking of apparently discriminatory questions at an interview are not precluded where the discrimination is permitted by the Code: s 23(3).

[110] (Alb) IRPA s 8(1). See also: (Man) HRC ss 14(3) and 18; (NB) HRA s 3(4); (NS) HRA s 8(2)-(3) (subject to the exceptions in s 6: s 8(3)); (PEI) HRA s 6(3).

[111] (Queb) CHR&F s 18.1.

employment inquiries are also specifically regulated in Manitoba.[112] In Saskatchewan employment application forms and written or oral inquiries which express "either directly or indirectly, a limitation, specification or preference indicating discrimination or an intention to discriminate" on the ground of disability, or which "contains a question or request for particulars as to" disability, are prohibited.[113]

Bona fide occupational qualification or requirement defence

Only the Northwest Territories province fails to make explicit provision for a defence of *bona fide* occupational qualification or requirement. In Alberta and Newfoundland the proscription of disability-based discrimination "does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement".[114] A general defence is also made available under Alberta law if the discriminator can show "that the alleged contravention was reasonable and justifiable in the circumstances".[115] In Manitoba, employers are allowed a defence to employment discrimination where it "is based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation".[116] Similarly, in New Brunswick, an exception is made for employment discrimination which is based upon a *bona fide* occupational requirement or qualification.[117] This is expanded upon in respect of disability by providing that the provisions outlawing employment discrimination as concerns disability do not apply to:

> (a) the termination of employment or a refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstances of the place of work in relation to the physical disability or mental disability, as determined by the Commission; or (b) the operation of terms or conditions of any *bona fide* group or

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[112] (Man) HRC s 14(4):

> No person shall use or circulate any application form for an employment or occupation, or direct any written or oral inquiry to an applicant for an employment or occupation, that (a) expresses directly or indirectly a limitation, specification or preference as to any [applicable] characteristic...; or (b) requires the applicant to furnish information concerning any [applicable] characteristic...

[113] (Sask) HRC s 19.

[114] (Alb) IRPA ss 7(3) and 8(2). *Cf* the almost identical language in (New) HRC s 9(1).

[115] (Alb) IRPA s 11.1. This defence did not protect an employer who dismissed an employee with AIDS where there was no evidence of any risk of social transmission of the disease: *STE v Bertelsen* (1989) CLLC ¶17,017 (Alb HRC).

[116] (Man) HRC s 14(1), (3) and (4). However, this defence does not excuse any failure to make reasonable accommodation for the special needs of any individual or group based upon disability: s 12.

[117] (NB) HRA ss 3(5) and 6.

employee insurance plan.[118]

Furthermore, Nova Scotia's Human Rights Act does not operate:

> where a denial, refusal or other form of alleged discrimination is (i) based upon a *bona fide* qualification, or (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.[119]

The province's employers are also permitted to discriminate in particular "where the nature and extent of... disability reasonably precludes performance of a particular employment or activity".[120] Employers in Yukon Territory may defend an act of alleged discrimination "if treatment is based on... reasonable requirements or qualifications for employment,... or other factors establishing reasonable cause for the discrimination".[121]

In Ontario there is no discrimination if a disabled person is "incapable of performing or fulfilling the essential duties or requirements" of employment because of disability, subject always to any accommodation without undue hardship.[122] Furthermore, there is no constructive (indirect) discrimination if the requirement, qualification or factor is "reasonable and *bona fide* in the circumstances" *and* "the needs of the group of which the person is a member cannot be accommodated without undue hardship", taking into account "the cost, outside sources of funding... and health and safety requirements".[123] Nevertheless, particular provision is made in respect of occupational pension and disability plans. Employment may not be denied or be made conditional because enrolment in an occupational employee benefit, pension, insurance or superannuation scheme or group insurance contract is a requirement of the employment, and the scheme discriminates on the ground of disability.[124] As far as employee disability or life insurance plans or benefits are concerned, reasonable and *bona fide* distinctions, exclusions or preferences may be made in respect of a pre-existing disability "that substantially increases the risk" being insured.[125] However,

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[118] (NB) HRA s 3(7).

[119] (NS) HRA s 6(f).

[120] (NS) HRA s 6(e).

[121] (YT) HRA s 9(a) and (d).

[122] (Ont) HRC s 17. An employer may also discriminate on the ground of disability where the primary duty of the employment is attending to the medical or personal needs of the employer or the employer's sick child or aged, infirm or ill spouse or relative: s 24(1)(c).

[123] (Ont) HRC s 11(1)(a) and (2). Consideration is to be given to any standards prescribed by regulations for assessing what is undue hardship: s 11(3). There is also no constructive discrimination if the apparent infringement is otherwise excused under the Code: s 11(1)(b).

[124] (Ont) HRC s 25(1).

[125] (Ont) HRC s 25(3)(a). A special exception also applies to employers employing less

a disabled employee excluded from an employee benefit, pension or superannuation scheme or group insurance contract is entitled to receive "compensation equivalent to the contribution that the employer would make thereto on behalf of" a non-disabled employee.[126]

In British Columbia, a defence of *bona fide* occupational requirement is afforded to defendants in respect of an employment refusal, limitation, specification or preference and, like the New Brunswick law, this extends in respect of disability to the operation of a *bona fide* retirement plan, superannuation plan, pension plan, group insurance plan or employee insurance plan.[127] In Prince Edward Island, it is a defence to employment discrimination to show that a refusal, limitation, specification or preference is based upon a "genuine occupational qualification" or that a person's disability is a "reasonable disqualification".[128] Furthermore, disability-based discrimination does not affect the operation of any genuine retirement or pension plan and any genuine group or employee insurance plan.[129]

Québec employers have a simple defence to discrimination at their disposal:

> A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment... is deemed non-discriminatory.[130]

The application of this defence in particular would allow disability-related inquiries in job application forms and interviews.[131] Moreover, it is not discriminatory for insurance or pension contracts, social benefits plans, or retirement, pension or insurance schemes to incorporate a distinction, exclusion or preference "based on risk determining factors or actuarial data".[132] In Saskatchewan, any "discrimination, limitation, specification or preference for a position or employment" based on disability is not prohibited where "ability... is a reasonable occupational qualification and requirement" for the job.[133] Regulations

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than 25 employees: s 25(3)(b).

[126] (Ont) HRC s 25(4).

[127] (BC) HRA ss 6, 8(2)(b) and 8(4). See, for example: *Cook v Noble, Prysianziuk, Ministry of Human Resources, and Tranquille Hospital* (1983) 83 CLLC ¶17,020 (BC HRC).

[128] (PEI) HRA ss 6(4)(a)-(b) and 14(1)(d). The onus of proof is upon the employer: s 14(2).

[129] (PEI) HRA s 11.

[130] (Queb) CHR&F s 20.

[131] (Queb) CHR&F s 18.1 so provides.

[132] (Queb) CHR&F s 20.

[133] (Sask) HRC s 16(7).

provide 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 duties of the job involved can be performed safely...[134]

However, an occupational qualification does not include one 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.[135] An occupational qualification may not be based on "the preferences of co-workers, the employer, clients or customers".[136] It is noteworthy that the references to reasonable occupational qualification are couched throughout in terms of "physical" ability or disability. Furthermore, exclusively non-profit organizations primarily engaged in serving the interests of disabled persons may employ or give preference to only disabled persons if "the qualification is a reasonable and *bona fide* qualification because of the nature of the employment".[137] The burden of proving a reasonable occupational qualification is upon the employer once a *prima facie* case of discrimination has been made out.

Application of human rights legislation

The statutory provisions on employment discrimination apply to employers, employment agencies, employers' organizations, occupational associations, trade unions, professional associations and trade associations.[138] In Saskatchewan, for example, the prohibition on employment discrimination also extends to employment agencies, and, in the course of hiring and recruitment, employers may not use any employment agency which discriminates on the ground of disability.[139] Exemption is usually given in respect of domestic employment in a

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[134] 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.

[135] (Sask) HRC Reg s 1(b)(iv)-(v). See *Davison v St Paul Lutheran Home* (1991) 91 CLLC ¶17,017 (Sask). The subsequent history of this case, concerned with whether obesity is a disability, is disposed of in Chapter XI.

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

[137] (Sask) HRC s 16(10).

[138] (Alb) IRPA ss 7(1), 8(1), 10 and 38(h); (BC) HRA ss 8(1)-(2) and 9; (Man) HRC s 14; (NB) HRA ss 2 and 7; (NS) HRA ss 3(k) and 8(1); (NWT) FPA s 3(4); (New) HRC s 9(2)-(3); (Ont) HRC ss 6, 23(4) and 46(c); (PEI) HRA ss 1(1)(k), 6(2) and ss 8-10; (Queb) CHR&F ss 16-18; (Sask) HRC ss 17-18; (YT) HRA s 8(b)-(c).

[139] (Sask) HRC s 16(2)-(3).

private home or to employment where the employee resides in the employer's private home.[140] In Nova Scotia, for example, the anti-discrimination provisions affecting employment do not apply to domestic employment or to religious organizations, and also excluded are non-profit-making organizations operating primarily to foster the welfare of a religious or ethnic group.[141] Such legislation also applies to Crown employment.[142] There was a doubt as to whether an employer could be vicariously liable under the former provisions of the British Columbia Human Rights Code for discriminatory acts of an employee in the absence of authorization or ratification. The wording of section 8(1) of the Code now makes it clear that employers are responsible for the actions of anyone acting on their behalf. Vicarious liability of employers is expressly provided for elsewhere.[143]

Affirmative action

In Nova Scotia, a programme or activity may be exempted from the anti-discrimination measures if there is a *bona fide* reason to do so and, furthermore, the Act does not affect any law, programme or activity whose object is the amelioration of the conditions of disadvantaged persons.[144] The Prince Edward Island Human Rights Commission may approve affirmative action programmes designed to promote the welfare of a class of persons and such programmes are an exception to the non-discrimination principle.[145] The Ontario Code does not prevent the implementation of any special programme:

> designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve... equal opportunity or that is likely to contribute to the elimination of discrimination.[146]

Any organisation primarily engaged in serving the interests of disabled persons may employ only disabled persons, or give them employment preference, if being disabled is a "reasonable and *bona fide* qualification because of the nature of the employment".[147] The Code employs

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[140] (Alb) IRPA s 9; (Sask) HRC s 16(8); (YT) HRA s 10.

[141] (NS) HRA s 6(c).

[142] (Alb) IRPA s 12.

[143] For example: (Man) HRC s 10; (Ont) HRC s 45; (Sask) s 2(f).

[144] (NS) HRA ss 6(i) and 9. The Act does not affect *bona fide* plans, schemes or practices of mandatory retirement: s 6(h).

[145] (PEI) HRA s 20.

[146] (Ont) HRC s 14(1). Whether a special programme satisfies the conditions of this provision may be determined by the Ontario Human Rights Commission: s 14(2).

[147] (Ont) HRC s 24(1)(a).

a measure of contract compliance to address employment discrimination. It is an implied term of every 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.[148] A similar provision applies in respect of government grants and loans.[149] 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).[150]

Charitable and social organizations in Yukon Territory may give preference, without the label of discrimination being attached, to its members or to people the organization serves to exist.[151] In respect of disability only, there is a duty to provide for special needs:

> Every person has a responsibility to make reasonable provisions in connection with employment... for the special needs of others where those special needs arise from physical disability...

but this duty is subject to the avoidance of "undue hardship" in making the provisions.[152] The application of term "undue hardship" is determined by "balancing the advantages and disadvantages of the provisions by reference to" certain factors. These factors include "safety", "disruption to the public", "effect on contractual obligations", "financial cost" and "business efficiency".[153] The Act also makes particular provision for special programmes and affirmative action programmes by providing that these are not discriminatory.[154] A special programme is one "designed to prevent disadvantages that are likely to be suffered by any group", while affirmative action programmes are "designed to reduce disadvantages resulting from discrimination suffered by a group", in both cases where the group is identified by reference to a prohibited ground of discrimination, such as disability.[155]

A distinguishing feature of the British Columbia legislation is its provisions for employment

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[148] (Ont) HRC s 26(1).

[149] (Ont) HRC s 26(2).

[150] (Ont) HRC s 26(3).

[151] (YT) HRA s 10(1). Employment in a private home is also excluded: s 10(3).

[152] (YT) HRA s 7(1).

[153] (YT) HRA s 7(2).

[154] (YT) HRA s 12(1).

[155] (YT) HRA s 12(2)-(3).

preference and affirmative action.[156] First, non-profit-making organizations whose primary purpose is the promotion of the interests and welfare of an identifiable group or class of persons are allowed to give preference in employment to such persons even if this would be otherwise upon a prohibited ground. This would allow such bodies the freedom to promote the employability of disabled persons, even at the expense of other protected minorities. Second, a programme or activity whose object is the amelioration of the conditions of disadvantaged individuals or groups may be approved by the Council and thereafter will not be subject to potential contravention of the law. This latitude afforded to affirmative action initiatives is clearly of advantage to disabled persons in employment and is modelled upon the similar provisions to be found in the Canadian federal human rights legislation.[157]

In Manitoba affirmative action is permitted and will not constitute discrimination under the Code.[158] This includes the making of reasonable accommodation for the special needs of an individual or group which are based upon an applicable characteristic. Furthermore, an employer may "plan, advertise, adopt or implement" an affirmative action or other special programme whose object is "the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any [applicable] characteristic" and which "achieves or is reasonably likely to achieve that object". A feature rarely found in other Canadian provincial legislation (but see the Ontario Code above at page 204) is that the Manitoba statute provides for contract compliance. The Code provides:

> Every contract entered into... by the government, a Crown agency or a local authority is here by deemed to contain as terms of the contract (a) a stipulation that no party shall contravene this Code in carrying out any term of the contract; and (b) such provision for an affirmative action program or other special program related to the implementation of the contract as may be required by regulations made under the authority of this Code.[159]

The contract may be repudiated where a provincial contractor is in breach of the deemed terms.

Québec makes special provision for affirmative action programmes in a manner which is more far-reaching than other provincial legislation. An affirmative action programme is a programme whose object is "to remedy the situation of persons belonging to groups discriminated against

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[156] (BC) HRA s 19.

[157] (Can) HRA ss 16(1) and 17 discussed above (see text at footnote 22 above).

[158] (Man) HRC s 11.

[159] (Man) HRC s 56(1).

in employment..." and it is deemed lawful if established in conformity with the Charter.[160] Such a programme must be approved by Québec's *Commission des Droits de la Personne*, which may provide assistance to employers who wish to establish an affirmative action plan.[161] The implementation of an affirmative action programme may form part of the recommendations of the Commission following an investigation into employment discrimination, and the Commission may, if necessary, seek a court order to enforce that proposal.[162] Thereafter, the supervision of the programme is overseen by the Commission, which may make further investigations and require reports.[163] Government departments and agencies are required (not merely encouraged) to implement affirmative action programmes after consultation with the Commission.[164]

The Regulation implementing these provisions on affirmative action programmes specifies four elements which such programmes must include as follows:

> (1) the objectives sought in regard to the greater representation of target group members; (2) the steps required to remedy the effects of an observed discriminatory situation; (3) a time-table for attaining the objectives and implementing the measures proposed to that end; (4) the control mechanisms that would allow for assessing progress made and problems encountered in carrying out the program and for determining any required adjustments.[165]

In establishing objectives for an affirmative action programme, the numbers and percentages for each job category, sector or service targeted within an undertaking must be expressed, with provisions for margins if thought necessary. The establishment of objectives must be based upon an analysis of staff, availability and the employment procedures of the undertaking.[166] The staff analysis must describe the position of the target group in comparison with all other employees of the employer in terms of the number of employees

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[160] (Queb) CHR&F s 86. Affirmative action programmes are particularly aimed at women, members of cultural communities, native peoples and disabled persons: see s 1 of the 1986 Regulation Respecting Affirmative Action Programs under the Charter of Human Rights and Freedoms (OC 1172-86): (Queb) AAP Reg.

[161] (Queb) CHR&F s 87. An affirmative action programme may also be imposed by court order. Withdrawal of the approval is contemplated by s 90, while a programme may be subject to modification, postponement or cancellation if there has been a change in circumstances: s 91.

[162] (Queb) CHR&F s 88.

[163] (Queb) CHR&F s 89.

[164] (Queb) CHR&F s 92.

[165] (Queb) AAP Reg s 2.

[166] (Queb) AAP Reg s 3.

and their job titles, their categorisation by sector or service, their working conditions, their length of service and occupational mobility within the undertaking, and their training and experience both within and outside the undertaking.[167] The analysis of availability is to establish what percentage of the workforce, both within and outside the undertaking, is represented by members of the target group who are qualified to hold a position or capable of acquiring competence to do so within a reasonable time.[168] Employment procedures must be analyzed to identify practices which are indirectly discriminatory and which are not necessary for security purposes or administrative efficiency. The analysis should address rules, directives, policies, decisions, contracts, agreements and so on, both in substance and in the way in which they are applied. Particular attention must be given to recruitment, promotion and transfer procedures and requirements; wages and salaries, fringe benefits and working conditions; the workplace; dismissals, lay-offs and recalls; disciplinary and administrative measures; work organization and distribution; evaluation of productivity; and training and up-grading.[169]

If, as a result of the employer's analyses, discrimination is discovered, the programme must give consideration to the application of equal opportunity measures and corrective measures.[170] Equal opportunity measures are designed to ensure equality in the exercise of employment rights, in particular by eliminating discriminatory management practices, while corrective measures attempt to eliminate the effects of past discrimination through temporary preferential treatment in employment. An affirmative action programme may also provide for "support measures" which aim at solving certain employment problems for the target group but which may be useful for all workers in the employer's undertaking.[171] The employer must delegate responsibility for implementing and applying the programme to an employee in authority, as well as ensuring that the workforce is educated about the programme.[172] When implementing an affirmative action programme, an employer may solicit information about a prohibited ground, such as disability, in application forms or at interview, if "useful"

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[167] (Queb) AAP Reg s 4.

[168] (Queb) AAP Reg s 5.

[169] (Queb) AAP Reg s 6.

[170] (Queb) AAP Reg s 7.

[171] (Queb) AAP Reg s 8.

[172] (Queb) AAP Reg ss 9-10.

for this purpose.[173] Finally, an affirmative action employer must file an annual report with the Commission describing all activities initiated to implement the programme, progress made towards reaching its objectives in comparison with its timetable, problems encountered in reaching those objectives and the steps planned to resolve such problems, and any desired changes in the programme.[174]

CONCLUDING REMARKS

At first sight, the Canadian human rights approach to disability discrimination is of a qualitatively different order to the civil rights approach of the US disability legislation or the anti-discrimination regulations of British sex and race legislation. However, upon closer scrutiny, it is clear that the framework and concepts of Canadian human rights codes are closely related to the ingredients of discrimination laws in other common law jurisdictions. Moreover, the language of the human rights approach to discrimination and equal opportunity would appear to raise a legislative commitment to the *positive* protection of disabled people and the promotion of their employment rights. The tenor and spirit of Canadian legislation is exhortatory and purposive, and might seem to admit little room for narrow or mean-spirited interpretation. Nevertheless, as will be seen in various chapters in Part C of this thesis, the Canadian judiciary have often failed to give effect to the emancipatory drafting of both federal and provincial human rights legislation. It is not surprising, therefore, that disability rights activists in Canada during the last decade have despaired at the achievement of disability rights via the conduit of human rights codes, but instead have begun to place more reliance upon employment equity laws, contract compliance requirements and affirmative action legislation.

In the following chapter, the experience of Australian anti-discrimination laws is examined. Drawing upon the British Sex Discrimination Act and Race Relations Act for inspiration, and directly adapting the conceptual framework of the British statutes, Australian Commonwealth and state legislation has constructed omnibus anti-discrimination laws that go beyond the British concern with gender, race and marital status. The Australian model of disability rights accordingly might furnish an example with which those who legislate and those who are subject to the legislation in Britain might more readily identify.

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[173] (Queb) CHR&F s 18.1.

[174] (Queb) AAP Reg s 11.

CHAPTER IX:
DISABLED EMPLOYMENT RIGHTS IN AUSTRALIA

INTRODUCTION

In Australia, the regulation of employment discrimination in general, and of discrimination on the grounds of disability in particular, is derived from statutory intervention at the levels of the Commonwealth and the individual states of the Australian federation.[1] Much of the relevant legislative activity took place during the 1970s and 1980s. The regulation of sex and race discrimination was in the vanguard of legal reform. Laws to address disability discrimination were subsequently enacted, but were usually grafted onto the pre-existing legal framework. As in the case of the Canadian provinces, some (but not all) of the Australian states have taken the lead in legislating for change, and Commonwealth or federal laws have then followed. The application of the anti-discrimination principle to disabled persons first occurred in 1981 in the states of New South Wales and South Australia. Victoria followed suit in 1982 and Western Australia in 1988. Queensland and the Australian Capital Territory did not enact such laws until 1991, while the Northern Territory did not act in this field until 1992. Early federal legislation dealt specifically with sex and race discrimination, and the Commonwealth enacted further laws committing the federal government to the promotion of equal opportunities and the protection of human rights in the public sector. However, it was not until 1992 that the federal government addressed directly the problem of disability-based discrimination.

Australian anti-discrimination legislation is closely patterned after the British sex and race discrimination statutes. Given the influence of the US Civil Rights Act upon the shape of the British legislation, Australian law in this area shares a common ancestry whose roots can be traced back to the US Supreme Court's seminal decision in *Griggs v Duke Power Co.*[2] The result is that Australian disability discrimination laws drew heavily upon the US Rehabilitation Act 1973 for basic concepts and drafting language.[3] Indeed, one of the leading cases under the legislation of one of the Australian states acknowledges an influential debt to the American law.[4] However, there are significant differences between the US and Australian

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[1] For a general discussion of, and critical perspective upon, Australian anti-discrimination legislation see: Thornton, 1990.

[2] (1971) 401 US 424.

[3] Waters, 1990: 380-4.

[4] *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252 (NSW CA) *passim*. See: Astor, 1988.

models, as well as within the various Australian paradigms themselves. Accordingly, it will be appropriate to examine each state's legal provisions in turn, and to do so in advance of any analysis of the position in the Australian Commonwealth.

STATE LEGISLATION IN AUSTRALIA

New South Wales

In New South Wales (NSW), discrimination in employment is considered under the Anti-Discrimination Act (ADA) 1977.[5] Originally, the 1976 Bill which preceded the Act included physical disability and condition as "other grounds" of discrimination. However, disability was subsequently relegated within the statute as an issue solely for research (rather than regulation) by the newly-formed Anti-Discrimination Board (ADB).[6] It was not until the 1981 amendments to the Act that disability was proscribed as a ground of employment discrimination, consequent upon the recommendations of the ADB.[7] The 1981 Act introduced Part IVA into the 1977 Act to deal with discrimination on the ground of "physical impairment." In 1982, following further representations by the ADB,[8] Part IVB was introduced to extend the law to discrimination on the ground of "intellectual impairment".

The Act outlaws direct discrimination or less favourable treatment on the ground of physical impairment.[9] The relevant text is reproduced in Text Box 12. The formula for identifying direct discrimination will be familiar to British labour lawyers used to the employment of that concept in section 1 of the Sex Discrimination Act 1975 and the Race Relations Act 1976. However, what amounts to discrimination based on a person's physical impairment is amplified to include discrimination based on a characteristic generally appertaining to or imputed to disabled persons with a particular physical impairment. The statute gives a

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[5] (NSW) N° 48 of 1977, as amended by the ADA 1980-1985.

[6] See in general: Scutt, 1977; Partlett, 1977.

[7] ADB (NSW), 1977. For a discussion of the NSW experience in regulating disability discrimination, see: Nothdurft and Astor, 1986.

[8] ADB (NSW), 1981.

[9] (NSW) ADA 1977 s 49A(1). It does not seem that s 49A requires an actual application for employment, followed by a refusal of employment, in order for there to be discriminatory treatment: *Clinch v Commissioner of Police* (1988) AILR ¶169 (NSW EOT). The EOT considered that it might be necessary to show that the defendant 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.

(1) A person discriminates against a physically handicapped person on the ground of his physical impairment if, on the ground of-
   (a) his physical impairment;
   (b) a characteristic that appertains generally to persons having the same physical impairments as the physically handicapped person; or
   (c) a characteristic that is generally imputed to persons having the same physical impairment as the physically handicapped person,

   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.

(2) The fact that a physically handicapped person who is visually impaired has, or may be accompanied by, a guide dog, shall be deemed to be a characteristic that appertains generally to persons having the same physical impairment as the physically handicapped person, but nothing in this Act affects the liability of any such physically handicapped person for any injury, loss or damage caused by his guide dog.

(3) A person discriminates against a physically handicapped person on the ground of his physical impairment if he requires the physically handicapped person to comply with a requirement or condition-
   (a) with which a substantially higher proportion of persons who are not physically handicapped persons comply or are able to comply;
   (b) which is not reasonable having regard to the circumstances of the case; and
   (c) with which the physically handicapped person does not or is not able to comply.

Text Box 12: Section 49A (NSW) Anti-Discrimination Act 1977

specific example of what would constitute characteristic-related discrimination.[10] Less favourable treatment of a visually impaired person because of their actual or potential use of a guide dog is deemed to be treatment on the basis of a disability-related characteristic. Indirect disability discrimination is also unlawful.[11] This involves the imposition of an unreasonable requirement or condition, with which a substantially smaller proportion of disabled persons than non-disabled persons can comply, and with which the particular complainant cannot comply (see Text Box 12). Once again, this is similar to the concept of indirect discrimination in British sex and race discrimination law. Thus discrimination by the application of facially-neutral criteria, which have an adverse impact upon disabled persons, is also prohibited.

The protection from direct and indirect discrimination on the ground of physical impairment applies to physically handicapped persons. Who is a "physically handicapped person" for this purpose? This is someone who:

> as a result of having a physical impairment to his body, and having regard to any community attitudes relating to persons having the same [or substantially the same] physical impairment as that person and to the physical environment, is limited in his opportunities to enjoy a full and active life.[12]

In this context, 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, but does not include intellectual impairment.[13]

Despite that rider, discrimination against intellectually disabled persons is also prohibited under the New South Wales legislation. Part IVB of the Act, which deals with discrimination on the ground of intellectual impairment, was introduced in 1982 and is a mirror image of Part IVA. The protected class is defined by reference to "intellectually handicapped persons", meaning persons who:

> as a result of disabilities arising from intellectual impairment, [are] substantially limited in one or more major life activities.[14]

An intellectually impaired person is one who experiences:

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[10] (NSW) ADA 1977 s 49A(2).

[11] (NSW) ADA 1977 s 49A(3).

[12] (NSW) ADA 1977 s 4(1). This definition was inserted by the 1982 amendments. The 1981 definition of a "handicapped person" was in identical terms. The text in square brackets is derived from s 4(5).

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

[14] (NSW) ADA 1977 ss 49P and 4(1). The provisions of s 49P mirror those of s 49A.

> 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.[15]

In the leading case of *Kitt v Tourism Commission*,[16] an epileptic was held to be intellectually impaired under the Act because epilepsy arises from a defect in a person's brain, although epileptics usually consider themselves to be *physically* disabled.

What types of employment discrimination against physically and intellectually disabled persons are circumscribed? Section 49B (the relevant text of which is reproduced in Text Box 13) prohibits discrimination in recruitment and selection,[17] employment offers, terms and conditions of employment, promotion, training or transfer opportunities, and any other employment benefits. Discriminatory dismissals are also outlawed, as in any other detrimental action informed by disability.[18] Section 49Q contains mirror provisions in respect of intellectually disabled applicants and employees.[19]

As has been noted, the language and structure of these sections is clearly derived from that of the British sex and race discrimination legislation. However, with regard to disability, there the comparison ends. 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

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

[16] (1987) EOC ¶92-196 (NSW EOT); (1987) 11 NSWLR 686 (NSW SC). See: Astor, 1988.

[17] In *Clinch v Commissioner of Police* (footnote 9 above) there was a breach of s 49B(1)(c) by virtue of the employer's standing instruction requiring prospective employees to have vision in both eyes.

[18] (NSW) ADA 1977 s 49B(3) excludes the application of the non-discrimination principle in respect of private households, employers employing up to five employees and private educational authorities. The remaining sections of Part IVA extend the anti-discrimination principles to discrimination against commission agents (s 49C) and contract workers (s 49D), and to discrimination by partnerships (s 49E), trade unions (s 49F), qualifying bodies (s 49G) and employment agencies (s 49H).

[19] See also (NSW) ADA 1977 ss 49R-49W which parallel ss 49C-49H.

(1) It is unlawful for an employer to discriminate against a physically handicapped person on the ground of his physical impairment-
   (a) in the arrangements he makes for the purpose of determining who should be offered employment;
   (b) in determining who should be offered employment; or
   (c) in the terms on which he offers employment.

(2) It is unlawful for an employer to discriminate against an employee who is a physically handicapped person on the ground of his physical impairment-
   (a) in the terms or conditions of employment which he affords him;
   (b) by denying him access, or limiting his access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
   (c) by dismissing him or subjecting him to any other detriment.

Text Box 13: Section 49B (NSW) Anti-Discrimination Act 1977

accommodated by the employer...[20]

Thus an employer may refuse to employ a disabled person whose disability disqualifies him or her from doing the job, or who would only be able to perform the work with the assistance of *unreasonable* accommodations. An employer may also discriminate on the basis of disability in the terms of an employment offer, in employment terms and conditions generally, and in access to promotion, transfer, training or other employment benefits:

> in respect of any determination by the employer... of any terms or conditions relating to the... handicapped person that are reasonable having regard to... (a) any limitation or restriction that the... handicapped person's... impairment would or does impose on his ability to carry out the work required to be performed in the course of the employment or engagement concerned; (b) any services or facilities which would be or are required by the... handicapped person in order to carry out the work referred to in paragraph (a) and which would not be or are not required by persons who are not... handicapped persons.[21]

Again, this means that an employer may allow a disability, or the limitations and requirements of a disabled person, to be a factor in making employment decisions and extending employment opportunities. The combined effect of sections 49I(1) and 49I(2) is a manifest failure to incorporate a clear requirement of reasonable accommodation of disabled persons in the workplace. The implications of this flaw in policy or drafting were confirmed in *Jamal v Secretary, Department of Health*,[22] the leading case interpreting the NSW disability discrimination provisions. This case is discussed in detail in Chapter XIII below.

Part IXA of the Act deals with equal opportunity in public employment and was introduced by the 1980 amendments. It applies to government departments, public authorities and the police force.[23] The provisions of this part of the Act were extended to physically disabled persons in 1984. In the present context, its objects are:

> (a) to eliminate and ensure the absence of discrimination in employment on the grounds of... physical impairment; and (b) to promote equal employment opportunity for... physically handicapped persons [in public employment].[24]

Section 122J requires public sector employers to whom it is addressed to prepare and to

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[20] (NSW) ADA 1977 ss 49I(1) and 49X(1). In *Clinch v Commissioner of Police* (footnote 9 above), as the employer had not examined the applicant, a defence made out under s 49I could not succeed. The respondent was ordered to give further consideration to the applicant. Subsequently the complaint was dismissed: (1989) AILR ¶372(16); (1988) EOC ¶92-262.

[21] (NSW) ADA 1977 ss 49I(2) and 49X(2).

[22] (1986) AILR ¶433 and (1986) EOC ¶92-162 (NSW EOT); (1987) AILR ¶280 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

[23] (NSW) ADA 1977 s 122B.

[24] (NSW) ADA 1977 s 122C.

implement an equal employment opportunity management plan in order to achieve those objects. The plan must be sent to Director of Equal Opportunity in Public Employment, with whom an annual report must also be filed.[25] The plan must include provisions relating to the devising of policies and programmes by which those objects are to be achieved; communication of such policies and programmes; collection and recording of appropriate information; review of personnel practices (including recruitment techniques, selection criteria, training and staff development programmes, promotion and transfer policies and patterns, and conditions of service) with a view to identifying discriminatory practices; setting of goals or targets against which the success of the management plan may be assessed; other means of evaluating the policies and programmes; revision and amendment of the management plan; and appointment of persons to implement these provisions.[26] Provision is made for references to the NSW ADB where a plan is unsatisfactory, for investigations to be made, and for the power to direct the amendment of a management plan.[27]

South Australia

The employment rights of disabled people in South Australia (SA) were first addressed in the Handicapped Persons Equal Opportunity Act 1981.[28] This was subsequently repealed and replaced by the Equal Opportunity Act (EOA) 1984.[29] The objects of the EOA are to promote equality of opportunity, to prevent discrimination based on sex, sexuality, marital status, pregnancy, race and physical or intellectual impairment, and to facilitate participation in the economic and social life of the community.

The scope of unlawful discrimination is defined in terms very similar to those in the (NSW)

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[25] (NSW) ADA 1977 ss 122J(6) and 122L. The Directorate is established by ss 122D-122I. Pre-1984 plans were required to be amended to take account of physically disabled persons: s 122JA.

[26] (NSW) ADA 1977 s 122J(2). A management plan may include other provisions which are not inconsistent with the objects of this Part: s 122J(3). A public employer may, from time to time, amend its management plan: s 122J(5).

[27] (NSW) ADA 1977 ss 122M-122S.

[28] (SA) N° 56 of 1981. For the pre-1981 position see: Committee on Rights of Persons with Handicaps (South Australia), 1978. Few cases were reported under this Act, but one such case demonstrated the legislative intention to control employer assumptions about the capabilities and reach of employees with disabilities: *Garton v Hillcrest Hospital* (1984) AILR ¶240 (SA HPDT).

[29] (SA) N° 95 of 1984, as amended by the EOA Amendment Act 1989 ((SA) N° 68 of 1989). The Act also extends to education, disposal of interests in land, provision of goods or services, accommodation, and superannuation schemes and provident funds.

ADA 1977 and is set out in Text Box 14.[30] Part V of the Act prohibits discrimination on the ground of impairment against applicants and employees. In this context, "impairment" means intellectual or physical impairment.[31] Under the Act, "physical impairment" denotes:

> (a) the total or partial loss of any function of the body; (b) the *total or partial* loss of any part of the body; (c) the malfunctioning of any part of the body; or (d) the malformation or disfigurement of any part of the body, *whether permanent or temporary* but does not include an intellectual impairment or mental illness.[32]

The definition of "intellectual impairment" extends to:

> permanent or temporary loss or imperfect development of mental faculties (except where attributable to mental illness) resulting in reduced intellectual capacity.[33]

Until 1989, intellectual impairment was not covered by the Act, but this omission has now been cured by the addition of a bespoke definition. What constitutes discrimination on the ground of impairment? The provisions of section 66 (as amended) are set out in Text Box 15. Direct and indirect discrimination appear in their now familiar guises, except that the standard of unfavourable treatment, rather than less favourable treatment, is preferred as the badge of discrimination.[34] Discrimination on the ground of past or presumed impairment is included, while discrimination based upon disability characteristics (actual or presumed) is also caught. Notably, discrimination also occurs through unreasonable refusal to accommodate disability or unfavourable treatment because such accommodation would be

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[30] As used in (SA) EOA 1984 s 67(2), "detriment" includes humiliation or denigration: s 5. The Act also extends to discrimination against agents (s 68), against contract workers (s 69) and within partnerships (s 70). Section 72 extends the non-discrimination principle to "associations" and qualifying bodies. The Act does not apply to employment within a private household: s 71(1). Section 6(2) provides that "a person acts on a particular ground... if the person in fact acts on a number of grounds, one of which is the [particular] ground..., and that ground is a substantial reason for the act."

[31] (SA) EOA 1984 s 5 (as amended).

[32] (SA) EOA 1984 s 5. The words in italics were added by the 1989 amendments.

[33] (SA) EOA 1984 s 5 (as amended).

[34] The original definition of direct discrimination was more narrowly drafted:

> For the purposes of this Act, a person discriminates against another on the ground of his physical impairment if... he treats the other person less favourably by reason of his physical impairment, or a presumed physical impairment, *than in identical or similar circumstances he treats, or would treat, a person who does not have such an impairment.*

Note the difference in the italicised portion of the original definition.

(1) It is unlawful for an employer to discriminate against a person on the ground of impairment-
   (a) in determining, or in the course of determining, who should be offered employment; or
   (b) in the terms or conditions on which employment is offered.
(2) It is unlawful for an employer to discriminate against an employee on the ground of impairment-
   (a) in the terms or conditions of employment;
   (b) by denying, or limiting access, to opportunities to promotion, transfer or training, or to any other benefits connected with employment;
   (c) by dismissing the employee; or
   (d) by subjecting the employee to any other detriment.

Text Box 14: Section 67 (SA) Equal Opportunity Act 1984

A person discriminates on the ground of impairment...

(a) if he or she treats another unfavourably because of the other's impairment, or a past or presumed impairment;

(b) ...treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and-

  (i) the nature of the requirement is such that a substantially higher proportion of persons who do not have such an impairment complies, or is able to comply, with the requirement than of those persons who have such an impairment; and

  (ii) the requirement is not reasonable in the circumstances of the case;

(c) ...treats another unfavourably on the basis of a characteristic that appertains generally to persons who have such an impairment, or on the basis of a presumed characteristic that is generally imputed to persons who have such an impairment;

(d) ...if, in circumstances where it is unreasonable to do so-

  (i) he or she fails to provide special assistance or equipment required by a person in consequence of the person's impairment; or

  (ii) he or she treats another unfavourably because the other requires special assistance or equipment as a consequence of the other's impairment;

(e) ...if he or she treats a person who is blind or deaf, or partially blind or deaf, unfavourably because the person possesses, or is accompanied by, a guide dog, or because of any related matter (whether or not it is his or her normal practice to treat unfavourably any person who possesses, or is accompanied by, a dog).

Text Box 15: Section 66 (SA) Equal Opportunity Act 1984

required.[35] Particular protection is afforded to visually-impaired or hearing-impaired persons by outlawing discrimination motivated by the fact that the person possesses or is accompanied by a guide dog.[36] A discriminator treats another unfavourably on the basis of a particular attribute or circumstance if the discriminator treats that other person less favourably than in identical or similar circumstances the discriminator treats, or would treat, a person who does not have that attribute or is not affected by that circumstance.[37]

The employer's main defence is contained in section 71(2) which provides that there will be no disability-based discrimination if:

> the person suffering from the impairment is not, or would not be, able- (a) to perform adequately, and without endangering himself or herself or other persons, the work genuinely and reasonably required for the employment or position in question; or (b) to respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment or position in question.

This is a version of the "otherwise qualified" or "*bona fide* occupational requirement" test observable in the disability statutes of the North American jurisdictions. It is noticeable that it expressly incorporates a safety risk defence. Furthermore, discriminatory rates of salary, wages or other remuneration payable to persons who have impairments are not rendered unlawful.[38] Disability-based discrimination arising because premises, as constructed, are inaccessible to disabled persons, or because the owner or occupier fails to ensure that the premises are accessible to such persons, is not unlawful.[39] On the other hand, schemes or undertakings for the benefit of persons who have a particular impairment are lawful, thus permitting a degree of positive discrimination.[40]

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[35] Originally, (SA) EOA 1984 s 83 (now repealed) provided:

> This Part does not render unlawful discrimination against a person on the ground of his physical impairment where the discriminatory act arises from the fact that the person, in consequence of his impairment, requires special assistance or equipment that cannot reasonably be provided in the circumstances in which that discrimination occurs.

The new and more liberal provision was introduced in 1989.

[36] In addition, (SA) EOA 1984 s 88 provides that:

> (a) it is unlawful to impose any condition or requirement that would result in a person who is blind or deaf, or partially blind or deaf, being separated from his or her guide dog; and (b) a person who imposes any such condition or requirement shall, in addition to any civil liability that might be incurred under this Act, be guilty of an offence and liable to a penalty not exceeding $1,000.

[37] (SA) EOA 1984 s 6(3) (as amended).

[38] (SA) EOA 1984 s 79.

[39] (SA) EOA 1984 s 84.

[40] (SA) EOA 1984 s 82.

Victoria

The Victorian EOA 1984[41] repeals and replaces the state's EOA 1977[42] and the Equal Opportunities (Discrimination Against Disabled Persons) Act 1982.[43] The Act renders unlawful certain kinds of discrimination and promotes equality of opportunity between persons of different status. It outlaws employment discrimination "on the ground of status or by reason of... private life."[44] This applies to the determination of employment offers, terms of employment offers, refusal or deliberate omission to offer employment, and denial of access to a guidance programme, an apprenticeship training programme or other occupational training or retraining programme.[45] Furthermore, it is unlawful to deny or limit access to opportunities for promotion, transfer or training or to any other benefits connected with employment, and to dismiss an employee or subject an employee to any other detriment, by reason of a prohibited ground.[46]

Discrimination on the ground of "status" includes discrimination because of sex, marital status, race and *impairment*.[47] For this purpose, "impairment" means:

> (a) total or partial loss of a bodily function; (aa) the presence in the body of organisms causing disease; (b) total or partial loss of a part of the body; (c) *malfunction of a part of the body*; and (d) malformation or disfigurement of a part of a body-
> and includes-
> (e) in relation to a person with a past or present impairment an impairment which presently exists or existed in the past but has now ceased to exist; and (f) an impairment which is imputed to a person.[48]

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[41] (Vic) Act N° 10095, as amended by the EO(A)A 1985 ((Vic) Act N° 10247) and further amended by the Health (General Amendment) Act 1988 ((Vic) Act N° 48 of 1988). In addition, in the Victorian civil service, all employees must receive fair and equitable treatment in employment regardless of, *inter alia*, physical disability: (Vic) Public Service Act 1974.

[42] (Vic) Act N° 9025.

[43] (Vic) Act N° 9843.

[44] (Vic) EOA 1984 s 21. The Act extends to discrimination against agents (s 22), against contract workers (s 23), within partnerships (s 24), by professional and other organisations (s 25), by qualifying bodies (s 26) and by employment agencies (s 27).

[45] (Vic) EOA 1984 s 21(1).

[46] (Vic) EOA 1984 s 21(2).

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

[48] (Vic) EOA 1984 s 4(1). Paragraphs (aa) and (f) were added by the 1988 amendments. The definition has been applied to capture a variety of disabilities: *MacLeod v State of Victoria* (1987) AILR ¶285 (Vic EOB): diabetes; *Campbell v FH Productions* (1984) AILR ¶178 (Vic EOB): back injury; *O'Neil v Burton Cables P/L* (1986) AILR ¶435 (Vic EOB): acute back condition; *Urie v Cadbury Schweppes P/L* (1987) AILR ¶283 (Vic EOB): knee injury and

As the words in italics above show, an impairment includes a malfunction of a part of the body. This is defined to include:

> (a) a mental or psychological disease or disorder; and (b) a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction.[49]

It does not matter whether the impairment arose before or during the employment, and whether or not the impairment was apparent before employment or only became apparent during employment.[50]

The criteria for identifying discrimination are set out in section 17. First, direct discrimination is described in familiar terms:

> A person discriminates against another person... if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.[51]

The comparison called for here must be based upon relevant circumstances which "are the same, or are not materially different" in the two cases being compared.[52] Second, less favourable treatment:

> by reason of a characteristic that appertains generally to persons of the status or with the private life of the other person; or... by reason of a characteristic which is generally imputed to persons of the status or with the private life of the other person

is discriminatory.[53] Third, there is indirect discrimination where:

> (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply; (b) the other person does not or cannot comply with the requirement or condition; and (c) the requirement or condition is not reasonable.[54]

In case there was any doubt, the Act provides that it is not discriminatory to select "the person who is, irrespective of impairment, best suited to perform the duties relevant to the employment".[55]

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childhood record of rheumatic fever.

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

[50] (Vic) EOA 1984 s 21(3).

[51] (Vic) EOA 1984 s 17(1) (as amended).

[52] (Vic) EOA 1984 s 17(2).

[53] (Vic) EOA 1984 s 17(4).

[54] (Vic) EOA 1984 s 17(5).

[55] (Vic) EOA 1984 s 21(4)(k). However, a disabled applicant must be given fair

A number of exceptions to the Act are outlined. The Act does not apply to small employers employing less than four employees.[56] Unusually, discrimination on the ground of impairment is permitted where the employment is for the purposes of dramatic performances, entertainment, artistic or photographic work and where persons with an impairment are required for reasons of authenticity.[57] Discrimination authorized or required by Australian Commonwealth or Victorian law is allowed, as it is if pursuant to a lawful agreement or arrangement relating to industrial relations.[58] Discrimination on the ground of impairment, with respect to persons of a particular impairment, is permitted in the provision of services for the promotion of the welfare or advancement of those persons, if those services can most effectively be provided by a person of the same impairment.[59] Section 39(f) permits "the exclusion of any person from a *bona fide* programme, plan or arrangement designed to prevent or reduce disadvantage suffered by a particular class of disadvantaged persons."

The employer's main defences under the Act are provided by section 21(4)(g)-(i) reproduced in Text Box 16. First, discrimination on the ground of impairment is lawful if the plaintiff would be unable to perform adequately the reasonable requirements of the job with or without special services or facilities which cannot reasonably be made available.[60] In deciding this question, the plaintiff's past training, qualifications and relevant experience (and, where appropriate, employment performance) must be taken into account. This is the Victorian version of the "otherwise qualified" or "*bona fide* occupational requirement" standard. Second, the section also incorporates a separate safety risk defence, which allows the employer to discriminate on the ground of an impairment which raises a risk of injury to the plaintiff or others in the workplace.[61] Section 39(da) also gives a general exemption to

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consideration and should only be rejected on capability grounds if there has been an individual assessment or medical examination: *O'Neil v. Burton Cables P/L* (footnote 48 above).

[56] (Vic) EOA 1984 s 21(4)(f). Employment "in domestic or personal services in or in relation to the home of the employer" is also exempted: s 21(4)(a). Private households are also excluded: s 21(4)(j).

[57] (Vic) EOA 1984 s 21(4)(b). It must have been intended only to provide for this exception to ensure uniformity of approach with the other grounds of unlawful discrimination, in particular with sex and race discrimination.

[58] (Vic) EOA 1984 s 21(4)(d).

[59] (Vic) EOA 1984 s 21(4)(e).

[60] (Vic) EOA 1984 s 21(4)(g). For a criticism of this aspect of the Victorian legislation, see: Johnstone, 1989.

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

This section does not apply to-

...

(g) discrimination on the ground of impairment, if taking into account the person's past training, qualifications and experience relevant to employment of that kind and, if the person is already employed by the employer, the person's performance as an employee, and all other factors which are relevant and reasonable in the circumstances, the person by reason of that person's impairment-
  (i) requires or would require special services or facilities that in the circumstances of the case cannot or could not reasonably be made available and without those services or facilities is or would be unable adequately to perform the work reasonably required of that person; or
  (ii) for any other reason is or has become unable adequately to carry out the work reasonably required of that person;

(h) discrimination on the ground of impairment if, because of the nature of the impairment and the environment in which the person works or is to work or the nature of the work performed or to be performed, there is or is likely to be-
  (i) a risk that the person will injure others, and it is not reasonable in all the circumstances to take that risk; or
  (ii) a substantial risk that the person will injure himself or herself.

(i) the fixing of reasonable terms or conditions of or the making of reasonable variations in the terms or conditions of employment where the terms as so fixed or as so varied take into account-
  (i) any special limitations that a person's impairment imposes on his capacity to carry on the work involved in the employment;
  (ii) any special conditions or services which are required to be provided to enable him to undertake the employment or to facilitate the conduct by him of that person's employment; or
  (iii) [state collective bargaining legislation].

Text Box 16: Section 21(4) (Vic) Equal Opportunity Act 1984

"discrimination on the ground of impairment where the discrimination is reasonably necessary to protect public health." This exemption was introduced in 1988. Third, discrimination in employment terms or conditions is permitted to take account of any limitations in working capacity or any accommodations made to enable a disabled employee to work. This last exception also permits disability-based discrimination in terms and conditions in accordance with collective bargaining arrangements.[62]

The Victorian legislation is very tightly drafted and gives only grudging protection to disabled workers facing employment discrimination. The Law Reform Commission of Victoria has proposed that the exception relating to the employment of people who create a risk of injury to themselves or others should be restricted to cases where the employer cannot by adopting reasonable measures reduce the risk to a level similar to other employees.[63] This is the conflict between sections 21(4)(g) and 21(4)(h). Reasonable accommodation should apply in both situations. The Commission also proposes that it should be unlawful to ask for information which might provide a basis for discrimination, unless it is for a non-discriminatory purpose. In multiple reason discrimination, the Commission proposes either a causation test or a significant factor test. A further report by the Commission[64] says that there is no evidence that the costs of complying with Act are unreasonable. It also rejects the argument that there should be a *freedom* to discriminate. The Commission recommends that the Act should specifically refer to a failure to accommodate a special need. It is recommended that section 39(da) should be extended to allow for a significant risk to a person's health, safety or property to be an exception.[65]

Western Australia

Western Australia's (WA) EOA 1984[66] was established by the state:

> to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination on the grounds of sex, marital status, pregnancy, race, religious or political conviction, *impairment*, or involving sexual harassment.[67]

Its objects include the elimination, so far as is possible, of discrimination against persons on

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[62] (Vic) EOA 1984 s 21(4)(i).

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

[64] Law Reform Commission of Victoria, 1990b.

[65] See text at footnote 61 above.

[66] (WA) N° 83 of 1984, as amended by the EO(A)A 1988 ((WA) N° 40 of 1988).

[67] (WA) EOA 1984 preamble (my emphasis).

the ground of impairment in work, and the promotion of recognition and acceptance within the community of the equality of all persons regardless of their impairment.[68] This is to be achieved by Part IVA of the Act, which was inserted in 1988 to deal with discrimination on the ground of impairment. It prohibits direct and indirect disability discrimination using the formulae with which we are now quite familiar but, for completeness, the definitions are reproduced in Text Box 17.[69] The definition of "impairment" for these purposes is also worth reproducing:

> (a) any defect or disturbance in the normal structure or functioning of a person's body; (b) any defect or disturbance in the normal structure or functioning of a person's brain; or (c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour, whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist.[70]

In employment, the prohibition on discrimination extends to the arrangements made for determining employment offers; the determination of who should be offered employment; the terms or conditions on which employment is offered; the terms or conditions of employment; the access to opportunities for promotion, transfer or training, or other employment benefits; and dismissal, or the subjecting of an employee to any other detriment.[71]

A novelty of the Western Australian legislation is that employment application procedures are also specifically regulated, as section 66O provides:

> [I]t is unlawful... to request or require... information (whether by way of completing a form or otherwise) that persons who do not have an impairment would not, in circumstances that are the same or not materially different, be requested or required to provide.

However, an employer may discriminate against a person on the ground of the impairment if the disabled person is not otherwise qualified for the job or would require accommodations which would impose unjustifiable hardship on the employer. The statute establishes the lawfulness of such disability-informed discrimination where:

> it is reasonable for the employer... to conclude, on such grounds having regard to the

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[68] (WA) EOA 1984 s 3. Impairment as a protected ground was added by the 1988 amendments. The Act extends to discrimination against commission agents (s 66C), against contract workers (s 66D), by partnerships (s 66E), by professional or trade organizations (s 66F), by qualifying bodies (s 66G) and by employment agencies (s 66H).

[69] (WA) EOA 1984 s 66A.

[70] (WA) EOA 1984 s 4(1) (as amended). Section 66U provides for regulations to be made to exclude particular infectious diseases from the scope of the Act. It is understood that no regulations have been made.

[71] (WA) EOA 1984 s 66B(1)-(2).

(1) For the purposes of this Act, a person... discriminates against another person... on the ground of impairment if, on the ground of-
  (a) the impairment of the aggrieved person;
  (b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;
  (c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or
  (d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

  the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment.

(2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person who has an impairment are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment.

(3) For the purposes of this Act, a person... discriminates against another person... on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition-
  (a) with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply;
  (b) which is not reasonable having regard to the circumstances of the case; and
  (c) with which the aggrieved person does not or is not able to comply.

(4) For the purposes of this Act, a person... discriminates against another person... who is blind, deaf, partially blind or partially deaf... if the discriminator treats the aggrieved person less favourably by reason of the fact that the aggrieved person possesses, or is accompanied by, a guide dog or hearing dog, or by reason of any matter related to that fact, whether or not it is the discriminator's practice to treat less favourably any person who possesses, or is accompanied by, a dog, but nothing in this Act affects the liability of the aggrieved person for any injury, loss or damage caused by the guide dog or hearing dog.

Text Box 17: Section 66A (WA) Equal Opportunity Act 1984

> circumstances of the case and having taken all reasonable steps to obtain relevant and necessary information concerning the impairment it is reasonable for the employer... to rely on, that the person with the impairment because of that impairment- (a) would be unable to carry out the work required to be performed in the course of the employment or engagement concerned; or (b) would, in order to carry out that work, require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer, principal or person.[72]

What constitutes "unjustifiable hardship" requires account to be taken of all relevant circumstances of the particular case, including any benefit or detriment likely to accrue or be suffered, the nature of the impairment, the financial circumstances of the employer, and the estimated expenditure required to be made.[73]

An employer may also discriminate in employment terms and conditions that:

> are reasonable having regard to either or both of the following- (a) any limitation or restriction that the impairment would or does impose on the person's ability to carry out the work required to be performed in the course of the employment or engagement concerned; or (b) any services or facilities that would be or are required by the person with the impairment in order to carry out the work referred to in paragraph (a) and that would not be or are not required by persons who do not have an impairment.[74]

The limitations of this form of wording are discussed in Chapter XIII. On the other hand, a degree of positive action is encouraged. Employers are permitted to take measures which are intended to achieve equality where their purpose is:

> (a) to ensure that persons who have an impairment have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or (b) to afford persons who have an impairment access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.[75]

The Act further contains a number of genuine occupational qualification exceptions.[76] These include participation in a dramatic performance or other entertainment or as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images where a person with a particular impairment is required for reasons of authenticity. Also excluded under this section is the provision of services promoting the welfare of impaired persons where those services can most effectively be provided by a person with the same impairment. Finally, state government departments and public authorities are obliged

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[72] (WA) EOA 1984 s 66Q(1).

[73] (WA) EOA 1984 s 4(4).

[74] (WA) EOA 1984 s 66Q(2).

[75] (WA) EOA 1984 s 66R.

[76] (WA) EOA 1984 s 66S.

to devise and implement equal employment opportunity programmes. Such public sector employers are under a statutory duty to eliminate employment discrimination based upon impairment and to ensure its continued absence.[77]

Remaining states

It will already be apparent that the development of state legislation regulating disability-related employment discrimination has been evolutionary and reform has been organic. New South Wales took the lead in this area, while South Australia and Victoria added to and developed the nascent principles and concepts of disability discrimination law. As has just been seen, Western Australia's statute borrows heavily from the pattern established by the pioneer states, perhaps adding one or two flourishes and novelties of its own. Much the same can be said of the remaining states to have legislated on this topic. In 1991, the Australian Capital Territory enacted the (ACT) Discrimination Act 1991,[78] while in the same year Queensland enacted the (Qld) Anti-Discrimination Act.[79] The Northern Territory adopted its (NT) Anti-Discrimination Act the following year.[80] These measures protect disabled persons and their associates from discrimination on the ground of impairment, and address discrimination based upon disability characteristics, presumed disability and past disability. Their definitions of impairment borrow heavily from the pre-existing models, as do the scope and definition of prohibited discrimination in each state. The range of exemptions and the provision of genuine occupational qualifications are also unsurprising.

AUSTRALIAN COMMONWEALTH LEGISLATION

Human Rights and Equal Opportunity Commission Act

Although the Australian Commonwealth had legislated to control racial discrimination in the 1970s[81] and gender discrimination in the 1980s,[82] it was not until the 1990s that disability discrimination was first addressed. Prior to this recent development, the civil rights of disabled persons were barely recognized in federal law. The Human Rights and Equal

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[77] (WA) EOA 1984 ss 140-145.

[78] (ACT) N° 81 of 1991.

[79] (Qld) N° 85 of 1991, as amended by the Anti-Discrimination Amendment Act 1992 ((Qld) N° 59 of 1992. See also: (Qld) Equal Opportunity in Public Employment Act 1992 ((Qld) N° 10 of 1992.

[80] (NT) N° 80 of 1992.

[81] (Cth) Racial Discrimination Act 1975.

[82] (Cth) Sex Discrimination Act 1984.

Opportunity Commission Act 1986[83] ratified and incorporated the UN Declaration on the Rights of Mentally Retarded Persons 1971 and the Declaration on the Rights of Disabled Persons 1975.[84] The Act also recognised the doubtful legality of social and employment discrimination, defined as:

> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and (b) *any other distinction, exclusion or preference* that- (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act, but does not include any distinction, exclusion or preference: (c) in respect of a particular job based on the inherent requirements of the job...[85]

Taking their cue from the italicised proportion of the definition above, regulations were made under the Act declaring, *inter alia*:

> any distinction, exclusion or preference made ... on the ground of ... medical record; or ... impairment; or ... mental, intellectual or psychiatric disability; or ... physical disability; or ... one or more of [these] grounds ... which existed but which has ceased to exist; or ... on the basis of the imputation to a person of any ground specified...

would constitute discrimination for the purposes of the Act.[86] Impairment was defined by the Regulations as:

> (a) total or partial loss of a bodily function; or (b) the presence in the body of organisms causing disease; or (c) total or partial loss of a part of the body; or (d) malfunction of a part of the body; or (e) malformation or disfigurement of a part of the body.[87]

However, the Act did not give disabled persons significant rights of action or remedies for disability discrimination. Rather, the Act provided a statutory framework in which the newly established Human Rights and Equal Opportunity Commission could treat disability discrimination as a subject for research, policy-making, and the occasional investigation and conciliation of complaints received by it. The work of the Commission in this regard led indirectly to the eventual enactment of Commonwealth disability discrimination laws in 1992.[88]

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[83] (Cth) N° 125 of 1986.

[84] (Cth) HR&EOCA 1986 s 3 and Schs 4-5.

[85] (Cth) HR&EOCA 1986 s 3(1).

[86] HR&EOC Regulations 1989 (SR 1989 N° 407) reg 4.

[87] HR&EOC Regulations 1989 reg 3.

[88] See, for example: Human Rights Commission (Australia), 1985; Ware and Neale, 1986; National Council on Intellectual Disability, 1989. For the background to the (Cth) Disability

Disability Discrimination Act

The (Cth) Disability Discrimination Act 1992 (DDA 1992) received constitutional assent on 5 November 1992,[89] and was due to come into force within twelve months of that date.[90] It sets out to eliminate disability-based discrimination in (*inter alia*) work, existing laws and the administration of Commonwealth laws and programmes.[91] Furthermore, the objects of the Act are:

> to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and... to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.[92]

The Act also applies to accommodation, education, access to premises, clubs and sport, provision of goods, facilities, services and land. The Act prohibits both direct and indirect discrimination on the ground of disability. The definition of direct disability discrimination is the familiar one of disability-motivated treatment of a disabled person, which is less favourable than the treatment that would be accorded a non-disabled person in circumstances which are the same or not materially different.[93] Similarly, indirect disability discrimination is also recognisable in the usual terms. It involves requiring disabled persons to comply with unreasonable requirements or conditions, with which they cannot comply, and with which a substantially higher proportion of non-disabled persons can comply.[94] The concept of disability-informed discrimination also expressly includes, as Text Box 18 shows, less favourable treatment because the disabled person uses palliative or therapeutic devices or auxiliary aids, or is accompanied by an interpreter, reader, assistant, carer or guide/hearing

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Discrimination Act 1992 see: Ronalds, 1990 and 1991; Commonwealth Disability Anti-Discrimination Legislation Committee, 1991; Shelley, 1991; Wightman, 1991; Parliament of the Commonwealth of Australia, 1992.

[89] (Cth) N° 135 of 1992.

[90] (Cth) DDA 1992 s 2.

[91] (Cth) DDA 1992 s 3(a). The Act applies throughout Australia and to both private and public sector employment: ss 4(1) and 12. It operates concurrently with state laws: s 13. The constitutionality of the legislation is beyond the scope of this study. The Act will prevail so far as any state law is inconsistent with it but, where a complaint has been instituted under state anti-discrimination legislation, action under Commonwealth law is excluded. On this point see: McCarry, 1989.

[92] (Cth) DDA 1992 s 3(b)-(c).

[93] (Cth) DDA 1992 s 5(1). It is sufficient that disability is one of the reasons, whether or not dominant or substantial, for the discriminatory act: s 10.

[94] (Cth) DDA 1992 s 6.

7. For the purposes of this Act, a person... discriminates against another person with a disability... if the discriminator treats the aggrieved person less favourably because of the fact that the aggrieved person is accompanied by, or possesses: (a) a palliative or therapeutic device; or (b) an auxiliary aid; that is used by the aggrieved person, or because of any matter related to that fact, whether or not it is the discriminator's practice to treat less favourably any person who is accompanied by, or is in possession of, and is the user of: (a) such a palliative or therapeutic device; or (b) such an auxiliary aid.

8. For the purposes of this Act, a person... discriminates against another person with a disability... if the discriminator treats the aggrieved person less favourably because of the fact that the aggrieved person is accompanied by: (a) an interpreter; or (b) a reader; or (c) an assistant; or (d) a carer; who provides interpretive, reading or other services to the aggrieved person because of the disability, or because of any matter related to that fact, whether or not it is the discriminator's practice to treat less favourably any person who is accompanied by: (a) an interpreter; or (b) a reader; or (c) an assistant; or (d) a carer.

9. (1) For the purposes of this Act, a person... discriminates against a person with: (a) a visual disability; or (b) a hearing disability; or (c) any other disability; if the discriminator treats the aggrieved person less favourably because of the fact that the aggrieved person possesses, or is accompanied by: (d) a guide dog; or (e) a dog trained to assist the aggrieved person in activities where hearing is required, or because of any matter related to that fact; or (f) any other animal trained to assist the aggrieved person to alleviate the effect of the disability, or because of any matter related to that fact; whether or not it is the discriminator's practice to treat less favourably any person who possesses, or is accompanied by, a dog or any other animal.
(2) Subsection (1) does not affect the liability of a person with a disability for damage to property caused by a dog or other animal trained to assist the person to alleviate the effect of the disability or because of any matter related to that fact.

Text Box 18: Sections 7-9 (Cth) Disability Discrimination Act 1992

dog.[95]

The definition of "disability" for the purposes of the Act is one of the most extensive in the Australian jurisdiction, as Text Box 19 demonstrates.[96] It includes past, present and imputed disabilities but, somewhat uniquely, it also includes a disability which may exist in the future, perhaps anticipating discrimination informed by genetic screening. Disability status is also found where a person possesses bodily organisms capable of causing disease or illness, thus preventing discrimination against carriers or persons with benign or stable viral infections. The potential application of this definition to someone who is HIV-positive, but otherwise healthy, is apparent. However, the Act does not render unlawful discriminatory acts in relation to disabilities which are comprised of infectious diseases and where it is reasonably necessary to discriminate to protect public health.[97]

In regulating disability discrimination in employment, Part 2 of the Act encompasses the usual areas of employment decisions and processes in which discrimination occurs.[98] That is, recruitment and selection, employment offers, terms and conditions, opportunities for promotion, transfer and training, other employment benefits, dismissal, and other detriment.[99] However, in prohibiting disability discrimination, Part 2 of the Act also applies to protect a complainant from discrimination based upon the disability of any of the complainant's associates.[100] The interpretation section provides that "associate", in relation to a person, includes:

> (a) a spouse of the person; and (b) another person who is living with the person on a genuine domestic basis; and (c) a relative of the person; and (d) a carer of the person; and (e) another person who is in a business, sporting or recreational relationship with the person.[101]

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[95] (Cth) DDA 1992 ss 7-9.

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

[97] (Cth) DDA 1992 s 48.

[98] (Cth) DDA 1992 s 15(1)-(2).

[99] The Act also applies to discrimination against commission agents (s 16), against contract workers (s 17), within partnerships (s 18), by qualifying bodies (s 19), by trade unions and employers' associations (s 20), and by employment agencies (s 21).

[100] (Cth) DDA 1992 s 15(1)-(2).

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

In this Act, unless the contrary intention appears...
"disability", in relation to a person, means:

(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;

and includes a disability that:

(h) presently exists; or
(i) previously existed but no longer exists; or
(j) may exist in the future; or
(k) is imputed to a person...

Text Box 19: Section 4(1) (Cth) Disability Discrimination Act 1992

The statute does not apply to domestic employment,[102] but more significantly the legislation incorporates a detailed "otherwise qualified" standard which provides a defence to disability discrimination (see Text Box 20). The disabled person must be able to carry out the "inherent requirements" of the job.[103] The employer, in making the judgement of whether a disabled person is so capable, 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. In addition, if the disabled worker could only satisfy the inherent requirements of the job with the assistance of services or facilities which would not be required by a non-disabled worker, an employer may discriminate if the provision of such accommodation would impose "unjustifiable hardship" on the employer.[104] In assessing what constitutes unjustifiable hardship, all the relevant circumstances are to be accounted for, including any benefit or detriment likely to accrue or be suffered by any persons concerned and the effect of the disability of (on?) any person concerned. The financial circumstances of the employer will be relevant, as will be the estimated amount of expenditure required for the accommodation.[105]

Like most, if not all, examples of disability discrimination laws, the Commonwealth legislation does not seek to regulate reverse discrimination. In other words, unlike sex and race discrimination laws, the legislation is not framed in terms which prohibit discrimination against persons without disabilities and in favour of disabled persons. The language of the statute might be sufficient to reach that conclusion, but the Act makes this clear. It is not unlawful to do an act that is "reasonably intended to... ensure that persons who have a disability have equal opportunities with other persons...".[106] Furthermore, disabled persons may be afforded "goods or access to facilities, services or opportunities to meet their special needs in relation to... employment...".[107] The Act also allows positive discrimination to the advantage of disabled persons in respect of grants, benefits or programmes to meet their special needs.[108]

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[102] (Cth) DDA 1992 s 15(3).

[103] (Cth) DDA 1992 s 15(4)(a).

[104] (Cth) DDA 1992 s 15(4)(b).

[105] (Cth) DDA 1992 s 11.

[106] (Cth) DDA 1992 s 45(a).

[107] (Cth) DDA 1992 s 45(b).

[108] (Cth) DDA 1992 s 45(c).

Neither [the prohibition on discrimination in determining employment offers or by dismissing an employee]... renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

(a) would be unable to carry out the inherent requirements of the particular employment; or

(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

Text Box 20: Section 15(4) (Cth) Disability Discrimination Act 1992

The Act contains a number of miscellaneous provisions which are worthy of note. First, disability harassment of a disabled person or a person with a disabled associate is expressly unlawful.[109] Second, 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 six months.[110] Third, it is a criminal offence, punishable in like manner, to incite the commission of an unlawful act or offence under the legislation.[111] Fourth, discriminatory advertisements are regulated by the criminal law and the penalty for a transgression is a fine of up to $1,000.[112]

Equal Employment Opportunity (Commonwealth Authorities) Act

Like many state governments in Australia, the Commonwealth government has acted to promote equal opportunity in public sector employment. The (Cth) Equal Employment Opportunity (Commonwealth Authorities) Act 1987[113] was passed to require certain Commonwealth public service authorities to promote equal opportunity in employment for women and persons in designated minority groups. This includes persons with physical or intellectual disabilities.[114] The relevant public authority employers are required to develop and implement equal employment opportunity programmes.[115] An equal employment opportunity programme should be designed to ensure that appropriate action is taken by the public sector employer in question to eliminate employment discrimination by it against women and persons in designated groups in relation to employment matters and to promote equal opportunity.[116] The discrimination which must be confronted includes discrimination by which a physically or mentally disabled person is treated less favourably than a non-disabled person because of disability.[117] However, discrimination is permitted if it is

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[109] (Cth) DDA 1992 ss 35-36.

[110] (Cth) DDA 1992 s 42.

[111] (Cth) DDA 1992 s 43.

[112] (Cth) DDA 1992 s 44.

[113] (Cth) N° 20 of 1987.

[114] (Cth) Public Services Act 1922 s 7(1) (as amended).

[115] (Cth) EEO(CA)A 1987 s 5. Under Part 3 of the (Cth) DDA 1992, state and Commonwealth departments, public authorities and instrumentalities providing goods, services or facilities *may* prepare and implement action plans to achieve the objectives of that Act.

[116] (Cth) EEO(CA)A 1987 s 3(1). A relevant authority is one employing 40 or more employees in Australia.

[117] (Cth) EEO(CA)A 1987 s 3(1). The scope of employment discrimination includes

essential for the effective performance of employment duties.[118] Nothing in the legislation requires any action incompatible with the principle that employment matters should be dealt with on the basis of merit.[119]

Section 6 of the Act deals with the content of an equal employment opportunity programme. Employees must be informed of the contents of the programme and of the results of any monitoring and evaluation of it. Relevant employers are obliged to confer responsibility for the development, implementation and review of a programme on a senior manager. Consultations with recognised trade unions concerning a programme must take place, while employees of the authority, particularly persons in designated groups, are also entitled to be consulted. The programme should provide for the collection and recording of employment statistics and information relating to the authority. The statistics must include the number of persons in designated groups, and the types of jobs undertaken by (or job classifications of) them. The employer's policies and practices must be considered and examined to identify their contribution to discrimination and any pattern of lack of equal opportunity. Objectives to be achieved by the programme must be set, and the quantitative and other indicators against which the effectiveness of the programme is to be assessed must be established. The implementation of the programme is required to be monitored and evaluated, while the achievement of its objectives must be appraised. The effectiveness of the programme has to be measured by comparing statistics and information (required to be collected and recorded) with the indicators against which the effectiveness of the programme is to be judged. Public sector employers must take any action necessary to give effect to their programmes and regard is to be had to a programme when exercising powers in relation to employment matters.[120] The Act makes provision for the lodging of annual programme reports with the responsible minister or Public Service Board.[121] Special reports may be requested. The minister or Board may make recommendations after considering an annual programme report. Relevant ministers are allowed to give directions to an authority with respect to its obligations under the Act and the Board may issue guidelines.[122]

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recruitment procedures, selection criteria, promotion and transfer, training and staff development, and conditions of service.

[118] (Cth) EEO(CA)A 1987 s 3(2).

[119] (Cth) EEO(CA)A 1987 s 3(4).

[120] (Cth) EEO(CA)A 1987 s 7.

[121] (Cth) EEO(CA)A 1987 ss 8-11.

[122] (Cth) EEO(CA)A 1987 s 12.

CONCLUDING REMARKS

The Australian experiment with disability discrimination legislation would appear to offer the most direct comparative model from which British reformers might take consolation. Designed upon the British archetype of sex and race discrimination laws, the Australian statutes have incorporated disability and other suspect grounds within a conceptual framework that will be readily familiar to British employers, politicians and lawyers. This would suggest that the Australian variant upon the British paradigm could be readily transplanted by the amendment and consolidation of our race and gender discrimination statutes so as to include disability as a prohibited ground of discrimination here. However, it will be apparent from the account in this chapter, and in the analyses that follow in Part C below, that the Australian model of anti-discrimination legislation has created complex and unwieldy laws. In particular, the effort to fit disability into a formula devised to address the problems and disadvantages of women and racial minorities has often strained the interpretation of laws designed to achieve too many simultaneous purposes. As a result, the rights and expectations of disabled persons have been done a disservice. The "liberal promise" of anti-discrimination legislation has singularly failed to deliver employment opportunities for disabled Australians.[123] Moreover, mandatory equal opportunity planning, affirmative action and monitoring in respect of minority groups has been limited to the public sector (at least, in respect of disabled people) with apparent little effect.[124]

In Part C we turn to examine a number of problems and issues that must inevitably arise when considering special legislation to advance the employment rights of disabled workers. That discussion will continue in Volume 2 of the thesis.

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[123] Thornton, 1990: 244 *et seq.*

[124] Thornton, 1990: 232-3 and 242-3.