

**DISABILITY, DISCRIMINATION AND EQUAL  
OPPORTUNITIES:  
A COMPARATIVE STUDY OF LEGAL MODELS ADDRESSING THE  
EMPLOYMENT RIGHTS OF DISABLED PERSONS, WITH PARTICULAR  
REFERENCE TO BRITAIN AND THE UNITED STATES**

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Volume 1 of 2 volumes

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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 many of the recommendations of British Standard 4821 (1990). It has been prepared in WordPerfect 5.1 and laser-printed on A4 80g/m<sup>2</sup> 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   | <i>Bona fide</i> 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<br>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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> However, in Britain these facilities are the product of an uneven patchwork of legal regulation, administrative action and voluntary effort.<sup>4</sup> Moreover, borrowing from McCrudden,<sup>5</sup> 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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<sup>1</sup> Burgdorf and Burgdorf, 1975.

<sup>2</sup> Oliver, 1985; Thompson *et al*, 1990; Barnes, 1991; Barnes, 1992.

<sup>3</sup> Haveman *et al*, 1984a; Habeck *et al*, 1985; Berkowitz and Hill, 1986a.

<sup>4</sup> McCrostie and Peacock, 1984.

<sup>5</sup> 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.<sup>6</sup> 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,<sup>7</sup> and have subscribed to the tenets of supranational disability associations.<sup>8</sup> 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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<sup>6</sup> Lyth, 1973; Walker, 1982. The evidence to rebut ignorance and fears about employing disabled persons is plentiful. See, for example: Stevens, 1986.

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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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<sup>9</sup> 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.

<sup>10</sup> Barnes, 1992: 18.

<sup>11</sup> Berkowitz and Hill, 1986b: 1.

<sup>12</sup> ILO, 1923.

<sup>13</sup> Bolderson, 1991: 45.

disabled workers.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

## 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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<sup>14</sup> 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.

<sup>15</sup> *Declaration on the Rights of Disabled Persons*, General Assembly Resolution 3447 (XXX) adopted 9 December 1975.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> However, the "uses and misuses" of comparative law must be acknowledged.<sup>20</sup> 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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<sup>19</sup> 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.

<sup>20</sup> 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".<sup>21</sup>

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.<sup>22</sup> 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 <sup>23</sup>

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.<sup>24</sup>

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<sup>21</sup> Whelan, 1985: 1437.

<sup>22</sup> Kahn-Freund, 1966: 129.

<sup>23</sup> 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.

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The comparative theme

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<sup>25</sup> 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.

<sup>26</sup> See for example: Shontz, 1975; Stubbins, 1977; Vash, 1981; Wright, 1983.

<sup>27</sup> See, in particular: Sainsbury, 1970; Sainsbury, 1973; Topliss, 1979; Topliss and Gould, 1981; Topliss, 1982; Stone, 1985.

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.

<sup>29</sup> 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 *rappoteurs* (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.

<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Again, remarkably, this scholarship is rooted in the broad social sciences rather than in legal studies.<sup>33</sup> An exception is the work of Campbell and Heginbotham in the area of mental illness and discrimination.<sup>34</sup>

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.<sup>35</sup> In the pages of British labour law, moreover, existing regulation of disabled employment rights is merely footnoted or mentioned *en passant*,<sup>36</sup> while the prospects for and direction of reform

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<sup>31</sup> Large, 1982 and Fry, 1986 among others.

<sup>32</sup> Oliver (1984; 1985; 1986; 1990) and Barnes (1991; 1992). See also: Bynoe, Oliver and Barnes, 1991; Cunningham, 1993.

<sup>33</sup> 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.

<sup>34</sup> Campbell and Heginbotham, 1991. See also the contribution of Bynoe, 1991.

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

<sup>36</sup> 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".<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

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.

<sup>37</sup> *The Oxford English Dictionary* (2nd ed, 1989; Oxford: Clarendon Press) Vol VII at 696.

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

<sup>39</sup> *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.

<sup>40</sup> *Ibid* at 1074.

of disadvantage and inferiority.<sup>41</sup>

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.<sup>42</sup>

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".<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup>

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<sup>41</sup> Burgdorf, 1980b: 3-4.

<sup>42</sup> WHO, 1980.

<sup>43</sup> WHO, 1980.

<sup>44</sup> Acton, 1981: 2.

<sup>45</sup> 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.<sup>46</sup> 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 be 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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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<sup>46</sup> 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.

<sup>47</sup> For a review of the tensions between the medical model and the social theory of disability, see: Sullivan, 1991.

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

<sup>49</sup> 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,<sup>60</sup> 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.<sup>61</sup>

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?<sup>62</sup>

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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<sup>60</sup> Becker, 1957.

<sup>61</sup> Allport, 1954: 8.

<sup>62</sup> McCrudden, 1982: 304.



is often (although not always) the result of unthinking deeds rather than ill-motivated or intentional actions.<sup>53</sup> 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<sup>54</sup>

### *Minority rights*

The protection and recognition of the human rights of minorities under international law<sup>55</sup> 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.<sup>56</sup>

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

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<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> See, for example; McKean, 1983. Disabled persons are largely ignored in commentaries on international human rights.

<sup>56</sup> Wirth, 1970: 34.

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

Wertlieb argues that disabled persons do satisfy the definition of a minority.<sup>61</sup> 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.<sup>62</sup> 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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<sup>57</sup> Gliedman and Roth, 1980.

<sup>58</sup> LaPlante, 1991: 56.

<sup>59</sup> Best, 1967; Jordan, 1963; Longres, 1982; Wertlieb, 1985.

<sup>60</sup> 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.

<sup>61</sup> Wertlieb, 1985.

<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup> 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,<sup>65</sup> 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.<sup>66</sup>

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<sup>63</sup> Wertlieb, 1985: 1059-60 and citing Safilios-Rothschild, 1970 in support of her view.

<sup>64</sup> Hepple, 1981: 68-9.

<sup>65</sup> *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...".

<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> However, the most pertinent contribution to the debate, and of especial assistance to the expectations of disabled people, is that of Kavka.<sup>69</sup>

Kavka argues that disabled people have a "moral right" to work and that this requires legal guarantees to uphold the right.<sup>70</sup> 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",<sup>71</sup> 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.<sup>72</sup> 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.

<sup>67</sup> Marsh, 1991.

<sup>68</sup> Hepple, 1981: 82.

<sup>69</sup> Kavka, 1992.

<sup>70</sup> Kavka, 1992: 264.

<sup>71</sup> Kavka, 1992: 264.

<sup>72</sup> Kavka, 1992: 265.

arguments based solely upon economic efficiency.<sup>73</sup> 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.<sup>74</sup> 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. Eighth, 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.<sup>75</sup> It aims to achieve

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<sup>73</sup> 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.

<sup>74</sup> McCrudden *et al*, 1991: 3-4. What follows is an adapted version of this account.

<sup>75</sup> 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.<sup>76</sup>

The second model, often suggested as a cure for the defects of the first, is the so-called group justice model.<sup>77</sup> 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.<sup>78</sup>

### ***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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<sup>76</sup> McCrudden *et al*, 1991: 5-6.

<sup>77</sup> Fiss, 1971.

<sup>78</sup> 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.<sup>79</sup>

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".<sup>80</sup> 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.<sup>81</sup>

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<sup>79</sup> O'Donovan and Szyszczak, 1988: 4.

<sup>80</sup> Dworkin, 1978: 227.

<sup>81</sup> MacKinnon, 1982. The feminist perspective may be particularly 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.<sup>82</sup> 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.<sup>83</sup>

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].<sup>84</sup>

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.<sup>85</sup> 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.

<sup>82</sup> Becker, 1987: 206.

<sup>83</sup> Becker, 1987: 207.

<sup>84</sup> Becker, 1987: 208.

<sup>85</sup> 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.<sup>86</sup> 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".<sup>87</sup> At least one writer in the disability sphere has utilised this approach in constructing a framework for challenging disability discrimination.<sup>88</sup> 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.<sup>89</sup> If there is evidence that a minority group have greater difficulty in meeting a particular occupational qualification or standard than 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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<sup>86</sup> Becker, 1987: 211.

<sup>87</sup> MacKinnon, 1979; MacKinnon, 1982; MacKinnon, 1987.

<sup>88</sup> McCluskey, 1988.

<sup>89</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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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<sup>80</sup> Lacey, 1987.

<sup>81</sup> 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.<sup>1</sup> 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.<sup>2</sup> Such limitations are almost invariably

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<sup>1</sup> Research Surveys of Great Britain Ltd (RSGB), 1978: Table 3.1.

<sup>2</sup> 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.<sup>3</sup> For Berkowitz and Hill, a disabled person is someone who "is unable to perform some social role because of a mental or physical condition".<sup>4</sup> Following Nagi and Haber,<sup>5</sup> they define disability as "the loss of the ability to perform socially accepted or prescribed tasks and roles due to a medically definable *condition*".<sup>6</sup> 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".<sup>7</sup> 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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<sup>3</sup> Weiss, 1974: 457.

<sup>4</sup> Berkowitz and Hill, 1986b: 1.

<sup>5</sup> Nagi, 1969a; Haber, 1985.

<sup>6</sup> Berkowitz and Hill, 1986b: 4 (emphasis in the original).

<sup>7</sup> Berkowitz and Hill, 1986b: 6.

environment".<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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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<sup>8</sup> Berkowitz and Hill, 1986b: 6.

<sup>9</sup> UN, 1990b.

<sup>10</sup> Martin, Meltzer and Elliott, 1988: 2.

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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<sup>12</sup> 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.

<sup>13</sup> Martin, Meltzer and Elliott, 1988: 6.

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

<sup>15</sup> Martin, Meltzer and Elliott, 1988: xi and 9.

<sup>16</sup> See generally: Martin, Meltzer and Elliott, 1988: 13-15.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> When gender is entered into the equation, OPCS found that women constitute approximately 59 per cent of the disabled population.<sup>22</sup> 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.

<sup>18</sup> Martin, Meltzer and Elliott, 1988: 16.

<sup>19</sup> Martin, Meltzer and Elliott, 1988: 18.

<sup>20</sup> Martin, White and Meltzer, 1989: 1 and Table 2.1.

<sup>21</sup> Martin, Meltzer and Elliott, 1988: 27.

<sup>22</sup> 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 |
|-------------------|-----------------------|-------------------|------------------|
|                   | <i>Thousands</i>      | <i>Thousands</i>  | <i>Thousands</i> |
| 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            |
| <b>Total</b>      | <b>5,780</b>          | <b>422</b>        | <b>6,202</b>     |

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**

| Severity | Age group        |       |       |       |       |       |       | Total |
|----------|------------------|-------|-------|-------|-------|-------|-------|-------|
|          | 16-19            | 20-29 | 30-39 | 40-49 | 50-59 | 60-69 | 70+   |       |
|          | <i>Thousands</i> |       |       |       |       |       |       |       |
| 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).<sup>23</sup> 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).<sup>24</sup> 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.<sup>25</sup> 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).<sup>26</sup> 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.<sup>27</sup> 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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<sup>23</sup> Martin, White and Meltzer, 1989: 1 and Table 2.1.

<sup>24</sup> Prescott-Clarke, 1990: 20.

<sup>25</sup> Prescott-Clarke, 1990: 20. A further 0.3 per cent expected to become economically active within a year.

<sup>26</sup> Prescott-Clarke, 1990: Table 4.1.

<sup>27</sup> Prescott-Clarke, 1990: Table 4.1.

|   | 16-24 | 25-34 | Age<br>35-44 | 45-54 | 55-59/64 |
|---|-------|-------|--------------|-------|----------|
|   | %     | %     | %            | %     | %        |
| Health problem  | 13.6  | 16.1  | 20.2         | 26.6  | 41.5     |
| Health problem<br>and occupational<br>handicap          | 3.8   | 4.9   | 7.5          | 11.4  | 20.9     |
| Occupational<br>handicap and:<br>economically<br>active | 2.2   | 2.9   | 4.4          | 5.9   | 7.4      |
| expecting to<br>become so in<br>next 12 mths            | 0.4   | 0.5   | 0.7          | 0.9   | 0.7      |
| not<br>economically<br>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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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

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<sup>28</sup> See, for example: Sainsbury, 1970; Harris *et al*, 1971; Buckle, 1971; Sainsbury, 1973; Townsend, 1979.

<sup>29</sup> Martin, Meltzer and Elliott, 1988: 20-21.

<sup>30</sup> Australian Bureau of Statistics, 1984 cited in UN, 1990b.

<sup>31</sup> Statistics Canada, 1984 cited in UN, 1990b.

<sup>32</sup> Study cited in LaPlante, 1991: 62.

<sup>33</sup> *Hearings on HR 8395 Before the Subcommittee on the Handicapped of the Senate*

physically disabled adults, of whom only 800,000 were in employment.<sup>34</sup> 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.<sup>35</sup> This survey has been interpreted as suggesting that 5.8 per cent of the non-institutionalised population of working age were disabled.<sup>36</sup> On 1980 figures,<sup>37</sup> 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.<sup>38</sup> Further research estimated that almost half the working-aged population had one or more chronic health conditions or impairments.<sup>39</sup> 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.<sup>40</sup> The 1989 *National Health Interview Survey* postulated that 14 per cent of the US population were limited in major life activities, including work.<sup>41</sup>

Analysis based upon the 1982 *Current Population Survey*, using a liberal definition of disability,<sup>42</sup> 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.

<sup>34</sup> *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.

<sup>35</sup> Lando, Cutler and Gamber, 1982 cited in LaPlante, 1991: 61.

<sup>36</sup> Haber, 1985.

<sup>37</sup> 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.

<sup>38</sup> US Department of Health and Human Services, 1982 cited in United Nations, 1990b.

<sup>39</sup> Ferron, 1981 cited in LaPlante, 1991: 61.

<sup>40</sup> US Bureau of Census, 1986 cited in LaPlante, 1991: 61.

<sup>41</sup> LaPlante, 1991: 62.

<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

### **NATURE OF DISABILITIES**

Examination of the types and frequency of disabilities produces useful results.<sup>45</sup> 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).<sup>46</sup> In the OPCS research, complaints of the musculo-skeletal

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<sup>43</sup> US Bureau of the Census, 1983b: 9-14 and Table 9; Berkowitz and Hill, 1986b: 9-11 and Table 1.2.

<sup>44</sup> 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.

<sup>45</sup> Comparable information about the nature of disabilities is available in the US: LaPlante, 1991: 65-68.

<sup>46</sup> Prescott-Clarke, 1990: Table 6.3.

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| Type of disability          | In private households | In establishments | Total population |
|-----------------------------|-----------------------|-------------------|------------------|
|                             | <i>Thousands</i>      | <i>Thousands</i>  | <i>Thousands</i> |
| 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                   | -                 | -                |

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

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

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system were the most commonly reported in 46 per cent of disabled adults,<sup>47</sup> followed by ear complaints in 38 per cent of cases.<sup>48</sup> Eye complaints (22 per cent),<sup>49</sup> mental disabilities (13 per cent),<sup>50</sup> and problems affecting the circulatory system (20 per cent),<sup>51</sup> the respiratory system (13 per cent),<sup>52</sup> and nervous system (13 per cent)<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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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<sup>47</sup> 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.

<sup>48</sup> Deafness forms the majority of this complaint category, which includes sensorineural deafness, conductive deafness, noise-induced deafness, tinnitus and other ear complaints

<sup>49</sup> Cataracts and glaucoma being specifically recorded.

<sup>50</sup> Senile dementia, anxiety and phobias, depression, mental retardation, and other mental illnesses.

<sup>51</sup> Coronary artery disease, valve disease, hypertension, other heart problems, other arterial and embolic diseases, varicose veins, phlebitis and other circulatory complaints.

<sup>52</sup> Bronchitis, asthma, allergy, and other problems.

<sup>53</sup> Stroke, hemiplegia, Parkinson's disease, multiple sclerosis, epilepsy, migraine and other (non-specific) complaints.

<sup>54</sup> Martin, Meltzer and White, 1988: 29.

<sup>55</sup> Martin, Meltzer and White, 1988: 34.

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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 per cent of disabled women) compared with 64 per cent (67 per cent of men and 61 per cent of women) for the general population.<sup>59</sup> Of all disabled adults aged under 50 years, 60 per cent were married or cohabiting and 13 per cent were living alone.<sup>60</sup> 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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<sup>57</sup> Prescott-Clarke, 1990: 38.

<sup>58</sup> Prescott-Clarke, 1990: Table 6.1.

<sup>59</sup> Martin and White, 1988: Table 2.2.

<sup>60</sup> 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.<sup>61</sup>

### ***Mobility status and transportation needs***

What effect does disability have upon disabled persons' mobility status and transportation needs?<sup>62</sup> The OPCS surveys show that 78 per cent of disabled adults are mobile<sup>63</sup> without assistance and 92 per cent with assistance if necessary.<sup>64</sup> With or without assistance, 74 per cent of all disabled adults were mobile every day or several times a week,<sup>65</sup> but even amongst mobile disabled adults, only 37 per cent experienced no restrictions on their mobility in terms of frequency or distance.<sup>66</sup> 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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<sup>61</sup> Martin and White, 1988: 7.

<sup>62</sup> These factors may affect, and be closely linked to, the economic activity of disabled persons.

<sup>63</sup> Mobility here denotes a status other than being bedfast, chairfast or being restricted to or within a dwelling.

<sup>64</sup> Martin, White and Meltzer, 1989: 21.

<sup>65</sup> Martin, White and Meltzer, 1989: Table 3.3.

<sup>66</sup> Martin, White and Meltzer, 1989: Table 3.4.

accessible to disabled people (40 and 43 per cent respectively).<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup>

#### ***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".<sup>71</sup> 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,<sup>72</sup> 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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<sup>67</sup> Martin, White and Meltzer, 1989: Table 3.10 and 24-27.

<sup>68</sup> Martin, White and Meltzer, 1989: Table 3.12.

<sup>69</sup> Prescott-Clarke, 1990: Table 7.10.

<sup>70</sup> Prescott-Clarke, 1990: Tables 7.11 and 7.12.

<sup>71</sup> Martin, White and Meltzer, 1989: 47.

<sup>72</sup> 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      |                     |
| <i>Proportion of disabled adults who used at least one item of disability equipment in each category</i> |                   |           |           |           |           |                     |
| 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                  |
| <b>Any equipment used excl glasses</b>   | <b>58</b>         | <b>64</b> | <b>76</b> | <b>84</b> | <b>91</b> | <b>69</b>           |

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 |
|---|---|---|---------------------|
| <i>Proportion who had each adaptation</i> |   |   |                     |
| 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                   |
| <b>Any adaptations to the home</b>        | <b>31</b>                                   | <b>38</b>                                       | <b>24</b>           |

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.<sup>73</sup> 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.

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<sup>73</sup> 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.<sup>1</sup>

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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<sup>1</sup> 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.<sup>2</sup> Martin and White examined factors associated with whether or not disabled adults were in paid jobs,<sup>3</sup> but Martin, White and Meltzer took a broader look at the employment status of disabled people.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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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<sup>2</sup> Martin and White, 1988: 13-14.

<sup>3</sup> Martin and White, 1988.

<sup>4</sup> Martin, White and Meltzer, 1989.

<sup>5</sup> The presumptuousness of this will be noted. If a unisex working age is 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).

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> Martin, White and Meltzer, 1989: 74. See also Moreton, 1992: 75.

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

\* 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).<sup>9</sup> 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).<sup>10</sup>

Martin, White and Meltzer suggest that economic activity varies with severity of disability and with age.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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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<sup>9</sup> Prescott-Clarke, 1990: Table 5.1.

<sup>10</sup> *General Household Survey 1987* (1989: London: HMSO) cited in Prescott-Clarke, 1990: 31-2.

<sup>11</sup> Martin, White and Meltzer, 1989: 69-71.

<sup>12</sup> Martin, White and Meltzer, 1989: Tables 7.5 and 7.6.

<sup>13</sup> Prescott-Clarke, 1990: 36 and Table 5.8.

<sup>14</sup> Martin, White and Meltzer, 1989: 72-73.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

#### ***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.<sup>18</sup> 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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<sup>16</sup> Martin, White and Meltzer, 1989: Table 7.14.

<sup>17</sup> Martin, White and Meltzer, 1989: 80.

<sup>18</sup> 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).<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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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<sup>19</sup> 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).

<sup>20</sup> Martin, White and Meltzer, 1989: 82.

<sup>21</sup> Martin, White and Meltzer, 1989: Table 7.23.

<sup>22</sup> Martin, White and Meltzer, 1989: 82.

health status or disability contributes to occupational handicap.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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).<sup>26</sup> 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.<sup>27</sup> 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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<sup>23</sup> 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.

<sup>24</sup> Prescott-Clarke, 1990: Table 7.2.

<sup>25</sup> Prescott-Clarke, 1990: Table 7.4.

<sup>26</sup> Prescott-Clarke, 1990: Table 7.5.

<sup>27</sup> Prescott-Clarke, 1990: Table 7.6.



|  | All in work | Employee | Self-employed | Want work now | Anticipate wanting work |
|--|-------------|----------|---------------|---------------|-------------------------|
|  | %           | %        | %             | %             | %                       |
| <b>Physical limitations</b>                                |             |          |               |               |                         |
| 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                      |
| <b>Intellectual/Psychological/Emotional</b>                |             |          |               |               |                         |
| Anxiety, depression, nervousness                           | 4           | 4        | 5             | 6             | 15                      |
| <b>Prejudice/Ignorance</b>                                 |             |          |               |               |                         |
| 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.<sup>28</sup> 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.<sup>29</sup> Supporting the view that disability discrimination affects pay, 28 per cent believed that they were earning less than co-workers doing the same job.<sup>30</sup>

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.<sup>31</sup> 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 cent 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).<sup>32</sup> 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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<sup>28</sup> Prescott-Clarke, 1990: Table 7.7.

<sup>29</sup> Prescott-Clarke, 1990: Table 7.8.

<sup>30</sup> Prescott-Clarke, 1990: Table 7.8.

<sup>31</sup> Martin, White and Meltzer, 1989: Tables 7.24 and 7.25.

<sup>32</sup> 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%).<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> Managerial or professional employees had a greater chance of being retained, while skilled or unskilled manual employees were least likely to be retained.<sup>38</sup> 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.<sup>39</sup>

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

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<sup>33</sup> Prescott-Clarke, 1990: 97.

<sup>34</sup> Prescott-Clarke, 1990: 92.

<sup>35</sup> Prescott-Clarke, 1990: Table 10.8.

<sup>36</sup> Prescott-Clarke, 1990: Table 10.9.

<sup>37</sup> Prescott-Clarke, 1990: Table 10.10.

<sup>38</sup> Prescott-Clarke, 1990: Table 10.11.

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

Among occupationally handicapped respondents in work, 85 per cent were employees and the remainder were self-employed.<sup>44</sup> 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.<sup>45</sup> 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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<sup>40</sup> Prescott-Clarke, 1990: 105-7.

<sup>41</sup> Extrapolation from Prescott-Clarke, 1990: Table 10.16.

<sup>42</sup> Prescott-Clarke, 1990: Table 10.17.

<sup>43</sup> Prescott-Clarke, 1990: 112-3.

<sup>44</sup> Prescott-Clarke, 1990: Table 10.22.

<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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*.<sup>48</sup> 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.<sup>49</sup>

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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<sup>46</sup> Prescott-Clarke, 1990: Table 10.23.

<sup>47</sup> Martin and White, 1988: 1.

<sup>48</sup> *New Earnings Survey 1989* (1989: London: HMSO).

<sup>49</sup> Prescott-Clarke, 1990: 86-8.

| Type of full-time employee | Disabled adults                            | Working population* | Disabled adults                        | Working population* | Working population* | Disabled adults earnings as % of working population earnings |
|----------------------------|--|---------------------|--|---------------------|---------------------|--|
|                            | <i>Average gross earnings (£ per week)</i> |                     | <i>Average hourly pay (£ per hour)</i> |                     | <i>%</i>            |  |
| 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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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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<sup>60</sup> Martin and White, 1988: 17.

<sup>61</sup> Australian Bureau of Statistics, 1984 cited in UN, 1990b.

<sup>62</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> A 1973 report estimated that there were 22 million physically disabled adults, of whom only 800,000 were in employment.<sup>58</sup> One study<sup>59</sup> showed that 25 per cent of unemployed disabled

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<sup>53</sup> US Bureau of Census, 1989; Yelin, 1986; 1989; 1991.

<sup>54</sup> Yelin, 1991: 135-6.

<sup>55</sup> Yelin, 1991: Table 1.

<sup>56</sup> Yelin, 1991: 135.

<sup>57</sup> (1972) 118 *Congressional Record* 3320-21.

<sup>58</sup> *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.<sup>60</sup> Two-thirds of all disabled Americans aged 16-64 years old were unemployed,<sup>61</sup> although 66 per cent of these (8.2 million) wanted to work.<sup>62</sup> Furthermore, evidence in the US demonstrates that over 20 per cent of disabled Americans of working age live in comparative poverty.<sup>63</sup> 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.<sup>64</sup> By 1988, the average earned income of disabled men in the US was 36 per cent less than the comparable figure for other men.<sup>65</sup>

#### 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.<sup>66</sup> First, they must surmount physical and vocational obstacles during rehabilitation and training. Second, disabled persons must

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million.

<sup>59</sup> Cited in *Georgetown Law Journal*, 1973: 1512.

<sup>60</sup> Louis Harris and Associates, 1986; 1987.

<sup>61</sup> 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.

<sup>62</sup> Louis Harris and Associates, 1986: 50-1. See also: National Council on the Handicapped, 1988: 15.

<sup>63</sup> National Council on the Handicapped, 1986: 5; Louis Harris and Associates, 1986: 25; National Council on the Handicapped, 1988: 13-14.

<sup>64</sup> Evidence cited in Hearne, 1991: 115.

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

<sup>66</sup> 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.<sup>67</sup> 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's 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.<sup>68</sup>

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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<sup>67</sup> Posner, 1989: 1318-21.

<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

One study suggested that personnel directors would prefer to engage former prisoners or mental hospital patients than they would an epileptic.<sup>71</sup> Employers tend to justify such resistance by reference to supposed reduced productivity, unsatisfactory performance, safety problems, insurance costs and the attitudes of co-workers.<sup>72</sup> This is despite evidence that disabled workers's performance emulates that of their able-bodied peers.<sup>73</sup> 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.<sup>74</sup> In this study, however, disabled workers experienced slightly higher rates of absenteeism,<sup>75</sup> and a higher rate of turnover.<sup>76</sup> 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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<sup>69</sup> West, 1991b; US Commission on Civil Rights, 1983.

<sup>70</sup> Yucker *et al*, 1966; Bowe, 1978; Hahn, 1983.

<sup>71</sup> Rickard *et al*, 1963; Rickard *et al*, 1977.

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> US Department of Labor, 1948.

<sup>75</sup> 3.8 days per 100 work days as opposed to 3.4 for non-disabled workers.

<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

In research undertaken for the Department of Employment, and published in 1990, Morrell solicited British employers' accounts of their experience regarding disabled persons.<sup>80</sup> 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 than 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.<sup>81</sup> 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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<sup>77</sup> Zadny, 1979.

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

<sup>79</sup> See for example: Flaccus, 1986b: 262-3.

<sup>80</sup> Morrell, 1990: 13-15.

<sup>81</sup> Morrell, 1990: Table 20.

of a belief that they are on average less productive than majority workers.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> In some cases, disabled Americans also appear to experience dual discrimination because of the combination of race or gender with disability.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> Nevertheless, other reasons for the poor employment status of persons with disabilities were also offered, including unavailability of

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<sup>82</sup> Johnson, 1986: 246.

<sup>83</sup> Johnson, 1986: 246.

<sup>84</sup> Schroedel and Jacobsen, 1978.

<sup>85</sup> See, for example: Livneh, 1982; US Commission on Human Rights, 1983.

<sup>86</sup> Burkhauser, Haveman and Wolfe, 1990.

<sup>87</sup> Louis Harris and Associates, 1986: 75 and Table 34.

<sup>88</sup> Louis Harris and Associates, 1986: 70 and Table 32.

<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup> Other social research pointed to negative attitudes and discrimination faced by people with particular disabilities.<sup>95</sup> 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.<sup>96</sup>

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<sup>90</sup> 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".

<sup>91</sup> Louis Harris and Associates, 1987: Table 37.

<sup>92</sup> DE, 1973: para 40.

<sup>93</sup> 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.

<sup>94</sup> Snowdon, 1976 and 1979; Large, 1982.

<sup>95</sup> 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.

<sup>96</sup> Fry, 1986; Graham, Jordan and Lamb, 1990. There is also evidence that disabled



In the first study,<sup>97</sup> employers' reactions to two largely identical job applications were measured.<sup>98</sup> 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.<sup>99</sup> 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.

<sup>97</sup> Fry, 1986.

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

<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup>

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.<sup>102</sup> 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.<sup>103</sup>

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<sup>100</sup> Fry, 1986: 14.

<sup>101</sup> Fry, 1986: 14.

<sup>102</sup> Graham, Jordan and Lamb, 1990: 2.

<sup>103</sup> 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".<sup>104</sup> 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'.<sup>105</sup>

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*'.<sup>106</sup>

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.<sup>107</sup>

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.

<sup>104</sup> Graham, Jordan and Lamb, 1990: 5.

<sup>105</sup> Graham, Jordan and Lamb, 1990: 5.

<sup>106</sup> Graham, Jordan and Lamb, 1990: 5 (my emphasis).

<sup>107</sup> 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 <sup>1</sup>

### 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).<sup>2</sup> 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".<sup>3</sup> 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.<sup>4</sup> 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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<sup>1</sup> This chapter draws heavily upon the author's publication of work-in-progress: Doyle, 1987a; 1987b; 1991; and 1993b.

<sup>2</sup> Tomlinson, 1943.

<sup>3</sup> Tomlinson, 1943: para 71.

<sup>4</sup> Tomlinson, 1943: para 9.

resettlement services, and obligatory provisions for sheltered employment.<sup>5</sup> These recommendations formed the substance of the Disabled Persons (Employment) Act which was enacted in 1944,<sup>6</sup> 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.<sup>7</sup>

When a decade later a second committee examined developments since 1944, the system was found to be sound and without need of radical change.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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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<sup>5</sup> Tomlinson, 1943: *passim*.

<sup>6</sup> 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.

<sup>7</sup> Tomlinson, 1943: para 77.

<sup>8</sup> Piercy, 1956.

<sup>9</sup> MSC, 1978; 1982; 1986.

<sup>10</sup> NACEDP, 1986.

<sup>11</sup> NACEDP, 1986: paras 5.9 to 5.10.

for helping the employment prospects of disabled people".<sup>12</sup> 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,<sup>13</sup> 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,<sup>14</sup> 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.<sup>15</sup> Although this idea was supported by the NACEDP,<sup>16</sup> it did not attract political support.<sup>17</sup> A code of good practice was subsequently produced,<sup>18</sup> 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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<sup>12</sup> NACEDP, 1986: para 6.6.

<sup>13</sup> MSC, 1982.

<sup>14</sup> Contemporary developments are discussed in Chapter XVI below and will not be alluded to here.

<sup>15</sup> MSC, 1981.

<sup>16</sup> *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.

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> Consideration should also be given to employers' duties and employees' rights under the Health and Safety at Work etc Act 1974 and related legislation.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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

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

<sup>20</sup> HASAWA 1974.

<sup>21</sup> DP(E)A 1944 s 1(2).

<sup>22</sup> DP(E)A 1944 s 1(1).

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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.
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**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".<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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).<sup>26</sup> A

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<sup>23</sup> DP(E)A 1944 s 6(3).

<sup>24</sup> 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).

<sup>25</sup> 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).

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> A person who ceases to satisfy the conditions for registration or who otherwise comes under a disqualification may be removed from the register.<sup>29</sup> 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.<sup>30</sup> 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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<sup>27</sup> The authority for these grounds of disqualification derives from DP(E)A 1944 ss 7(1) and 8(2).

<sup>28</sup> DP(E)A 1944 s 8(1).

<sup>29</sup> DP(E)A 1944 s 8(3). Removal will only occur after a reference to a local CEDP for recommendations.

<sup>30</sup> DP(E)A 1958 s 2(2).

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- (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<sup>31</sup> 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,<sup>32</sup> but otherwise contravention of this provision is a criminal offence punishable by a fine and/or imprisonment.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

The 1944 Act also regulates the dismissal of registered disabled persons.<sup>36</sup> 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,<sup>37</sup> but otherwise such a dismissal is a criminal offence.<sup>38</sup> 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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<sup>31</sup> As to the interpretation of references to taking into employment, see: DP(E)A 1944 s 13(2).

<sup>32</sup> DP(E)A 1944 s 13(5).

<sup>33</sup> DP(E)A 1944 s 9(6); note s 9(7) which contains provisions relating to prosecution.

<sup>34</sup> EP(C)A 1978 s 69.

<sup>35</sup> DP(E)A 1944 s 13(2)(b).

<sup>36</sup> DP(E)A 1944 s 9(5).

<sup>37</sup> DP(E)A 1944 s 13(5).

<sup>38</sup> DP(E)A 1944 s 9(6)-(7).

20 employees in the employment.<sup>39</sup>

These recruitment and employment security obligations apply only to employers of not less than 20 employees.<sup>40</sup> 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.<sup>41</sup> The quota percentage is determined by section 10 and regulations made thereunder. The standard percentage is 3 per cent.<sup>42</sup> 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.<sup>43</sup> Disabled persons employed in a designated employment under section 12 (discussed at page 87 below) do not count towards satisfaction of employers' quota obligations,<sup>44</sup> 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.<sup>45</sup> Applications are renewable and are made through the Disablement Resettlement Officer (DRO) and on the advice a local CEDP.<sup>46</sup>

#### *Exemption permits*

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

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<sup>39</sup> DP(E)A 1944 s 9(5).

<sup>40</sup> 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).

<sup>41</sup> 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).

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> DP(E)A 1944 ss 9(2), 9(5), 10(4) and 10(6).

<sup>45</sup> DP(E)A 1944 ss 10(5) and 10(6); Disabled Persons (General) Regulations 1945.

<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> The permit may be unconditional or subject to conditions,<sup>49</sup> 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.<sup>50</sup>

### ***Designated employment***

Certain classes of employment have been designated by ministerial order as affording specially suitable opportunities for disabled employment.<sup>51</sup> The Disabled Persons (Designated Employments) Order 1946<sup>52</sup> 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.<sup>53</sup> Breach of this provision is a criminal offence punishable by a fine and/or imprisonment.<sup>54</sup> 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.<sup>55</sup>

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<sup>47</sup> DP(E)A 1944 ss 9(4) and 11(1); Disabled Persons (General) Regulations 1945.

<sup>48</sup> DP(E)A 1944 s 11(1).

<sup>49</sup> DP(E)A 1944 s 11(2).

<sup>50</sup> DP(E)A 1944 s 11(3).

<sup>51</sup> DP(E)A 1944 s 12(1).

<sup>52</sup> SR&O 1946 N° 1257 made under DP(E)A 1944 s 12.

<sup>53</sup> DP(E)A 1944 s 12(2)-(3).

<sup>54</sup> DP(E)A 1944 s 12(4).

<sup>55</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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

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<sup>66</sup> DP(E)A 1944 s 14 and the Disabled Persons (General) Regulations 1945.

<sup>67</sup> DP(E)A 1944 s 15.

advancement of disabled persons (as defined by the 1944 Act).<sup>68</sup> 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.<sup>69</sup> 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.<sup>60</sup> It is a defence, however, to show that all reasonable steps were taken to comply with the requirement.<sup>61</sup>

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.<sup>62</sup>

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.<sup>63</sup> 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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<sup>68</sup> 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.

<sup>69</sup> CA 1985 Sch 7, para 9.

<sup>60</sup> CA 1985 s 234(5).

<sup>61</sup> CA 1985 s 234(6).

<sup>62</sup> Doyle, 1987b.

<sup>63</sup> 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.<sup>64</sup> 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***<sup>65</sup>

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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<sup>64</sup> Local Government and Housing Act 1989 s 7.

<sup>65</sup> 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,<sup>66</sup> 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.<sup>67</sup> 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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<sup>66</sup> The functions of the ERS are gradually being contracted out to local training agents: Berthoud *et al*, 1993: 39

<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> This inserted a new provision into planning legislation.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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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<sup>68</sup> CS&DPA 1970 ss 4 and 7-8A, as amended by the CS&DP(A)A 1976 ss 1-2.

<sup>69</sup> DPA 1981 s 3.

<sup>70</sup> Now the Town and Country Planning Act 1990 s 76.

<sup>71</sup> British Standards Institute Code of Practice BS 5810 (1979).

<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

### ***Code of Good Practice***

The Code of Good Practice on the Employment of Disabled People is issued by the DE.<sup>75</sup> 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.<sup>76</sup> 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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<sup>73</sup> *Employment Gazette* Vol 101 N° 7 (July 1993) at 299; *IRS Employment Trends* N° 544 (September 1993) at 2.

<sup>74</sup> *IRS Employment Trends* N° 544 (September 1993) at 2.

<sup>75</sup> 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.

<sup>76</sup> 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.<sup>77</sup> This provision was repealed by the Wages Act 1986.<sup>78</sup> 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.<sup>79</sup> In any event, the statutory minimum wage machinery is in the process of being dismantled following the repeal of its statutory underpinning.<sup>80</sup>

### ***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.<sup>81</sup>

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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<sup>77</sup> Wages Act 1979 s 16.

<sup>78</sup> Wages Act 1986 s 32(2) and Sch 5.

<sup>79</sup> Under the Equal Pay Act 1970.

<sup>80</sup> Trade Union Reform and Employment Rights Act 1993 s 35.

<sup>81</sup> Paras 4.2-4.3 and 6.3.

safe workplace, a safe system of work, and safe plant and equipment.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> The House of Lords decision in *Polkey v AE Dayton Services Ltd*<sup>87</sup> 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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<sup>82</sup> *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 (HL).

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

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

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

<sup>86</sup> EP(C)A 1978 s 57.

<sup>87</sup> *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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> An employer should consider what, if any, alternative employment is available.<sup>91</sup>

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.<sup>92</sup> 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.<sup>93</sup> This

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

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

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

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

<sup>92</sup> Paras 6.10 and 6.12.

<sup>93</sup> *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.<sup>94</sup>

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.<sup>95</sup> 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).

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

<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup> However, the MSC doubted whether the voluntarist approach would work without statutory support.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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).<sup>102</sup> 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.<sup>103</sup> Nevertheless, some 86 per cent of disabled

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<sup>96</sup> MSC, 1981: chapter 7.

<sup>97</sup> MSC, 1981: para 7.2.

<sup>98</sup> MSC, 1981: para 7.7.

<sup>99</sup> MSC, 1981: paras 7.10 and 7.11.

<sup>100</sup> MSC, 1979: para 68.

<sup>101</sup> Research Surveys of Great Britain Ltd (RSGB), 1978: Table 9.12.1.

<sup>102</sup> RSGB, 1978: Table 9.11.1.

<sup>103</sup> RSGB, 1978: Table 9.9.1.

persons in the 1978 survey favoured retention of the quota scheme with modifications and reforms.<sup>104</sup>

***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.<sup>105</sup> 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.<sup>106</sup> Anti-discrimination legislation for disabled persons had not been seriously considered in official circles until the MSC's 1979 review of the quota.<sup>107</sup> In its 1981 review of the quota, the MSC returned once again to what it now termed "equal opportunities legislation".<sup>108</sup> 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.<sup>109</sup>

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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<sup>104</sup> MSC, 1979: para 75.

<sup>105</sup> RSGB, 1978: Table 9.8.1.

<sup>106</sup> RSGB, 1978: Table 9.8.2.

<sup>107</sup> MSC, 1979: paras 78-81.

<sup>108</sup> MSC, 1981: para 8.20.

<sup>109</sup> MSC, 1979: para 79.2.

tribunal or court.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> No recommendation for anti-discrimination legislation covering disability was forthcoming.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> 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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<sup>110</sup> 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.

<sup>111</sup> MSC, 1979: para 80.2.

<sup>112</sup> MSC, 1981: para 8.22.

<sup>113</sup> 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.

<sup>114</sup> HCEC, 1981: para 23.

<sup>115</sup> 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.

<sup>116</sup> 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".<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup>

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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<sup>117</sup> DE, 1990: 16.

<sup>118</sup> DE, 1990: 35-6.

<sup>119</sup> DE, 1990: para 5.14.

become more reluctant to hire people with disabilities.<sup>120</sup>

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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup>

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

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<sup>120</sup> DE, 1990: para 5.15.

<sup>121</sup> 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.

<sup>122</sup> Law Society Employment Law Committee, 1992.

<sup>123</sup> HCEC, 1990: para 23.

<sup>124</sup> 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.<sup>126</sup>

### ***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.<sup>126</sup> 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.<sup>127</sup> The Bill was reintroduced in the following parliamentary session in a slightly more sophisticated form.<sup>128</sup> 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.<sup>129</sup>

In the 1983-84 session, Part I of the Chronically Sick & Disabled Persons (Amendment) Bill again attempted to introduce anti-discrimination measures.<sup>130</sup> 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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<sup>126</sup> Both the Labour Party and the Liberal Democratic Party have indicated support for such legislation at various times.

<sup>126</sup> HC Bill 173 (1981-82).

<sup>127</sup> HC Deb Vol 27 cols 151-2 and 619 (1st Reading 6 July 1982).

<sup>128</sup> Disablement (Prohibition of Unjustifiable Discrimination) Bill: HC Bill 21 (1982-83).

<sup>129</sup> 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).

<sup>130</sup> 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.<sup>131</sup>

The Bill was reintroduced in the House of Lords.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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

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<sup>131</sup> 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).

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

<sup>133</sup> 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).

<sup>134</sup> HL Bills 78, 158 and 196 (1983-84).

made no further headway.<sup>136</sup>

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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> This also failed to get off the ground.<sup>139</sup> In the 1990-91 Session the Disability Discrimination Bill was given a First Reading but subsequently not even printed.<sup>140</sup>

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,<sup>141</sup> 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.<sup>142</sup> The Bill was promptly reintroduced in the House of

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<sup>136</sup> 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).

<sup>136</sup> HC Bill 219 (1985-86).

<sup>137</sup> HC Deb Vol 102 cols 366-8 (1st Reading 23 July 1986).

<sup>138</sup> HC Bill 99 (1986-87).

<sup>139</sup> HC Deb Vol 111 cols 873-5 (1st Reading 4 March 1987).

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

<sup>141</sup> HC Bill 24 (1991-92).

<sup>142</sup> 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,<sup>143</sup> but failed to make progress with the intervention of the General Election.<sup>144</sup> The Bill was again reintroduced in the 1992-93 parliamentary session,<sup>145</sup> and passed all stages of the legislative process in the House of Lords, even surviving a procedural error on Third Reading.<sup>146</sup> The Bill was sent to the House of Commons, where it has been presented for First reading, but it has made no further progress.<sup>147</sup> 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.<sup>148</sup>

### 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).

<sup>143</sup> Civil Rights (Disabled Persons) (N° 2) Bill: HL Bill 49 (1991-92).

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

<sup>145</sup> Civil Rights (Disabled Persons) Bill: HL Bills 13, 25 and 29 (1992-93).

<sup>146</sup> 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).

<sup>147</sup> HC Bills 79 and 82 presented for First Reading (5 November 1992), withdrawn and re-presented 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.

<sup>148</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> While

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<sup>1</sup> Mangin, 1983; European Communities (EC), 1991 and 1993.

<sup>2</sup> Commission of the EC, 1988: 7.

<sup>3</sup> See, for example: Ravaud *et al*, 1992 cited in the previous chapter.

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

<sup>5</sup> 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,<sup>6</sup> 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*<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> Other activities were also begun, especially in respect of research and social security provision.<sup>10</sup> 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.<sup>11</sup> This was followed by an influential opinion on

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<sup>6</sup> Szyszczak, 1992.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> Daunt, 1991: 10.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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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<sup>12</sup> 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.

<sup>13</sup> 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).

<sup>14</sup> 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.<sup>16</sup>

Nevertheless, despite this concession and the careful groundwork that had been done to establish the statistical, socio-economic and legislative basis of the proposals,<sup>16</sup> the Council "did all it could at all stages of the process to weaken its content, especially on the question of employment quotas".<sup>17</sup> 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.<sup>18</sup>

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".<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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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<sup>16</sup> Daunt, 1991: 22.

<sup>16</sup> 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.

<sup>17</sup> 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).

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

<sup>19</sup> Recommendation 86/379 Art 1.

<sup>20</sup> Recommendation 86/379 Art 2.

<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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 Professionnelles*,<sup>25</sup> 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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<sup>22</sup> Recommendation 86/379 Art 2(b)(i).

<sup>23</sup> Recommendation 86/379 Art 2(b)(ii)-(iii).

<sup>24</sup> DE, 1986.

<sup>25</sup> [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.<sup>26</sup> The second action programme was established in 1988 under the title "HELIOS".<sup>27</sup> 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.<sup>28</sup>

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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<sup>26</sup> COM(87) 342 of 20 July 1987.

<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup> HELIOS II has attracted ECU 37 million (approximately £29.5 million) for the

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

<sup>30</sup> Daunt, 1991: 151-2 (emphasis in original).

<sup>31</sup> Daunt, 1991: 152.

<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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,<sup>36</sup> 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".<sup>37</sup> 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.<sup>38</sup> These steps will

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<sup>33</sup> 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).

<sup>34</sup> See: Commission of the EC, 1992.

<sup>35</sup> 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).

<sup>36</sup> 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.

<sup>37</sup> Art 2(a) with emphasis supplied.

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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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<sup>39</sup> Art 4. It is envisaged that Arts 3 and 4 must be implemented by 31 December 1999: Art 8(a).

<sup>40</sup> 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.

<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup>

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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<sup>42</sup> 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.

<sup>43</sup> Commission of the EC, 1988: 71 and Table 2.

<sup>44</sup> 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,<sup>45</sup> and supported by state-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.<sup>46</sup> 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.<sup>47</sup>

### ***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.<sup>48</sup> 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).<sup>49</sup> 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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<sup>45</sup> The use of codes of good practice as a substitute for legal measures appears to be almost ubiquitous.

<sup>46</sup> Britain is excluded from this discussion because of the full treatment given to it in Chapter IV above.

<sup>47</sup> 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.

<sup>48</sup> Established under the Law of 28 April 1958.

<sup>49</sup> 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.<sup>60</sup> 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,<sup>61</sup> and local authorities must apply a quota of 1 out of every 55 full-time positions in favour of disabled persons.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> Second, a contribution may be made to the provision of a suitably fitted work bench or to the costs of tools and working clothes.<sup>66</sup> Third, a loan may be made to an employer if merited by the circumstances of the employment of a disabled person.<sup>67</sup> More recently, a new decree has insisted that employers of an

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<sup>60</sup> 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.

<sup>61</sup> 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).

<sup>62</sup> Royal Order of 23 December 1977 (*Moniteur Belge* 13 January 1978) and Royal Order of 6 March 1978 (*Moniteur Belge* 25 March 1978).

<sup>63</sup> Royal Order of 1 December 1964 (*Moniteur Belge* 4 December 1964).

<sup>64</sup> Ministerial Decree of 23 January 1968, as amended (*Moniteur Belge* 3 February 1968).

<sup>65</sup> 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).

<sup>66</sup> Ministerial Decree of 17 March 1965, as amended (*Moniteur Belge* 20 March 1965).

<sup>67</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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,<sup>61</sup> 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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<sup>58</sup> Royal Order of 13 December 1991. This came into force on 20 December 1991.

<sup>59</sup> By a decree of the Ministry of Labour of 18 December 1985.

<sup>60</sup> 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).

<sup>61</sup> 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.<sup>62</sup> 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<sup>63</sup>**

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.<sup>64</sup> Failure to comply with the quota obligation results in a civil penalty of Deutschmark 200 per month (since

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<sup>62</sup> 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.

<sup>63</sup> 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.

<sup>64</sup> *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.<sup>65</sup> 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,<sup>66</sup> 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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<sup>65</sup> 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.

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

powers. Otherwise, the disabled employees have a right to continued employment. 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> Also in the public sector, 5 per cent of vacant posts must be reserved and all vacant telephonists' jobs are reserved for blind applicants.<sup>70</sup> Disabled persons are also entitled to 6 extra days paid annual holiday.<sup>71</sup>

### ***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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<sup>67</sup> Law 1648 of 1986.

<sup>68</sup> Joint Decision 30965 of the Ministers of National Defence and of Labour (14 May 1991).

<sup>69</sup> Law 1648 of 1986.

<sup>70</sup> Law 1735 of 1987.

<sup>71</sup> Ministerial Decree 2065/89.

workers and their rights.<sup>72</sup>

### *Italy*<sup>73</sup>

The Italian quota programme applies to "sheltered" workers. This is a broad category that includes disabled persons, widows, orphans and refugees.<sup>74</sup> 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.<sup>75</sup> 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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<sup>72</sup> 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.

<sup>73</sup> This account also draws upon Tudor, 1989: 42-4.

<sup>74</sup> Act N° 482 of 2 April 1968. The Act consolidates pre-existing legislation from as early as 1940.

<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> However, it was not until 1991 that reform in these terms was achieved.<sup>78</sup> 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.<sup>79</sup> Since 1 July 1989, employers who have failed to satisfy these

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<sup>76</sup> Act of 28 April 1959.

<sup>77</sup> *European Industrial Relations Review* N° 184 (May 1989) at page 7.

<sup>78</sup> Law of 12 November 1991.

<sup>79</sup> 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.<sup>80</sup>

### ***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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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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<sup>80</sup> Legislative Decree N° 84/76 of 28 November 1976.

<sup>81</sup> 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.

<sup>82</sup> Royal Decree 198 of 1987.

<sup>83</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Women also enjoyed protection from sex-based discrimination in employment remuneration under the Equal Pay Act and Fair Labor Standards Act.<sup>4</sup> 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.<sup>5</sup> Most of these laws secured services and assistance for disabled people, rather than civil rights, or targeted only certain sections of the disabled constituency.<sup>6</sup> Moreover, the law and the legal system often conspired against the best interests of disabled persons. In one case,<sup>7</sup> 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,<sup>8</sup> the plaintiff had satisfied all

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<sup>1</sup> 42 USC §1981.

<sup>2</sup> 42 USC §2000d.

<sup>3</sup> 42 USC §2000e.

<sup>4</sup> 29 USC §§201-219.

<sup>5</sup> 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.

<sup>6</sup> *Georgetown Law Journal*, 1973: 1502.

<sup>7</sup> *In re Morton* (1922) 137 NE 62 (Ind App Crt) cited in Burgdorf and Falcon, 1980: 319.

<sup>8</sup> *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".<sup>9</sup>

### CONSTITUTIONAL PROTECTION<sup>10</sup>

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*,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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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<sup>9</sup> Burgdorf and Falcon, 1980: 325.

<sup>10</sup> See generally: Burgdorf and Falcon, 1980; Schoenfeld, 1980.

<sup>11</sup> (1970) 317 FSupp 164 (WD Penn), reversed at (1972) 455 F2d 378 (3rd Circ).

<sup>12</sup> 42 USC §1983 and §1985.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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*,<sup>17</sup> 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*,<sup>18</sup> the plaintiff was blind and a certified teacher. She was refused

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<sup>14</sup> 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.

<sup>15</sup> *Cleburne v Cleburne Living Center* (1985) 473 US 432.

<sup>16</sup> See, for example: *Board of Regents v Roth* (1972) 408 US 564; *Perry v Sindermann* (1972) 408 US 593.

<sup>17</sup> (1973) 345 NYS2d 921 (SC NY).

<sup>18</sup> (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.<sup>19</sup> 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*.<sup>20</sup> 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.<sup>21</sup> 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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<sup>19</sup> See further: Richman, 1978; Sluzas, 1981.

<sup>20</sup> (1977) 430 FSupp 75 and (1978) 451 FSupp 954 (MD Fla).

<sup>21</sup> 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,<sup>22</sup> it was not until the RA 1973 that the civil rights of disabled people were addressed and, even then, in a limited manner.<sup>23</sup> 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.<sup>24</sup> 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).<sup>25</sup>

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<sup>22</sup> Flaccus, 1986b: 263.

<sup>23</sup> 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.

<sup>24</sup> 29 USC §701 as amended.

<sup>25</sup> 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,<sup>26</sup> whereas the section 503 regulations are those proclaimed by the OFCCP to ensure compliance with the affirmative action obligations of government contractors.<sup>27</sup> The US Department of Justice has been designated as the federal department responsible for coordinating the implementation of section 504.<sup>28</sup> The coordinating regulations<sup>29</sup> 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.<sup>30</sup> Various section 504 regulations have been issued, the most important of which are those issued by the Department of Labor,<sup>31</sup> the Department of Health and Human Services,<sup>32</sup> and the Department of Justice itself.<sup>33</sup>

### ***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.<sup>34</sup> 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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<sup>26</sup> 29 CFR Part 1613.

<sup>27</sup> 41 CFR Part 60-741.

<sup>28</sup> 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.

<sup>29</sup> 28 CFR Part 41.

<sup>30</sup> 28 CFR §§41.2 and 41.4(a).

<sup>31</sup> 29 CFR Parts 32 and 33.

<sup>32</sup> 45 CFR Parts 84 and 85.

<sup>33</sup> 28 CFR Part 42.

<sup>34</sup> 29 USC §791(b).

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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.

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**Text Box 3: Section 501(b) (US) RA 1973**



Committee on Handicapped Employees,<sup>35</sup> 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.<sup>36</sup>

The section has been interpreted as including a non-discrimination component,<sup>37</sup> although this is not made explicit in the statutory language.<sup>38</sup> 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".<sup>39</sup> 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.<sup>40</sup> The use of discriminatory employment

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<sup>35</sup> 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.

<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> Mayerson, 1991b: 501.

<sup>39</sup> 29 CFR §1613.703. As to the scope of federal employment, see 29 CFR §1613.701(b) and 5 USC §105.

<sup>40</sup> 29 CFR §1613.704; *Prewitt v US Postal Service* (1981) 662 F2d 292 (CA Miss)

criteria or pre-employment enquiries is also regulated,<sup>41</sup> while federal employers must not discriminate against qualified disabled applicants or employees by allowing their facilities to be physically inaccessible.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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).<sup>47</sup> This section has also been interpreted

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<sup>41</sup> 29 CFR §§1613.705 and 1613.706.

<sup>42</sup> 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).

<sup>43</sup> *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).

<sup>44</sup> *Shirley v Devine* (1982) 670 F2d 1188 (DC Cir); *Coleman v Darden* (1979) 595 F2d 533 (10th Cir), *certiorari denied* (1979) 444 US 927.

<sup>45</sup> 29 USC §794(a)(1).

<sup>46</sup> 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.

<sup>47</sup> 41 CFR Part 60-741.

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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.

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**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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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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<sup>48</sup> *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.

<sup>49</sup> *Rogers v Frito-Lay Inc* (1977) 433 FSupp 200 (DC Tex), *affirmed* 611 F2d 1074, *certiorari denied* 101 SCt 246, 449 US 889.

<sup>50</sup> 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.

<sup>51</sup> 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.

<sup>52</sup> 41 CFR §60-741.3(a)(1).

<sup>53</sup> 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.<sup>64</sup> Contracts for services will include, by way of illustration, contracts for utilities, construction,<sup>65</sup> 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.<sup>66</sup>

The provisions of section 503 may be waived by executive action in the national interest with respect to any contract.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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).<sup>62</sup> The Department will investigate the complaint, through the OFCCP, and

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<sup>64</sup> 41 CFR §60-741.2.

<sup>65</sup> Broadly defined and including functions incidental to construction.

<sup>66</sup> 41 CFR §60-741.2.

<sup>67</sup> Exemption regulations have been promulgated at 31 CFR §202.1 *et seq.*

<sup>68</sup> 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).

<sup>69</sup> 41 CFR §60-741.3(b)(1).

<sup>60</sup> 41 CFR §60-741.3(b)(2).

<sup>61</sup> *OFCCP v Western Electric* (1981) No 80-OFCCP-29 (US Department of Labor).

<sup>62</sup> 29 USC §793(b).

take action accordingly.<sup>63</sup> If the investigation uncovers a breach of section 503, conciliation is attempted before a formal hearing disposes of the complaint.<sup>64</sup> 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.<sup>65</sup>

### ***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.<sup>66</sup> The section "was enacted with little debate and most likely little understanding of its critical role in the development of civil-rights policy".<sup>67</sup> 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.<sup>68</sup> The section is amplified by federal regulations promulgated under the Act.<sup>69</sup>

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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<sup>63</sup> 41 CFR §60-741.26.

<sup>64</sup> 41 CFR §60-741.28.

<sup>65</sup> Whether section 503 affords a disabled complainant a private cause of action is discussed in Chapter XVI below.

<sup>66</sup> RA 1973 §504(a); 29 USC §794(a). See generally: Tucker, 1989a.

<sup>67</sup> Jones, 1991b: 29.

<sup>68</sup> 29 CFR §794(c).

<sup>69</sup> 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).

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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.

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**Text Box 5: Section 504(a) (US) Rehabilitation Act 1973**

assistance, rather than the whole of the recipient's enterprise.<sup>70</sup> 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.<sup>71</sup> 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*<sup>72</sup> 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*<sup>73</sup> 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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<sup>70</sup> *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.

<sup>71</sup> 29 USC §794(b).

<sup>72</sup> (1984) 465 US 624.

<sup>73</sup> (1985) 469 US 287.



discrimination cases as well as intentional discrimination cases.<sup>74</sup>

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

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<sup>74</sup> 42 USC §2000e-5(g); *Griggs v Duke Power Co* (1971) 401 US 421.

Act.<sup>76</sup>

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.<sup>76</sup>

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.<sup>77</sup>

Further amendments were wrought in 1986, resulting in a redesignated sub-section and the substitution of the term "individual with handicaps" for "handicapped individual".<sup>78</sup> Further textual changes were made in 1988, at which time exclusionary provision was made for contagious diseases and infections.<sup>79</sup> Finally, the 1990 amendments introduced further refinements in the light of the Americans with Disabilities Act of that year.<sup>80</sup> 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.<sup>81</sup> A similar definition is to be found in the various

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<sup>76</sup> RA 1973 §7(6) (Pub L 93-112).

<sup>76</sup> 29 USC §706(6)(B) inserted by Pub L 93-516 and Pub L 93-651.

<sup>77</sup> 29 USC §706(7)(B). The sub-section was renumbered and the additional text added by Pub L 95-602.

<sup>78</sup> 29 USC §706(8)(B), as a result of the amendments of Pub L 99-506.

<sup>79</sup> 29 USC §706(8)(C) added by Pub L 100-259.

<sup>80</sup> 29 USC §706(8)(B)-(D) as amended by Pub L 101-336.

<sup>81</sup> 29 USC §706(8)(B). The definition in the ADA 1990 is in virtually identical terms: 42 USC §12102(2).

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...

(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)

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Text Box 6: (US) RA 1973 definition of "individual with handicaps"

regulations.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

The definition of an "individual with handicaps" is amplified by the model regulations, which also illustrate the disabilities covered by the section.<sup>86</sup> 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",<sup>87</sup> while a person who is regarded as having an impairment is one who:

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<sup>82</sup> 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).

<sup>83</sup> 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.

<sup>84</sup> 29 USC §706(8)(C)(v). This provision purports to apply only to §793 and 794.

<sup>85</sup> 29 USC §706(8)(D).

<sup>86</sup> 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.

<sup>87</sup> 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.<sup>88</sup>

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".<sup>89</sup> 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.<sup>90</sup> 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".<sup>91</sup> 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*,<sup>92</sup> 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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<sup>88</sup> 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.

<sup>89</sup> 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).

<sup>90</sup> 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.

<sup>91</sup> 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.

<sup>92</sup> (1979) 442 US 397 at 406.

In *Alexander v Choate*,<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

#### ***Reasonable accommodation***

The "otherwise qualified" standard is somewhat ameliorated by the imposition of a duty upon employers to make reasonable accommodation.<sup>97</sup> 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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<sup>93</sup> (1985) 469 US 287 at 300.

<sup>94</sup> 41 CFR §§60-741.2 and 60-741.6(c).

<sup>95</sup> 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).

<sup>96</sup> 29 CFR §1613.702(f).

<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup>

The Department of Labor section 504 regulations are to like effect,<sup>100</sup> as are the regulations under section 501.<sup>101</sup>

## 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.<sup>102</sup>

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<sup>98</sup> 28 CFR §41.53. See to like effect: 45 CFR §84.12(a).

<sup>99</sup> 45 CFR §84.12(b).

<sup>100</sup> 29 CFR §§32.3 and 32.13.

<sup>101</sup> 29 CFR §1613.704. The section 503 regulations do not amplify the meaning of reasonable accommodation.

<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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".<sup>105</sup> 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.<sup>106</sup>

However, the model law "is unimpressive in both reach and enforceability... [and] does not

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1987; Perlin, 1987; Collins, 1988.

<sup>103</sup> Weiss, 1974: 460.

<sup>104</sup> Weiss, 1974: 462 note 29 (emphasis in original).

<sup>105</sup> Weiss, 1974: 464-5.

<sup>106</sup> Quoted by Weiss, 1974: 465 n<sup>43</sup>, citing TenBroek, 1966: 918. The author of the Model White Cane Law was Professor Jacobus TenBroek himself.



cover the private sector".<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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<sup>107</sup> Weiss, 1974: 465.

<sup>108</sup> Flaccus, 1986b. See also Flaccus, 1986a: 109-14.

<sup>109</sup> 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.<sup>110</sup> Indiana limited coverage to persons who have had their status as disabled persons certified by a state agency.<sup>111</sup> Overall, Flaccus concluded that only 17 states defined the protected class as broadly as federal legislation.<sup>112</sup>

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.<sup>113</sup> 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".<sup>114</sup>

#### ***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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<sup>110</sup> Haw Rev Stat §378-1.

<sup>111</sup> Ind Code Ann §22-9-1-13(c).

<sup>112</sup> Flaccus, 1986b: 292.

<sup>113</sup> *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(l).

<sup>114</sup> *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.<sup>116</sup>

### ***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.<sup>116</sup>

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".<sup>117</sup> 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.<sup>118</sup> Six states applied a narrower concept of

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<sup>116</sup> Flaccus, 1986b: 311.

<sup>116</sup> Flaccus, 1986b: 305.

<sup>117</sup> 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).

<sup>118</sup> 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.<sup>119</sup>

***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.<sup>120</sup> 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).

<sup>119</sup> Flaccus, 1986b: 309.

<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup>

Flaccus concluded that, taking all factors into account, only twelve states adequately addressed the problem of employment discrimination against disabled people in private employment.<sup>123</sup> She commented that "where state and federal coverage overlap, the federal statutes are generally more helpful to the handicapped person than the state statutes".<sup>124</sup> 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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<sup>121</sup> Flaccus, 1986b: 313.

<sup>122</sup> 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.

<sup>123</sup> Flaccus, 1986b: 321.

<sup>124</sup> 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.<sup>1</sup> Calls were made for the amendment of the Civil Rights Act 1964 to include disabled persons as a protected class.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> It received repeated evidence of disability discrimination.<sup>5</sup> Such evidence was

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<sup>1</sup> Weicker, 1991. See also Flaccus, 1986a. For an analysis of disability rights policy prior to 1990, see: Percy, 1989; Drimmer, 1993.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Subsequently renamed as the National Council on Disability. See: 29 USC §781.

reinforced by survey data,<sup>6</sup> 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.<sup>7</sup> Finally, in its first and landmark report in 1986, the Council recommended far-reaching legislative reform to prohibit comprehensive disability discrimination.<sup>8</sup>

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).<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> The second ADA bill took a different approach and was structured according to distinctive issues, such as

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<sup>5</sup> National Council on the Handicapped, 1988.

<sup>6</sup> 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.

<sup>7</sup> 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 Paralyzed 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.

<sup>8</sup> National Council on the Handicapped, 1986. See also to like effect: Presidential Commission on the Human Immunodeficiency Virus Epidemic, 1988.

<sup>9</sup> 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.

<sup>10</sup> National Council on the Handicapped, 1988.

<sup>11</sup> 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.<sup>12</sup> It was introduced into Congress in May 1989. After much debate and modification,<sup>13</sup> 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.<sup>14</sup> 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".<sup>15</sup> 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.<sup>16</sup> 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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<sup>12</sup> Senate Bill 933 and House of Representatives Bill 2273 (101st Congress, 1st Session, 1989).

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 42 USC §12101(b)(1). For a detailed analysis of the Act, see: Bureau of National Affairs, 1990.

<sup>16</sup> 42 USC §12101(b)(2),(3).

of discrimination faced day-to-day by people with disabilities.<sup>17</sup>

As legislation fashioned upon the model of Title VII of the Civil Rights Act 1964,<sup>18</sup> 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.<sup>19</sup>

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".<sup>20</sup> 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.<sup>21</sup> The Act has thus been designated as "social legislation to end barriers, not an instrumentality for continuous and acrimonious litigation".<sup>22</sup>

### *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,<sup>23</sup> which

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<sup>17</sup> 42 USC §12101(b)(4).

<sup>18</sup> 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.

<sup>19</sup> Mayerson, 1991a: 1.

<sup>20</sup> Mikochik, 1991a: 372.

<sup>21</sup> 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.

<sup>22</sup> Thornburgh, 1991: 384.

<sup>23</sup> 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<sup>6</sup>.

are reproduced in Text Box 7, and a statement of the legislative purpose.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> Regulations were published on the first anniversary of the Act being signed into law and have subsequently been codified.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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*.<sup>31</sup>

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<sup>24</sup> 42 USC §12101(b).

<sup>25</sup> US Senate, 1989; US House of Representatives, 1990a and 1990b.

<sup>26</sup> 42 USC §12116.

<sup>27</sup> 29 CFR Part 1630 originally published at 56 *Federal Regulations* 35734 (26 July 1991).

<sup>28</sup> 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.

<sup>29</sup> 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).

<sup>30</sup> 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).

<sup>31</sup> 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).

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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.

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Text Box 7: (US) ADA 1990: Congressional findings

### ***Employment provisions of the ADA 1990 outlined*** <sup>32</sup>

The employment provisions in Title I of the ADA came into force on 26 July 1992.<sup>33</sup> 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".<sup>34</sup> However, the legislation does not apply to all employers.<sup>35</sup> 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.<sup>36</sup> 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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<sup>32</sup> See generally: Postol and Kadue, 1991.

<sup>33</sup> 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.

<sup>34</sup> 42 USC §12111(2); 29 CFR 1630.2(b).

<sup>35</sup> It is estimated that the ADA 1990 will cover 3.9m business establishments and 666,000 employers (Creasman and Butler, 1991: 52).

<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> A "substantial limitation" on a major

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<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 29 CFR §1630(h).

<sup>40</sup> 42 USC §12102(2); 29 CFR §1630.2(g).

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> Individuals with "psychoactive

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<sup>42</sup> 29 CFR §1630.2(j)(1).

<sup>43</sup> 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).

<sup>44</sup> 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.

<sup>45</sup> 29 CFR §1630.2(l).

<sup>46</sup> 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".<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

A further group of individuals are expressly outside the legislation.<sup>52</sup> 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).

<sup>47</sup> 42 USC §12211(b)(3).

<sup>48</sup> 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).

<sup>49</sup> 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).

<sup>50</sup> 42 USC §12114(d); 29 CFR §1630.16(c)(1).

<sup>51</sup> 42 USC §12114(c); 29 CFR §1630.16(b).

<sup>52</sup> 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.<sup>63</sup>

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".<sup>64</sup> 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".<sup>65</sup> 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.<sup>66</sup> The use of the word "essential" suggests that the law is concerned with job tasks which are

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<sup>63</sup> 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.

<sup>64</sup> 42 USC §12112(a); 29 CFR §1630.4 (my emphasis).

<sup>65</sup> 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).

<sup>66</sup> 42 USC §12111(8); 29 CFR §1630.2(n)(3).

fundamental rather than marginal.<sup>67</sup> 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.<sup>68</sup>

## 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.<sup>69</sup>

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.<sup>60</sup>

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.<sup>61</sup> 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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<sup>67</sup> 29 CFR §1630.2(n)(1).

<sup>68</sup> 29 CFR §1630.2(n)(2).

<sup>69</sup> 42 USC §12112(a).

<sup>60</sup> 29 CFR §1630.4.

<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

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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<sup>62</sup> 42 USC §12112(b)(1); 29 CFR §1630.5.

<sup>63</sup> 42 USC §12112(b)(2); 29 CFR §1630.6.

<sup>64</sup> 42 USC §12112(b)(3); 29 CFR §1630.7.

<sup>65</sup> 42 USC §12112(b)(4); 29 CFR §1630.8.

<sup>66</sup> Shaller and Rosen, 1992: 407.

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[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)

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Text Box 8: The meaning of discrimination: (US) ADA 1990

consistent with business necessity.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

### ***Medical examinations and inquiries***

The Act augments the meaning of unlawful discrimination by extending it to include medical examinations and inquiries.<sup>71</sup> 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.<sup>72</sup> However, pre-employment inquiries are permitted only to the extent necessary to ascertain an applicant's ability to do the job.<sup>73</sup> 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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<sup>67</sup> 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).

<sup>68</sup> 42 USC §12112(b)(7); 29 CFR §1630.11 (unless it is those very skills that the test purports to measure).

<sup>69</sup> Shaller and Rosen, 1992: 420.

<sup>70</sup> 29 CFR §1630.11 appendix.

<sup>71</sup> 42 USC §12112(1):

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

<sup>72</sup> 42 USC §12112(2)(A); 29 CFR §1630.13(a).

<sup>73</sup> 42 USC §12112(2)(B); 29 CFR § 1630.14(a).

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(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 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 inquiries.*

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature 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).

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condition of employment entrance that the applicant submit to a pre-placement medical examination.<sup>74</sup> 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.<sup>75</sup> Such examinations or inquiries are lawful, however, if job-related and consistent with business necessity.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

#### **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.<sup>79</sup> A person is qualified for employment if he or she can perform the essential functions of the job with or without reasonable accommodation.<sup>80</sup> 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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<sup>74</sup> 42 USC §12112(3); 29 CFR §1630.14(b).

<sup>75</sup> 42 USC §12112(4)(A); 29 CFR §1630.13(b).

<sup>76</sup> 42 USC §12112(4)(A); 29 CFR §1630.14(c).

<sup>77</sup> 42 USC §12112(4)(B); 29 CFR §1630.14(d).

<sup>78</sup> 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.

<sup>79</sup> 42 USC §12112(b)(5)(A); 29 CFR §1630.9(a). *Cf* 45 CFR §84.12(b).

<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> An employer may not deny employment opportunities to a qualified disabled person where the denial is based upon the need to make reasonable accommodation.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> "Undue hardship" is judged by the test of whether the accommodation would require significant difficulty or expense, taking into account various factors.<sup>86</sup> 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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<sup>81</sup> 42 USC §12111(9); 29 CFR §1630.2(o). Cf 45 CFR §84.12.

<sup>82</sup> 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.

<sup>83</sup> 42 USC §12112(b)(5)(B); 29 CFR §1630.9(b).

<sup>84</sup> See, for example: 45 CFR §84.12(a).

<sup>85</sup> 42 USC §12112(b)(5)(A); 29 CFR §1630.9(a).

<sup>86</sup> 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.



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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)

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**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.<sup>87</sup> The burden of proof will be upon the employer to demonstrate undue hardship.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> The determination of a direct threat to health or safety must be made on

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<sup>87</sup> 42 USC §12111(10)(B); 29 CFR §1630.2(p)(2).

<sup>88</sup> *Prewitt v US Postal Service*, 662 F2d 292.

<sup>89</sup> 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.

<sup>90</sup> 42 USC §§12112(b)(6) and 12113(a); 29 CFR §§1630.15(b)(1) and 1630.15(c).

<sup>91</sup> 42 USC §12113(b); 29 CFR §1630.15(b)(2).

<sup>92</sup> 42 USC §12111(3); 29 CFR §1630.2(r)

a case-by-case basis and must be predicated upon the individual's *present* condition.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

### ***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.<sup>98</sup> 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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<sup>93</sup> 29 CFR §§1630.2(r) and appendix.

<sup>94</sup> Shaller and Rosen, 1992: 430.

<sup>95</sup> 42 USC §§12111(10) and 12112(b)(5); 29 CFR §1630.15(d).

<sup>96</sup> 29 CFR §1630.15(c).

<sup>97</sup> 29 CFR §1630.15(e) and appendix.

<sup>98</sup> 42 USC §12113(d)(1).

accommodation.<sup>99</sup> 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.<sup>100</sup>

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,<sup>101</sup> 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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<sup>99</sup> 42 USC 12113(d); 29 CFR §1630.16(e).

<sup>100</sup> Jones, 1991a: 482.

<sup>101</sup> 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.<sup>102</sup> 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.

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<sup>102</sup> 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.<sup>1</sup> 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*.<sup>2</sup>

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".<sup>3</sup> 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.<sup>4</sup> 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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<sup>1</sup> Canadian Constitution (Constitution Act 1982) Part I.

<sup>2</sup> 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.

<sup>3</sup> Hahn, 1987a: 365. Hahn presents an interesting discussion of the political processes by which disabled people were eventually included within the Charter.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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...<sup>7</sup>

The Act proscribes a number of grounds of discrimination and prohibits certain discriminatory practices. Disability is one of the proscribed grounds of discrimination.<sup>8</sup> 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".<sup>9</sup>

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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<sup>5</sup> Lepofsky, 1992: 168.

<sup>6</sup> (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.

<sup>7</sup> (Can) HRA s 2.

<sup>8</sup> (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).

<sup>9</sup> (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.<sup>10</sup>

This extends to both unintentional and adverse effect discrimination.<sup>11</sup> 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,<sup>12</sup> and to an individual who was an army cadet enrolled on a three week parachuting course.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

For example, a failure to consider reassignment of a newly disabled employee to other work may be discriminatory.<sup>16</sup>

An employer might defend an employment decision based on disability if it can be shown to

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<sup>10</sup> (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.

<sup>11</sup> *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can) SC.

<sup>12</sup> *Fontaine v Canadian Pacific Ltd* (1989) 89 CLLC ¶17,024 (Can) HRC; (1991) 91 CLLC ¶17,008 (Can) FCA.

<sup>13</sup> *Attorney-General of Canada v Rosin* [1991] 1 FC 391, (1991) 91 CLLC ¶17,011 (Can) FCA.

<sup>14</sup> (Can) HRA s 8.

<sup>15</sup> (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).

<sup>16</sup> *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...<sup>17</sup>

There must be an honest, genuine requirement which is real and substantial, and which is related to the actual duties of the job.<sup>18</sup> A *bona fide* occupational requirement will include a need to avoid posing a significant safety risk to the disabled individual, fellow employees and others.<sup>19</sup> An employer will clearly need to rely upon medical evidence rather than uninformed assumptions.<sup>20</sup> However, provided the assessment of the evidence is made in good faith, it is the employer's judgement which ultimately seems to count.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup> A proposal to adapt services, facilities, premises, equipment or

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<sup>17</sup> (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).

<sup>18</sup> *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.

<sup>19</sup> *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.

<sup>20</sup> *Erikson v Canadian Pacific Express & Transport Ltd* (1987) 87 CLLC ¶17,005 (Can) HRT.

<sup>21</sup> *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.

<sup>22</sup> (Can) HRA s 16(1).

<sup>23</sup> (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.<sup>24</sup> Provision is made for the enactment of regulations prescribing standards of accessibility to services, facilities or premises.<sup>25</sup> 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.<sup>26</sup>

### ***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.<sup>27</sup> 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*.<sup>28</sup>

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.

<sup>24</sup> (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.

<sup>25</sup> (Can) HRA s 24.

<sup>26</sup> (Can) HRA s 19(2).

<sup>27</sup> RSC 1985 (2nd Supp), c 23, which came into force on 12 December 1988.

<sup>28</sup> EEA 1985 s 2 (emphasis supplied).

in federal work, or a federal undertaking or business.<sup>29</sup> 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...<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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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<sup>29</sup> EEA 1985 s 3.

<sup>30</sup> 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).

<sup>31</sup> EEA 1985 s 4. See further: Employment Equity Programs Exclusion Approval Order 1989 (SOR/89-30); Employment Equity Programs Regulations 1989 (SOR/89-30).

<sup>32</sup> 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).

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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.

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**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.<sup>33</sup> 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.<sup>34</sup>

### ***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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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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<sup>33</sup> 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.

<sup>34</sup> EEA 1985 ss 8-10.

<sup>35</sup> Fair Wages and Hours of Labour Regulations 1978 (CRC 1978 c 1015) s 3 which came into force on 15 August 1979.

<sup>36</sup> Fair Wages and Hours of Labour Regulations 1978 s 9.

<sup>37</sup> 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,<sup>38</sup> Manitoba,<sup>39</sup> New Brunswick,<sup>40</sup> Newfoundland,<sup>41</sup> Nova Scotia,<sup>42</sup> Ontario,<sup>43</sup> Prince Edward Island,<sup>44</sup> Saskatchewan<sup>45</sup> and Yukon Territory<sup>46</sup> 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,<sup>47</sup> in Québec it is the Charter of Human Rights and Freedoms,<sup>48</sup> and in the Northwest Territories the law is to be found in the Fair Practices Act.<sup>49</sup> 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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<sup>38</sup> (BC) HRA (SBC 1984 c 22 as amended by 1985 c 51, 1989 c 40 and 1989 c 53).

<sup>39</sup> (Man) HRC (RSM 1987 c H175 as enacted by SM 1987 c 45).

<sup>40</sup> (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).

<sup>41</sup> (New) HRC (RSN 1990 c H-14 derived from SN 1988 c 62).

<sup>42</sup> (NS) HRA (RSNS 1989 c 214 as amended by SNS 1991 c 12).

<sup>43</sup> (Ont) HRC (RSO 1990 c H19).

<sup>44</sup> (PEI) HRA (RSPEI 1988 c H-12 as amended by SPEI 1989 c 3).

<sup>45</sup> (Sask) HRC (SS 1979 c S-24.1 as amended by 1980-81 c 41, 1980-81 c 81 and 1989 c 23).

<sup>46</sup> (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.

<sup>47</sup> (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).

<sup>48</sup> (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).

<sup>49</sup> (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.<sup>50</sup> 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.<sup>51</sup> Prince Edward Island's human rights statute also takes precedence over all other provincial laws which must be read subject to it.<sup>52</sup> The Québec Charter similarly takes precedence over other provincial laws,<sup>53</sup> as does human rights legislation in the Yukon Territory.<sup>54</sup> 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.<sup>56</sup>

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<sup>50</sup> (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.

<sup>51</sup> (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).

<sup>52</sup> (PEI) HRA s 1(2).

<sup>53</sup> (Queb) CHR&F ss 50-53.

<sup>54</sup> (YT) HRA ss 35-36.

<sup>56</sup> *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.<sup>56</sup> 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<sup>57</sup> prohibited discrimination on the ground of physical disability in 1981 and extended this protection to mental disability in 1984.<sup>58</sup>

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".<sup>59</sup> Manitoba outlaws discrimination based upon the "characteristics" of an individual, but defines the applicable "characteristics" as including "physical or mental disability".<sup>60</sup> Ontario and Québec simply prohibit discrimination because of "handicap".<sup>61</sup> Prince Edward Island prefers the terminology of "physical or mental handicap",<sup>62</sup> while Saskatchewan and the Northwest Territories apply the law simply to discrimination because of "disability".<sup>63</sup> 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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<sup>56</sup> *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.

<sup>57</sup> (New) HRC (RSN 1990 c H-14, which is derived from SN 1988 c 62 which repealed and replaced RSN 1970 c 262).

<sup>58</sup> SN 1981 c 29 and 1984 c 31.

<sup>59</sup> (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).

<sup>60</sup> (Man) HRC s 9(2)(l).

<sup>61</sup> (Ont) HRC s 5(1); (Queb) CHR&F s 10.

<sup>62</sup> (PEI) HRA s 1(1)(d).

<sup>63</sup> (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.<sup>64</sup>

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.<sup>65</sup> 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."<sup>66</sup> 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".<sup>67</sup> 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...<sup>68</sup>

Other provincial definitions are in similar terms.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> Prince Edward Island does not supply a particular definition of mental disability.<sup>72</sup>

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<sup>64</sup> (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).

<sup>65</sup> (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.

<sup>66</sup> (NS) HRA s 3(1).

<sup>67</sup> (Ont) HRC s 10(1).

<sup>68</sup> (NB) HRA s 2.

<sup>69</sup> (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.

<sup>70</sup> (Alb) IRPA s 38(e.1). See also to like effect: (Sask) HRC s 2(i.1).

<sup>71</sup> (YT) HRA s 34.

Discrimination upon the basis of "characteristics or circumstances" related to disability is outlawed by some provinces.<sup>73</sup> 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.<sup>74</sup>

This province also addresses discrimination based upon "an actual or perceived" disability and "previous dependency on drugs or alcohol."<sup>75</sup> Ontario prohibits discrimination where a "person has or has had, or is believed to have or have had" a disability.<sup>76</sup> In Prince Edward Island, the anti-discrimination principle applies to "a previous or existing disability".<sup>77</sup>

### ***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.*<sup>78</sup> 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",<sup>79</sup> 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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<sup>72</sup> (PEI) HRA s.1(1)(l).

<sup>73</sup> See for example: (Man) HRC s 9(2)(l).

<sup>74</sup> (NS) HRA s 4.

<sup>75</sup> (NS) HRA s 3(l).

<sup>76</sup> (Ont) HRC s 10(1).

<sup>77</sup> (PEI) HRA s 1(1)(l).

<sup>78</sup> (1971) 401 US 424.

<sup>79</sup> (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...<sup>80</sup>

Discrimination because of association with a disabled person is also unlawful in Ontario.<sup>81</sup>

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.<sup>82</sup> Furthermore, any "conduct that results in discrimination is discrimination", and the Act terms this "systematic discrimination".<sup>83</sup> In British Columbia, the intention of the discriminator is explicitly an irrelevant consideration when a question of prohibited discrimination arises.<sup>84</sup> 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].<sup>85</sup>

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,<sup>86</sup>

and discrimination arises where "such a distinction, exclusion or preference has the effect of nullifying or impairing such right".<sup>87</sup> Additionally, every disabled individual has the right to

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<sup>80</sup> (Ont) HRC s 11(1). This concept is broadly similar to the concept of indirect discrimination in British equal opportunity legislation.

<sup>81</sup> (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.

<sup>82</sup> (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.

<sup>83</sup> (YT) HRA s 11. Harassment is also covered: s 13.

<sup>84</sup> (BC) HRA s 13(1.1).

<sup>85</sup> (NS) HRA s 5(1).

<sup>86</sup> (Queb) CHR&F s 10.

<sup>87</sup> Harassment and the publication of discriminatory notices are also proscribed: (Queb) CHR&F ss 10.1 and 11.

be protected from exploitation.<sup>88</sup>

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...<sup>89</sup>

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...<sup>90</sup>

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.<sup>91</sup>

### ***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".<sup>92</sup> 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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<sup>88</sup> (Queb) CHR&F s 48.

<sup>89</sup> (Man) HRC s 9(1)(a).

<sup>90</sup> (Man) HRC s 9(1)(b)-(d).

<sup>91</sup> (Man) HRC s 9(3). Harassment based upon an applicable characteristic is also unlawful: s 19.

<sup>92</sup> (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.<sup>93</sup>

The human rights statutes of British Columbia, New Brunswick, Newfoundland, Northwest Territories and Prince Edward Island follow suit in virtually identical language.<sup>94</sup> 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...<sup>95</sup>

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.<sup>96</sup>

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.<sup>97</sup>

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.<sup>98</sup>

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<sup>93</sup> (Alb) IRPA s 7(1) with emphasis added.

<sup>94</sup> (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.

<sup>95</sup> (Sask) HRC s 9.

<sup>96</sup> (Sask) HRC s 16(1).

<sup>97</sup> (Queb) CHR&F s 16.

<sup>98</sup> (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.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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...<sup>102</sup>

The provision requires pay inequality to be remedied by raising the rate of pay of the employee discriminated against.<sup>103</sup> 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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<sup>99</sup> (Man) HRC s 14(13). An exception is provided in respect of employees providing personal services in private residences: s 14(8)-(9).

<sup>100</sup> (Man) HRC s 14(12).

<sup>101</sup> (YT) HRA s 14.

<sup>102</sup> (PEI) HRA s 7(1). Note also s 7(3).

<sup>103</sup> (PEI) HRA ss 7(2) and (4).

discrimination.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup>

In provincial human rights laws, discriminatory publication of notices, signs, etc is usually banned,<sup>107</sup> as is discrimination in employment advertisements.<sup>108</sup> 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.<sup>109</sup> 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...<sup>110</sup>

In Québec employment application forms may not be used to solicit information about disability; nor may employment interviewers ask disability-related questions.<sup>111</sup> Pre-

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<sup>104</sup> (PEI) HRA s 7(1)(a)-(c).

<sup>105</sup> Salary and wages includes "compensations or benefits of pecuniary value connected with the employment": (Queb) CHR&F s 56(2).

<sup>106</sup> (Queb) CHR&F s 46.

<sup>107</sup> (Alb) IRPA s 2; (BC) HRA s 2; (Ont) HRC s 13.

<sup>108</sup> (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.

<sup>109</sup> (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).

<sup>110</sup> (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).

<sup>111</sup> (Queb) CHR&F s 18.1.

employment inquiries are also specifically regulated in Manitoba.<sup>112</sup> 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.<sup>113</sup>

***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".<sup>114</sup> 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".<sup>115</sup> 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".<sup>116</sup> Similarly, in New Brunswick, an exception is made for employment discrimination which is based upon a *bona fide* occupational requirement or qualification.<sup>117</sup> 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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<sup>112</sup> (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...

<sup>113</sup> (Sask) HRC s 19.

<sup>114</sup> (Alb) IRPA ss 7(3) and 8(2). Cf the almost identical language in (New) HRC s 9(1).

<sup>115</sup> (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).

<sup>116</sup> (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.

<sup>117</sup> (NB) HRA ss 3(5) and 6.



employee insurance plan.<sup>118</sup>

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.<sup>119</sup>

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".<sup>120</sup> 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".<sup>121</sup>

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.<sup>122</sup> 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".<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> However,

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<sup>118</sup> (NB) HRA s 3(7).

<sup>119</sup> (NS) HRA s 6(f).

<sup>120</sup> (NS) HRA s 6(e).

<sup>121</sup> (YT) HRA s 9(a) and (d).

<sup>122</sup> (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).

<sup>123</sup> (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).

<sup>124</sup> (Ont) HRC s 25(1).

<sup>125</sup> (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.<sup>126</sup>

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.<sup>127</sup> 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".<sup>128</sup> Furthermore, disability-based discrimination does not affect the operation of any genuine retirement or pension plan and any genuine group or employee insurance plan.<sup>129</sup>

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.<sup>130</sup>

The application of this defence in particular would allow disability-related inquiries in job application forms and interviews.<sup>131</sup> 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".<sup>132</sup> 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.<sup>133</sup> Regulations

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than 25 employees: s 25(3)(b).

<sup>126</sup> (Ont) HRC s 25(4).

<sup>127</sup> (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).

<sup>128</sup> (PEI) HRA ss 6(4)(a)-(b) and 14(1)(d). The onus of proof is upon the employer: s 14(2).

<sup>129</sup> (PEI) HRA s 11.

<sup>130</sup> (Queb) CHR&F s 20.

<sup>131</sup> (Queb) CHR&F s 18.1 so provides.

<sup>132</sup> (Queb) CHR&F s 20.

<sup>133</sup> (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...<sup>134</sup>

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.<sup>136</sup> An occupational qualification may not be based on "the preferences of co-workers, the employer, clients or customers".<sup>136</sup> 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".<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> Exemption is usually given in respect of domestic employment in a

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<sup>134</sup> 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.

<sup>135</sup> (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.

<sup>136</sup> (Sask) HRC Reg s 1(b)(vi).

<sup>137</sup> (Sask) HRC s 16(10).

<sup>138</sup> (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).

<sup>139</sup> (Sask) HRC s 16(2)-(3).

private home or to employment where the employee resides in the employer's private home.<sup>140</sup> 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.<sup>141</sup> Such legislation also applies to Crown employment.<sup>142</sup> 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.<sup>143</sup>

### ***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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup>

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".<sup>147</sup> The Code employs

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<sup>140</sup> (Alb) IRPA s 9; (Sask) HRC s 16(8); (YT) HRA s 10.

<sup>141</sup> (NS) HRA s 6(c).

<sup>142</sup> (Alb) IRPA s 12.

<sup>143</sup> For example: (Man) HRC s 10; (Ont) HRC s 45; (Sask) s 2(f).

<sup>144</sup> (NS) HRA ss 6(i) and 9. The Act does not affect *bona fide* plans, schemes or practices of mandatory retirement: s 6(h).

<sup>145</sup> (PEI) HRA s 20.

<sup>146</sup> (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).

<sup>147</sup> (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.<sup>148</sup> A similar provision applies in respect of government grants and loans.<sup>149</sup> 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).<sup>150</sup>

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.<sup>151</sup> 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.<sup>152</sup> 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".<sup>153</sup> The Act also makes particular provision for special programmes and affirmative action programmes by providing that these are not discriminatory.<sup>154</sup> 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.<sup>155</sup>

A distinguishing feature of the British Columbia legislation is its provisions for employment

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<sup>148</sup> (Ont) HRC s 26(1).

<sup>149</sup> (Ont) HRC s 26(2).

<sup>150</sup> (Ont) HRC s 26(3).

<sup>151</sup> (YT) HRA s 10(1). Employment in a private home is also excluded: s 10(3).

<sup>152</sup> (YT) HRA s 7(1).

<sup>153</sup> (YT) HRA s 7(2).

<sup>154</sup> (YT) HRA s 12(1).

<sup>155</sup> (YT) HRA s 12(2)-(3).

preference and affirmative action.<sup>156</sup> 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.<sup>157</sup>

In Manitoba affirmative action is permitted and will not constitute discrimination under the Code.<sup>158</sup> 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.<sup>159</sup>

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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<sup>156</sup> (BC) HRA s 19.

<sup>157</sup> (Can) HRA ss 16(1) and 17 discussed above (see text at footnote 22 above).

<sup>158</sup> (Man) HRC s 11.

<sup>159</sup> (Man) HRC s 56(1).

in employment..." and it is deemed lawful if established in conformity with the Charter.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> Thereafter, the supervision of the programme is overseen by the Commission, which may make further investigations and require reports.<sup>163</sup> Government departments and agencies are required (not merely encouraged) to implement affirmative action programmes after consultation with the Commission.<sup>164</sup>

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.<sup>166</sup>

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.<sup>166</sup> 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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<sup>160</sup> (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.

<sup>161</sup> (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.

<sup>162</sup> (Queb) CHR&F s 88.

<sup>163</sup> (Queb) CHR&F s 89.

<sup>164</sup> (Queb) CHR&F s 92.

<sup>165</sup> (Queb) AAP Reg s 2.

<sup>166</sup> (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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup> 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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<sup>167</sup> (Queb) AAP Reg s 4.

<sup>168</sup> (Queb) AAP Reg s 5.

<sup>169</sup> (Queb) AAP Reg s 6.

<sup>170</sup> (Queb) AAP Reg s 7.

<sup>171</sup> (Queb) AAP Reg s 8.

<sup>172</sup> (Queb) AAP Reg ss 9-10.



for this purpose.<sup>173</sup> 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.<sup>174</sup>

### 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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<sup>173</sup> (Queb) CHR&F s 18.1.

<sup>174</sup> (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.<sup>1</sup> 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.*<sup>2</sup> The result is that Australian disability discrimination laws drew heavily upon the US Rehabilitation Act 1973 for basic concepts and drafting language.<sup>3</sup> Indeed, one of the leading cases under the legislation of one of the Australian states acknowledges an influential debt to the American law.<sup>4</sup> However, there are significant differences between the US and Australian

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<sup>1</sup> For a general discussion of, and critical perspective upon, Australian anti-discrimination legislation see: Thornton, 1990.

<sup>2</sup> (1971) 401 US 424.

<sup>3</sup> Waters, 1990: 380-4.

<sup>4</sup> *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.<sup>6</sup> 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).<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> 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.<sup>9</sup> 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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<sup>6</sup> (NSW) N° 48 of 1977, as amended by the ADA 1980-1985.

<sup>6</sup> See in general: Scutt, 1977; Partlett, 1977.

<sup>7</sup> ADB (NSW), 1977. For a discussion of the NSW experience in regulating disability discrimination, see: Nothdurft and Astor, 1986.

<sup>8</sup> ADB (NSW), 1981.

<sup>9</sup> (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.

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- (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.
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**Text Box 12: Section 49A (NSW) Anti-Discrimination Act 1977**

specific example of what would constitute characteristic-related discrimination.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

An intellectually impaired person is one who experiences:

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<sup>10</sup> (NSW) ADA 1977 s 49A(2).

<sup>11</sup> (NSW) ADA 1977 s 49A(3).

<sup>12</sup> (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).

<sup>13</sup> (NSW) ADA 1977 s 4(1). The 1981 definition of "impairment" was in similar, although not exact, terms.

<sup>14</sup> (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.<sup>15</sup>

In the leading case of *Kitt v Tourism Commission*,<sup>16</sup> 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,<sup>17</sup> 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.<sup>18</sup> Section 49Q contains mirror provisions in respect of intellectually disabled applicants and employees.<sup>19</sup>

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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<sup>15</sup> (NSW) ADA 1977 s 4(1).

<sup>16</sup> (1987) EOC ¶92-196 (NSW EOT); (1987) 11 NSWLR 686 (NSW SC). See: Astor, 1988.

<sup>17</sup> 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.

<sup>18</sup> (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).

<sup>19</sup> See also (NSW) ADA 1977 ss 49R-49W which parallel ss 49C-49H.

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- (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.
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**Text Box 13: Section 49B (NSW) Anti-Discrimination Act 1977**

accommodated by the employer...<sup>20</sup>

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.<sup>21</sup>

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*,<sup>22</sup> 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.<sup>23</sup> 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].<sup>24</sup>

Section 122J requires public sector employers to whom it is addressed to prepare and to

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<sup>20</sup> (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.

<sup>21</sup> (NSW) ADA 1977 ss 49I(2) and 49X(2).

<sup>22</sup> (1986) AILR ¶433 and (1986) EOC ¶92-162 (NSW EOT); (1987) AILR ¶280 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

<sup>23</sup> (NSW) ADA 1977 s 122B.

<sup>24</sup> (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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

### ***South Australia***

The employment rights of disabled people in South Australia (SA) were first addressed in the Handicapped Persons Equal Opportunity Act 1981.<sup>28</sup> This was subsequently repealed and replaced by the Equal Opportunity Act (EOA) 1984.<sup>29</sup> 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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<sup>25</sup> (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.

<sup>26</sup> (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).

<sup>27</sup> (NSW) ADA 1977 ss 122M-122S.

<sup>28</sup> (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).

<sup>29</sup> (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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup> 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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<sup>30</sup> 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."

<sup>31</sup> (SA) EOA 1984 s 5 (as amended).

<sup>32</sup> (SA) EOA 1984 s 5. The words in italics were added by the 1989 amendments.

<sup>33</sup> (SA) EOA 1984 s 5 (as amended).

<sup>34</sup> 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.

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- (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.
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**Text Box 14: Section 67 (SA) Equal Opportunity Act 1984**

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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).
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Text Box 15: Section 66 (SA) Equal Opportunity Act 1984

required.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> (SA) EOA 1984 s 6(3) (as amended).

<sup>38</sup> (SA) EOA 1984 s 79.

<sup>39</sup> (SA) EOA 1984 s 84.

<sup>40</sup> (SA) EOA 1984 s 82.

## **Victoria**

The Victorian EOA 1984<sup>41</sup> repeals and replaces the state's EOA 1977<sup>42</sup> and the Equal Opportunities (Discrimination Against Disabled Persons) Act 1982.<sup>43</sup> 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."<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

Discrimination on the ground of "status" includes discrimination because of sex, marital status, race and *impairment*.<sup>47</sup> 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.<sup>48</sup>

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<sup>41</sup> (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.

<sup>42</sup> (Vic) Act N° 9025.

<sup>43</sup> (Vic) Act N° 9843.

<sup>44</sup> (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).

<sup>45</sup> (Vic) EOA 1984 s 21(1).

<sup>46</sup> (Vic) EOA 1984 s 21(2).

<sup>47</sup> (Vic) EOA 1984 s 4(1).

<sup>48</sup> (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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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".<sup>55</sup>

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childhood record of rheumatic fever.

<sup>49</sup> (Vic) EOA 1984 s 4(1).

<sup>50</sup> (Vic) EOA 1984 s 21(3).

<sup>51</sup> (Vic) EOA 1984 s 17(1) (as amended).

<sup>52</sup> (Vic) EOA 1984 s 17(2).

<sup>53</sup> (Vic) EOA 1984 s 17(4).

<sup>54</sup> (Vic) EOA 1984 s 17(5).

<sup>55</sup> (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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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).

<sup>56</sup> (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).

<sup>57</sup> (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.

<sup>58</sup> (Vic) EOA 1984 s 21(4)(d).

<sup>59</sup> (Vic) EOA 1984 s 21(4)(e).

<sup>60</sup> (Vic) EOA 1984 s 21(4)(g). For a criticism of this aspect of the Victorian legislation, see: Johnstone, 1989.

<sup>61</sup> (Vic) EOA 1984 s 21(4)(h).



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This section does not apply to-

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- (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].

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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.<sup>62</sup>

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.<sup>63</sup> 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<sup>64</sup> 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.<sup>65</sup>

### ***Western Australia***

Western Australia's (WA) EOA 1984<sup>66</sup> 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.<sup>67</sup>

Its objects include the elimination, so far as is possible, of discrimination against persons on

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<sup>62</sup> (Vic) EOA 1984 s 21(4)(i).

<sup>63</sup> Law Reform Commission of Victoria, 1989 and 1990a.

<sup>64</sup> Law Reform Commission of Victoria, 1990b.

<sup>65</sup> See text at footnote 61 above.

<sup>66</sup> (WA) N° 83 of 1984, as amended by the EO(A)A 1988 ((WA) N° 40 of 1988).

<sup>67</sup> (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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup>

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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<sup>68</sup> (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).

<sup>69</sup> (WA) EOA 1984 s 66A.

<sup>70</sup> (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.

<sup>71</sup> (WA) EOA 1984 s 66B(1)-(2).

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- (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.
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**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.<sup>72</sup>

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.<sup>73</sup>

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.<sup>74</sup>

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.<sup>75</sup>

The Act further contains a number of genuine occupational qualification exceptions.<sup>76</sup> 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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<sup>72</sup> (WA) EOA 1984 s 66Q(1).

<sup>73</sup> (WA) EOA 1984 s 4(4).

<sup>74</sup> (WA) EOA 1984 s 66Q(2).

<sup>75</sup> (WA) EOA 1984 s 66R.

<sup>76</sup> (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.<sup>77</sup>

### ***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,<sup>78</sup> while in the same year Queensland enacted the (Qld) Anti-Discrimination Act.<sup>79</sup> The Northern Territory adopted its (NT) Anti-Discrimination Act the following year.<sup>80</sup> 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<sup>81</sup> and gender discrimination in the 1980s,<sup>82</sup> 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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<sup>77</sup> (WA) EOA 1984 ss 140-145.

<sup>78</sup> (ACT) N° 81 of 1991.

<sup>79</sup> (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.

<sup>80</sup> (NT) N° 80 of 1992.

<sup>81</sup> (Cth) Racial Discrimination Act 1975.

<sup>82</sup> (Cth) Sex Discrimination Act 1984.

Opportunity Commission Act 1986<sup>83</sup> ratified and incorporated the UN Declaration on the Rights of Mentally Retarded Persons 1971 and the Declaration on the Rights of Disabled Persons 1975.<sup>84</sup> 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...<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup>

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<sup>83</sup> (Cth) N° 125 of 1986.

<sup>84</sup> (Cth) HR&EOCA 1986 s 3 and Schs 4-5.

<sup>85</sup> (Cth) HR&EOCA 1986 s 3(1).

<sup>86</sup> HR&EOC Regulations 1989 (SR 1989 N° 407) reg 4.

<sup>87</sup> HR&EOC Regulations 1989 reg 3.

<sup>88</sup> 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,<sup>89</sup> and was due to come into force within twelve months of that date.<sup>90</sup> It sets out to eliminate disability-based discrimination in (*inter alia*) work, existing laws and the administration of Commonwealth laws and programmes.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup> 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.

<sup>89</sup> (Cth) N° 135 of 1992.

<sup>90</sup> (Cth) DDA 1992 s 2.

<sup>91</sup> (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.

<sup>92</sup> (Cth) DDA 1992 s 3(b)-(c).

<sup>93</sup> (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.

<sup>94</sup> (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.<sup>96</sup>

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.<sup>96</sup> 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.<sup>97</sup>

In regulating disability discrimination in employment, Part 2 of the Act encompasses the usual areas of employment decisions and processes in which discrimination occurs.<sup>98</sup> That is, recruitment and selection, employment offers, terms and conditions, opportunities for promotion, transfer and training, other employment benefits, dismissal, and other detriment.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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<sup>96</sup> (Cth) DDA 1992 ss 7-9.

<sup>98</sup> (Cth) DDA 1992 s 4(1).

<sup>97</sup> (Cth) DDA 1992 s 48.

<sup>98</sup> (Cth) DDA 1992 s 15(1)-(2).

<sup>99</sup> 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).

<sup>100</sup> (Cth) DDA 1992 s 15(1)-(2).

<sup>101</sup> (Cth) DDA 1992 s 4(1).

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- 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,<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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...".<sup>106</sup> Furthermore, disabled persons may be afforded "goods or access to facilities, services or opportunities to meet their special needs in relation to... employment...".<sup>107</sup> The Act also allows positive discrimination to the advantage of disabled persons in respect of grants, benefits or programmes to meet their special needs.<sup>108</sup>

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<sup>102</sup> (Cth) DDA 1992 s 15(3).

<sup>103</sup> (Cth) DDA 1992 s 15(4)(a).

<sup>104</sup> (Cth) DDA 1992 s 15(4)(b).

<sup>105</sup> (Cth) DDA 1992 s 11.

<sup>106</sup> (Cth) DDA 1992 s 45(a).

<sup>107</sup> (Cth) DDA 1992 s 45(b).

<sup>108</sup> (Cth) DDA 1992 s 45(c).

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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.

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**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.<sup>109</sup> 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.<sup>110</sup> Third, it is a criminal offence, punishable in like manner, to incite the commission of an unlawful act or offence under the legislation.<sup>111</sup> Fourth, discriminatory advertisements are regulated by the criminal law and the penalty for a transgression is a fine of up to \$1,000.<sup>112</sup>

***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<sup>113</sup> 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.<sup>114</sup> The relevant public authority employers are required to develop and implement equal employment opportunity programmes.<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> However, discrimination is permitted if it is

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<sup>109</sup> (Cth) DDA 1992 ss 35-36.

<sup>110</sup> (Cth) DDA 1992 s 42.

<sup>111</sup> (Cth) DDA 1992 s 43.

<sup>112</sup> (Cth) DDA 1992 s 44.

<sup>113</sup> (Cth) N° 20 of 1987.

<sup>114</sup> (Cth) Public Services Act 1922 s 7(1) (as amended).

<sup>115</sup> (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.

<sup>116</sup> (Cth) EEO(CA)A 1987 s 3(1). A relevant authority is one employing 40 or more employees in Australia.

<sup>117</sup> (Cth) EEO(CA)A 1987 s 3(1). The scope of employment discrimination includes

essential for the effective performance of employment duties.<sup>118</sup> Nothing in the legislation requires any action incompatible with the principle that employment matters should be dealt with on the basis of merit.<sup>119</sup>

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.<sup>120</sup> The Act makes provision for the lodging of annual programme reports with the responsible minister or Public Service Board.<sup>121</sup> 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.<sup>122</sup>

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recruitment procedures, selection criteria, promotion and transfer, training and staff development, and conditions of service.

<sup>118</sup> (Cth) EEO(CA)A 1987 s 3(2).

<sup>119</sup> (Cth) EEO(CA)A 1987 s 3(4).

<sup>120</sup> (Cth) EEO(CA)A 1987 s 7.

<sup>121</sup> (Cth) EEO(CA)A 1987 ss 8-11.

<sup>122</sup> (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.<sup>123</sup> 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.<sup>124</sup>

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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<sup>123</sup> Thornton, 1990: 244 *et seq.*

<sup>124</sup> Thornton, 1990: 232-3 and 242-3.



**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**

**Brian John Doyle**

**Volume 2 of 2 volumes**

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**PART C**  
**PROBLEMS & ISSUES IN LEGAL RESPONSES TO DISABILITY  
DISCRIMINATION**

## CHAPTER X: DEFINING DISABILITY DISCRIMINATION IN THE WORKPLACE

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

### INTRODUCTION

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

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

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

<sup>2</sup> (1971) 401 US 424.

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

<sup>4</sup> 42 USC §12112(a).

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

#### DIRECT DISABILITY DISCRIMINATION

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

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

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

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

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

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

<sup>6</sup> Sex Discrimination Act (SDA) 1975 s 1(1)(a); Race Relations Act (RRA) 1976 s 1(1)(a).

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

<sup>8</sup> (SA) EOA 1984 s 66(a).

<sup>9</sup> 42 USC §12112(b)(1).

<sup>10</sup> (Can) HRA s 7.

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

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

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

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<sup>11</sup> (Ont) HRC s 5(1).

<sup>12</sup> (YT) HRA s 6.

<sup>13</sup> (Queb) CHR&F s 10.

<sup>14</sup> (Man) HRC s 9.

<sup>15</sup> (1984) AILR ¶240 (SA HPDT): a complaint under s 49(5) (SA) HPEOA 1981.

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



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

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

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<sup>17</sup> (SA) EOA 1984 s 6(2).

<sup>18</sup> *Campbell v FH Productions* (1984) AIR 1178 (Vic EOB); but see Law Reform Commission of Victoria, 1989; 1990a; and 1990b.

<sup>19</sup> (Cth) DDA 1992 s 10.

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

<sup>21</sup> *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can SC).

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

not interpreted as prohibiting unconsciously motivated discrimination. The reversal of this ruling has been proposed.<sup>24</sup>

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

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

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

<sup>23</sup> [1988] VR 319.

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

<sup>25</sup> (BC) HRA s 13(1.1). See also: (Man) HRC s 9(3).

<sup>26</sup> (1986) EOC 92-162 (NSW EOT); (1986) EOC 92-183 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

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

<sup>28</sup> (1988) AILR ¶169 (NSW EOT).

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

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

#### INDIRECT DISABILITY DISCRIMINATION

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

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

<sup>30</sup> SDA 1975 s 5(3); RRA 1976 s 3(4).

<sup>31</sup> (NSW) ADA 1977 s 49A(1); (Vic) EOA 1984 s 17(2); (WA) EOA 1984 s 66A; (Cth) DDA 1992 s 5(1).

<sup>32</sup> (SA) EOA 1984 s 66.

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

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

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

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

Yukon Territory terms "any conduct that results in discrimination" as "systematic discrimination", as does Manitoba,<sup>40</sup> while Québec explicitly outlaws effects discrimination.<sup>41</sup>

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<sup>34</sup> (1971) 401 US 424.

<sup>35</sup> SDA 1975 s 1(1)(b); RRA 1976 s 1(1)(b).

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

<sup>37</sup> 42 USC §12112(b)(6).

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

<sup>39</sup> (Ont) HRC s 11(1).

<sup>40</sup> (YT) HRA s 11; (Man) HRC s 9(3).

<sup>41</sup> (Queb) CHR&F s 10.

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

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

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<sup>42</sup> 42 USC §12112(b).

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

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

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

## OTHER FORMS OF DISABILITY DISCRIMINATION

### *Victimisation*

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

### *Harassment*

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

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

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

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

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

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

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

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

### ***Characteristics discrimination***

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

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

<sup>50</sup> (1992) 92 CLLC ¶17,039 (Ont HRC).

<sup>51</sup> (1987) 87 CLLC ¶17,013 (Ont HRC).

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

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

### ***Discrimination by association***

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

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

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

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

<sup>56</sup> (Cth) DDA 1992 s 8.

<sup>57</sup> US Senate, 1989: 8; US House of Representatives, 1990a: 30; Burgdorf, 1991: 419.

<sup>58</sup> (Man) HRC s 9(1)(a) and (d); (NS) HRA s 5(1); (Ont) HRC s 12; (PEI) HRA ss 1(1)(d) and 13; (YT) HRA s 6.

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



## DISABILITY DISCRIMINATION AND EMPLOYMENT PRACTICES

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

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

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

<sup>61</sup> (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).

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

<sup>63</sup> (Sask) HRC s 9. This is then amplified in the usual terms: (Sask) HRC s 16(1).

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

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

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

<sup>65</sup> 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.

<sup>66</sup> (Man) HRC s 14(1)-(2).

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

<sup>68</sup> See for example: (PEI) HRA s 7; (Queb) CHR&F s 19; (YT) HRA s 14.

<sup>69</sup> 42 USC §12112(a).

<sup>70</sup> 28 CFR §41.52(c); 29 CFR §1630.4; 45 CFR §84.11(b).

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

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

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

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<sup>71</sup> *Ibid.*

<sup>72</sup> Feldblum, 1991c: 92.

<sup>73</sup> Feldblum, 1991c: 90-92.

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

<sup>75</sup> (1988) 9 CHRR D/4910, (1988) 88 CLLC ¶17,000 (Can) HRT.

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

### PRE-EMPLOYMENT SCREENING

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

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<sup>76</sup> (1990) 90 CLLC ¶17,018 (Can) HRT.

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

<sup>78</sup> (1991) 91 CLLC ¶17,018 (Can) HRT; (1992) 92 CLLC ¶17,031 (FCA).

<sup>79</sup> Rothstein, 1983: 1422. See also: Craft *et al*, 1980; Hadler, 1986.

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

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

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

#### ***Uses and misuses of pre-employment screening***

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

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<sup>80</sup> For example, lower back weaknesses: Rockey *et al*, 1979. See also: Stickler and Sebok, 1992.

<sup>81</sup> Feldblum, 1991c: 97.

<sup>82</sup> Feldblum, 1991a: 531.

<sup>83</sup> US Senate, 1989: 39; US House of Representatives, 1990a: 72. Cited in Feldblum, 1991a: 533.

<sup>84</sup> Canter, 1984; Gostin, 1991; Rothstein, 1992a and 1992b; Wilkie, 1993.

<sup>85</sup> Rothstein, 1983; Canter, 1984.

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

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

Nevertheless, Rothstein concludes that:

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

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

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

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

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

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<sup>87</sup> Rothstein, 1983: 1381-2.

<sup>88</sup> Rothstein, 1983: 1417.

<sup>89</sup> Rothstein, 1983 and 1987.

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

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

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<sup>90</sup> Rothstein, 1983: 1411.

<sup>91</sup> Rothstein, 1983: 1412.

<sup>92</sup> Labour Research Department, 1989 and 1990.

<sup>93</sup> Morrell, 1990: 8.

<sup>94</sup> Britton, 1987.

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

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

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

### ***Pre-employment screening and the law in Britain***

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

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

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

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

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



examinations would need to be prayed in aid.

***Pre-employment screening and the law in the United States***

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

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

<sup>102</sup> 42 USC §12112(c)(3); 29 CFR §1630.15(f).

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

<sup>104</sup> Shaller and Rosen, 1991: 422.

<sup>105</sup> Rothstein, 1983: 1445.

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

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

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<sup>106</sup> This is also apparent from the EEOC regulations: 29 CFR §1630.14.

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

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

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

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

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

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<sup>110</sup> This is explained by interpretative guidance in the EEOC regulations expanding upon 29 CFR §1630.13:

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

<sup>111</sup> 42 USC §12112(c)(4)(B).

<sup>112</sup> Feldblum, 1991a: 540.

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

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

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

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<sup>114</sup> This is a more common practice in Britain than in the US.

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

<sup>116</sup> 45 CFR §84.14(b).

<sup>117</sup> Feldblum, 1991a: 543.

<sup>118</sup> Interpretive guidance to 29 CFR §§1630.1(b), 1630.1(c) and 1630.14(a).

<sup>119</sup> Feldblum, 1991a: 545.

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

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

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

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

## **CONCLUDING REMARKS**

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

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<sup>120</sup> Feldblum, 1991a: 533.

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

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

## CHAPTER XI: IDENTIFYING THE PROTECTED CLASS

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

### INTRODUCTION

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

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

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<sup>1</sup> Burgdorf, 1991: 441.

<sup>2</sup> RRA 1976 ss 1 and 3.

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

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

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

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

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

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

### **LEGAL DEFINITIONS OF DISABILITY**

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

#### ***Social security and welfare law***

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

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<sup>8</sup> Borrowing from Weiss, 1974 and the jurisprudence of US disability discrimination law.

<sup>9</sup> Limitation Act 1980 s 33.

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

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



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

### ***Employment law***

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

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

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

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5, 9 and 16.

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

<sup>13</sup> Tomlinson, 1943.

<sup>14</sup> DP(E)A 1944 s 1(1).

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

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

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

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

### ***Comparative perspective***

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

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<sup>15</sup> See Chapter IV where these provisions are discussed in more detail.

<sup>16</sup> NACEDP, 1986: para 6.11.

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

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

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

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

## WHO IS A DISABLED PERSON?

### *Present or actual disability*

In the US, the anti-discrimination provisions of the RA 1973 and the ADA 1990 address the employment rights of individuals with "handicaps" or a "disability".<sup>21</sup> This means that the protected class embraces any person who has a physical or mental "impairment".<sup>22</sup> 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,<sup>23</sup>

while a mental impairment constitutes:

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

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<sup>19</sup> See the detailed discussion in Chapter VIII above.

<sup>20</sup> (NSW) ADA 1977 s 4(1) and see the detailed discussion in Chapter IX above.

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

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

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

syndrome, emotional or mental illness, and specific learning disabilities,<sup>24</sup> although there are slight differences between the different regulatory definitions.

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

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

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

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

Alberta expands upon the concept of "mental disorder",<sup>30</sup> while in Yukon Territory a "mental

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

<sup>25</sup> (Can) HRA s 3(1). For this purpose, "disability" denotes "any previous or existing mental or physical disability...": (Can) HRA s 25.

<sup>26</sup> (Alb) IRPA s 38(i).

<sup>27</sup> (NS) HRA s 3(1).

<sup>28</sup> (Ont) HRC s 10(1).

<sup>29</sup> (NB) HRA s 2; (New) HRC s 2(h); (NS) HRA s 3(1); (Ont) HRC s 10(1); (Sask) HRC s 2(d.1)(ii); (YT) HRA s 34.

<sup>30</sup> (Alb) IRPA s 38(e.1):

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

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

disability" includes any mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness or learning disability.<sup>31</sup>

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

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

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

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

and an intellectual impairment is:

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

The Western Australian definitions are derived from this root.<sup>38</sup>

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

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<sup>31</sup> (YT) HRA s 34.

<sup>32</sup> (NSW) ADA 1977 ss 49A and 49P; (SA) EOA 1984 s 67; (WA) EOA 1984 s 66A.

<sup>33</sup> (Vic) EOA 1984 s 21.

<sup>34</sup> (SA) EOA 1984 s 5; (Vic) EOA 1984 s 4(1)

<sup>35</sup> (Cth) DDA 1992 s 4(1).

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

<sup>37</sup> (NSW) ADA 1977 s 4(1).

<sup>38</sup> (WA) EOA 1984 s 4(1).

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

### ***Record of disability***

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

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<sup>39</sup> WHO, 1980. See Chapter II above.

<sup>40</sup> It has been rejected in recent attempts to introduce disability discrimination legislation in Britain.

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

<sup>42</sup> 29 CFR Part 1630 Appendix.

<sup>43</sup> 29 USC §706(8)(B)(ii); 42 USC §12102(2)(B).

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

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

### *Perceived disability*

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

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

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

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<sup>45</sup> (PEI) HRA s 1(1)(l); (Ont) HRC s 10(1).

<sup>46</sup> (WA) EOA 1984 s 4(1).

<sup>47</sup> (Cth) DDA 1992 s 4(1).

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

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

<sup>50</sup> 29 USC §706(8)(B)(iii); 42 USC §12102(2)(C).

defined... but is treated... as having such an impairment.<sup>51</sup>

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

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

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

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

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<sup>51</sup> 28 CFR §41.31(b)(4); 29 CFR §1613.702(e); 29 CFR §1630.2(l); 45 CFR §84.3(j)(2)(iv).

<sup>52</sup> 29 CFR Part 1630 Appendix.

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

<sup>54</sup> *Duran v City of Tampa* (1977) 430 FSupp 75 (MD Fla).

<sup>55</sup> Jones, 1991a: 490; 29 CFR Part 1630 Appendix.

<sup>56</sup> (NSW) ADA 1977 s 4(1).

<sup>57</sup> (Vic) EOA 1984 s 4(1).

<sup>58</sup> (Cth) DDA 1992 s 4(1). Disability status is also found where a person possesses bodily



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

### **SUBSTANTIAL LIMITATION ON MAJOR LIFE ACTIVITIES**

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

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

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

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

<sup>59</sup> (Can) HRA s 25.

<sup>60</sup> (NS) HRA s 3(1); (Ont) HRC s 10(1).

<sup>61</sup> (1991) 91 CLLC ¶17,017 (Sask HRC).

<sup>62</sup> (1992) 92 CLLC ¶17,007 (Sask QB). Subsequently, the complaint was dismissed: (1992) 92 CLLC ¶17,026 (Sask HRC).

<sup>63</sup> 29 USC §706(8)(B); 42 USC §12102(2); (NSW) ADA 1977 s 4(1).

<sup>64</sup> WHO, 1980.

<sup>65</sup> See text at footnote 14 above.

### ***Major life activities***

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

### ***Substantial limitation***

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

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<sup>66</sup> 29 CFR Part 1630 Appendix.

<sup>67</sup> 28 CFR §41.31; 29 CFR §1613.702(c); 29 CFR §1630.2(i) and Appendix; 45 CFR §84.3.

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

<sup>69</sup> Shaller and Rosen, 1991: 410.

<sup>70</sup> 29 CFR Part 1630 Appendix.

<sup>71</sup> 29 CFR Part 1630 Appendix.

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

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

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

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<sup>72</sup> 29 CFR §1630.2(j)(1). The RA 1973 regulations did not attempt such an explication.

<sup>73</sup> 29 CFR Part 1630 Appendix.

<sup>74</sup> The problems of fitting insulin-dependent diabetics into the protected class are explored by Bayler, 1992.

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

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

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

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

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<sup>77</sup> 29 CFR §1630.2(j)(2).

<sup>78</sup> 29 CFR Part 1630 Appendix.

<sup>79</sup> 29 CFR §1630.2(j)(3)(i).

<sup>80</sup> 29 CFR §1630.2(3)(ii).

<sup>81</sup> 29 CFR Part 1630 Appendix.

### *Judicial view*

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

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

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<sup>82</sup> 41 CFR §60-741.2.

<sup>83</sup> *Pridemore v Legal Aid Society of Dayton* (1985) 625 FSupp 1171 (SD Ohio); *Pridemore v Rural Legal Aid Society of West Central Ohio* (1985) 625 FSupp 1180 (SD Ohio).

<sup>84</sup> *Daley v Koch* (1989) 892 F2d 212 (2nd Cir).

<sup>85</sup> *Taylor v US Postal Service* (1990) 771 FSupp 882 (SD Ohio).

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

<sup>87</sup> *Coley v Secretary of Army* (1987) 689 FSupp 519 (D Md).

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

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

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

That reading was overturned by a district court which held that the statute envisaged a *substantial* handicap or limitation and not merely any impairment or limitation to any degree. If it were otherwise, said the court, an acrophobic applicant offered 10 jobs by an employer, of which only one was on an upper storey, would be a disabled individual within the meaning of the Act, even though 9 other jobs within that person's limitations were on offer. The district court also rejected the administrative law judge's formulation of the test as being too narrow. Persons whose impairments are a handicap to employment in their chosen field are

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<sup>89</sup> *Perez v Philadelphia Housing Authority* (1987) 677 FSupp 357 (ED Pa).

<sup>90</sup> *Carty v Carlin* (1985) 623 FSupp 1181 (DC Md).

<sup>91</sup> *Pridemore v Rural Legal Aid Society of West Central Ohio* (1985) 625 FSupp 1180 (SD Ohio).

<sup>92</sup> (1980) 497 FSupp 1088 (D Haw). See: Haines, 1983.

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

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

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

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

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<sup>93</sup> Flaccus, 1986b: 276.

<sup>94</sup> Larson, 1986: 764.

<sup>95</sup> 29 CFR Part 1630 Appendix.

<sup>96</sup> Johnson, 1986: 258-9.

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

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

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

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<sup>97</sup> (1985) 755 F2d 1249 (6th Cir).

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

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

<sup>100</sup> See, for example: Bogaards, 1982.

<sup>101</sup> Mayerson, 1991b: 507-8.



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

## **PARTICULAR DISABILITIES**

### ***Introduction***

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

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

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

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

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

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<sup>102</sup> Richards, 1985: 7-8.

<sup>103</sup> Feldblum, 1991c: 84.

<sup>104</sup> 29 USC §706(13).

<sup>105</sup> 28 CFR §41.31.

<sup>106</sup> US Senate, 1989: 22; US House of Representatives, 1990a: 51; US House of Representatives, 1990b: 28.

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

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

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<sup>107</sup> *Fynes v Weinberger* (1985) 677 FSupp 315 (ED Pa).

<sup>108</sup> *Schuett Investment Co v Anderson* (1986) 386 NW2d 249 (medical evidence of inability to lift heavy weights).

<sup>109</sup> *Bey v Bolger* (1982) 540 FSupp 910 (DC Pa).

<sup>110</sup> *Reynolds v Brock* (1987) 815 F2d 571 (9th Cir) (a wrongful discharge case).

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

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

<sup>113</sup> *Norcross v Sneed* (1983) 573 FSupp 533 (DC Ark).

<sup>114</sup> Feldblum, 1991c: 85.

<sup>115</sup> *de la Torres v Bolger* (1986) 781 F2d 1134 (5th Cir). See: McEvoy, 1988.

<sup>116</sup> (1983) 576 FSupp 1409 (DC Ga).

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

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

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<sup>117</sup> (1990) 12 CHRR D/19, 90 CLLC ¶17,109 (Ont HRC)

<sup>118</sup> *Walders v Garrett* (1991) 765 FSupp 303 (ED Va).

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

<sup>120</sup> *Horton v Regional Municipality of Niagara* (1988) 88 CLLC ¶17,004 (Ont HRC).

<sup>121</sup> *Santiago v Temple University* (1990) 739 FSupp 974 (ED Pa).

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

### ***Alcoholism and drug abuse***

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

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

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

<sup>124</sup> Larson, 1986: 757.

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

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

<sup>127</sup> (1978) 451 FSupp 791 (ED Pa).

<sup>128</sup> See now: 29 USC §706(8)(C)(v).

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

<sup>130</sup> (1980) 629 F2d 1226 (7th Cir).

members of the protected class unless their addiction or prior use prevented them from meeting the otherwise qualified standard.<sup>131</sup>

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

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

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<sup>131</sup> The otherwise qualified standard is discussed in Chapter XII.

<sup>132</sup> *New York City Transport Authority v Beazer* (1979) 440 US 568.

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

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

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

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

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

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<sup>136</sup> 42 USC §§12114(a) and 12111(6); 29 CFR §1630.3(a).

<sup>137</sup> 42 USC §12114(b); 29 CFR §1630.3(b). See: Rand, 1988; Robbins, 1991.

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

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

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

<sup>141</sup> 42 USC §12114(c)(1)-(3); 29 CFR §1630.16(b)(1)-(3).

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

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

#### ***Contagious diseases and infections***

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

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

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

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<sup>142</sup> 42 USC §12114(c)(4); 29 CFR §1630.16(b)(4).

<sup>143</sup> 42 USC §12114(c)(5); 29 CFR §1630.16(b)(5)-(6).

<sup>144</sup> 42 USC §12114(e); 29 CFR §1630.16(c)(2).

<sup>145</sup> (1979) 440 US 568.

<sup>146</sup> 42 USC §706(8)(D).

<sup>147</sup> (1987) 107 SCt 1123, 480 US 273.

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

### ***HIV and AIDS***<sup>149</sup>

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

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<sup>148</sup> Subject to the food handling exception: 42 USC §12112(d); 29 CFR §1630.16(e).

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

<sup>150</sup> Feldblum, 1991c: 86.

<sup>151</sup> *Chalk v US District Court* (1988) 840 F2d 701 (9th Cir).

<sup>152</sup> US Senate, 1989: 22; US House of Representatives, 1990a: 52; US House of Representatives, 1990b: 28 n<sup>18</sup>.

<sup>153</sup> *Harris v Thigpen* (1991) 941 F2d 1495 (11th Cir).

<sup>154</sup> See: Kenney, 1988; Kussner, 1989; Smith, 1989; Roussos, 1990; Waters, 1990. For



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

### ***Physical appearance disabilities***

The boundaries of disability discrimination law have been frequently tested by its reaction to discrimination on the basis of physical appearance or characteristics, such as weight, height or disfigurement. Appearance discrimination has been defined by reference to the "immutable aspects of bodily and facial appearance", in contrast with such mutable aspects as hair length, cleanliness and orthodoxy of dress.<sup>165</sup> There have been a number of studies of the incidence of discrimination on the basis of physical attractiveness,<sup>166</sup> while there is historical evidence of local legislation in the US regulating the appearance in public of "unsightly" diseased, deformed or mutilated persons.<sup>167</sup> Because disability discrimination laws are often applied beyond the circumference of "traditional" disabilities, it would seem possible to extend the law to appearance discrimination (although there would be undoubted problems of proof and causation).

In the US, the definition of impairment expressly includes "cosmetic disfigurement", including "disfiguring scars".<sup>168</sup> In any event, if employers react adversely to facial or bodily appearance, it would be possible to argue that the object of such reaction has been treated or perceived as impaired, and the failure to be granted employment opportunity has interfered with a major life activity.<sup>169</sup> An employer might seek to justify such discrimination by reference to the "otherwise qualified" standard, and this might be easier to sustain in respect of certain occupations - such as modelling, acting, cabin crew, retail selling, etc - where it might be argued that appearance is an aspect of the job. However, in the context of sex discrimination, appearance has been rejected as an essential job function, at least in the context of employer and customer preference for female flight attendants.<sup>160</sup> There seems

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

<sup>165</sup> *Harvard Law Review*, 1987: 2035. Physical appearance discrimination might also affect persons with restricted or stunted growth or abnormal height: Miller, 1987.

<sup>166</sup> *Harvard Law Review*, 1987: 2037-42.

<sup>167</sup> Burgdorf and Burgdorf, 1975: 863.

<sup>168</sup> Canadian federal law also includes disfigurement as a disability: (Can) HRA s 25.

<sup>169</sup> *Harvard Law Review*, 1987: 2044-5.

<sup>160</sup> *Diaz v Pan American World Airways* (1971) 442 F2d 385 (5th Cir). It has been

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

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

### ***Smoking and passive smoking***

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

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

<sup>161</sup> (1991) 91 CLLC ¶17,017 (Sask) HRC.

<sup>162</sup> (1992) 92 CLLC ¶17,007 (Sask QB). Subsequently, the complaint was dismissed: (1992) 92 CLLC ¶17,026 (Sask HRC).

<sup>163</sup> (1987) 9 CHRR D/4611, 88 CLLC ¶17,004 (Ont) HRC.

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

<sup>165</sup> Feldblum, 1991b: 19.

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

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

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

## CONCLUDING REMARKS

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

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

<sup>168</sup> *Vickers v Veterans Administration* (1982) 549 FSupp 85 (DC Wash).

<sup>169</sup> 42 USC §12201(b).

<sup>170</sup> Jones, 1991b: 43.

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

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

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

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<sup>172</sup> 41 CFR §60-741.7.

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

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

be discussed next.

## CHAPTER XII: FITNESS FOR WORK AND QUALIFICATION FOR EMPLOYMENT

### INTRODUCTION

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

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

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

<sup>2</sup> 42 USC §12112(a); 29 CFR §1630.4. The ADA 1990 applies to "qualified" individuals with disabilities.

<sup>3</sup> Flaccus, 1986b: 299-303 and see Chapter VI above.

<sup>4</sup> (Can) HRA s 15(a).

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

<sup>6</sup> For example: (Cth) HR&EOCA 1986 s 3; (Cth) DDA 1992 s 15; (NSW) ADA 1977 ss

was not the plaintiff's disability but rather an inability to perform the work in question.<sup>7</sup>

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

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

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

<sup>8</sup> Larson, 1986; 755.

<sup>9</sup> See for example the cases cited by Larson (1986: 754-5): *Strathie v Department of Transportation* (1983) 716 F2d 227 (3rd Cir) (hearing aid user unable to pass employer's hearing requirements); *Longoria v Harris* (1982) 554 FSupp 102 (DC Tex) (leg amputee refused re-employment as bus driver); *Fitzgerald v Green Valley Area Education Agency* (1984) 589 FSupp 1130 (DC Iowa) (multiple-handicapped person refused employment as teaching aide).

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

undertake employment.<sup>11</sup>

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

As Flaccus comments:

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

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

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

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<sup>11</sup> Larson, 1986: 759. See, in particular: Larson, 1988.

<sup>12</sup> Flaccus, 1986b: 272.



## OTHERWISE QUALIFIED IN THE UNITED STATES<sup>13</sup>

### *Business necessity test*

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

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

The Court continued that:

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

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

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

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<sup>13</sup> See generally: Maffeo, 1990 and Snyder, 1993 (reviewing the position under the RA 1973 and the ADA 1990).

<sup>14</sup> (1971) 401 US 424 at 430-1.

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

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

<sup>17</sup> 41 CFR §§60-741.2 and 60-741.6(c).

<sup>18</sup> 42 USC §§12112(b)(6) and 12113(a).

necessity tests.<sup>19</sup>

***Essential functions approach***

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

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

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

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

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<sup>19</sup> 42 USC §12112(d)(4)(A).

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

<sup>21</sup> *Harvard Law Review*, 1984: 1011.

<sup>22</sup> *Southeastern Community College v Davis* (1979) 442 US 397.

<sup>23</sup> 29 CFR §1630.2(m).

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

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

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

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

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

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

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

<sup>27</sup> 29 CFR §1630.2(n)(2).

<sup>28</sup> 29 CFR Part 1630 Appendix.

<sup>29</sup> (1983) 707 F2d 473 (11th Cir).

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

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

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

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<sup>30</sup> *Dexler v Tisch* (1987) 660 FSupp 1418 (D Conn).

<sup>31</sup> 29 CFR §1630.2(n)(3).

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

<sup>33</sup> (1988) 857 F2d 1073 (6th Cir).

<sup>34</sup> Barlow and Hane, 1992; Phelan, 1992.

does not attempt to second guess the employer's choice of standards or criteria. Provided these standards and criteria are uniformly and actually imposed and required, a court will not question the reasoning behind them. However, if it is suspected that such standards and criteria were intentionally selected to exclude disabled persons from employment opportunities, then the employer might be called upon to offer a rational and non-discriminatory reason for their selection.<sup>36</sup> Nevertheless, despite the best efforts of the EEOC to produce a litmus test for essential job functions:

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

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

### ***BONA FIDE OCCUPATIONAL REQUIREMENT IN CANADA***

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

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

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<sup>36</sup> 29 CFR Part 1630 Appendix.

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

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

<sup>38</sup> (Can) HRA s 15(a). See generally: Barrett, 1989.

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

duties of the job involved can be performed safely.<sup>40</sup>

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

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

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<sup>40</sup> 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.

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

<sup>42</sup> (Sask) HRC Reg s 1(b)(vi).

<sup>43</sup> (1982) 82 CLLC ¶17,012 (Can HRT).

<sup>44</sup> (1991) 91 CLLC ¶17,030 (Can HRT).

<sup>45</sup> (1984) 84 CLLC ¶17,006 (Can HRT).

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

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

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

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<sup>47</sup> (1989) 89 CLLC ¶17,018 (Can HRT).

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

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

<sup>50</sup> (1984) 84 CLLC ¶17,008 (Ont HRC).

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

### QUALIFICATION FOR EMPLOYMENT IN AUSTRALIA

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

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

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

<sup>53</sup> (NSW) ADA 1977 ss 49I(1) and 49X(1); (WA) EOA 1984 s 66Q(1).

<sup>54</sup> (NSW) ADA 1977 ss 49I(2) and 49X(2); (WA) EOA 1984 s 66Q(2).

<sup>55</sup> (SA) EOA 1984 s 71(2).

<sup>56</sup> (Vic) EOA 1984 s 21(4)(g). For a criticism of this aspect of the Victorian legislation,



training, qualifications and relevant experience (and, where appropriate, employment performance) must be taken into account.<sup>67</sup>

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

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

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

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see: Johnstone, 1989.

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

<sup>68</sup> (1986) EOC 92-162 (NSW EOT); (1986) EOC 92-183 (NSW SC); (1988) 14 NSWLR 252 (NSW CA).

<sup>69</sup> Discussed in Chapter XIV below.

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

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

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

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

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

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

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

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

<sup>61</sup> Astor, 1990: 122.

<sup>62</sup> Thornton, 1990: 113.

<sup>63</sup> Thornton, 1990: 114.

<sup>64</sup> Astor, 1990: 122.

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

## **FITNESS FOR WORK AND FUTURE SAFETY RISK**

### ***Reconciling disability discrimination with health and safety***

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

This is undoubtedly one area where the potentially conflicting objectives of disability discrimination legislation and health and safety laws need to be reconciled. At common law, employers owe a duty of reasonable care to provide for the occupational health and safety of their employees.<sup>66</sup> In exercising that duty of care towards a disabled employee, the employer must take into account the greater risk and degree of injury faced by employees with particular disabilities. This may lead to the employer needing to take additional steps or precautions to ensure the safety of disabled workers than might otherwise apply to their able-bodied colleagues. For example, the need for enhanced training or closer supervision of some disabled employees might be called for. This analysis is underlined by the Health and Safety at Work etc Act 1974 which indicates that the employer has a duty to the work-force to provide safe fellow employees, and a duty to third parties not to expose their health and safety to risk through the activities of the employer's business.

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<sup>66</sup> See the fuller discussion of this issue in Chapter IV above.

### ***Safety risk and occupational qualification in the United States***

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

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

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

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

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<sup>66</sup> 42 USC §§12113(b) and 12111(3). See: Frierson, 1992a.

<sup>67</sup> (1987) 480 US 273.

<sup>68</sup> (1987) 480 US 273 at 288.

<sup>69</sup> 29 CFR §§1630.15(b)(2) and 1630.2(r).

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

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

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<sup>70</sup> 29 CFR Part 1630 Appendix.

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

<sup>72</sup> See: Perras and Hunter, 1986.

<sup>73</sup> (1983) 716 F2d 1227 (3rd Cir).

<sup>74</sup> (1983) 704 F2d 1402 (5th Cir).

<sup>75</sup> (1985) 767 F2d 1416 (9th Cir). See Berns, 1986.

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

person could be excluded from the workplace because many disabilities are capable of being characterised as presenting an increased risk of injury.<sup>77</sup>

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

### ***Safety risk and occupational qualification in Canada***

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

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

<sup>78</sup> 29 CFR Part 1630 Appendix, subject to reasonable accommodation.

<sup>79</sup> See: Neal, 1992.

<sup>80</sup> *Bentivegna v US Department of Labor* (1982) 694 F2d 610 (9th Cir).

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

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

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

<sup>82</sup> *Erikson v Canadian Pacific Express & Transport Ltd* (1987) 87 CLLC ¶17,005 (Can HRT).

<sup>83</sup> *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).

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

<sup>85</sup> (1986) 86 CLLC ¶17,017 (Can HRT).

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

<sup>87</sup> (1985) 85 CLLC ¶17,019 (Can HRT).

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

#### ***Safety risk and occupational qualification in Australia***

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

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<sup>88</sup> (1989) 89 CLLC ¶17,021 (Can HRT).

<sup>89</sup> (1987) 87 CLLC ¶17,005 (Can HRC).

<sup>90</sup> (1985) 85 CLLC ¶17,024 (Can HRT).

<sup>91</sup> (1987) 88 CLLC ¶17,002 (Can HRT).

<sup>92</sup> (Vic) EOA 1984 s 21(4)(h).

<sup>93</sup> (1987) AILR ¶285 (Vic EOB).



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

## CONCLUDING REMARKS

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

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

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<sup>94</sup> *Urie v Cadbury Schweppes P/L* (1987) AILR ¶283 (Vic EOB).

<sup>95</sup> Law Reform Commission of Victoria, 1989 and 1990a.

<sup>96</sup> (NSW) ADA 1977 s 71(2).

<sup>97</sup> Morrell, 1990: 10 and Table 12.

<sup>98</sup> In the sense of whether loss of a particular ability would result in inability to carry on in the job without substantial assistance.

<sup>99</sup> Morrell, 1990: 9-10.

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

Source: Adapted from Morrell, 1990: Table 12

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

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

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

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

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

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

### INTRODUCTION

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

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

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

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

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

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<sup>1</sup> Astor, 1988: 79-80.

<sup>2</sup> West, 1991b: 8.

<sup>3</sup> Astor, 1988: 80.

<sup>4</sup> See the EEOC regulations under the (US) ADA 1990: 29 CFR §1630.2(o).

individualized basis.<sup>5</sup>

Reasonable accommodation has also been portrayed as:

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

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

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

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<sup>5</sup> US Commission on Civil Rights, 1983: 139. See also: US Department of Labor, 1982.

<sup>6</sup> Dolatly, 1993: 524.

<sup>7</sup> Hearne, 1991: 124.

<sup>8</sup> 29 CFR §1605.1(a)(2) (1966 edition).

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

<sup>10</sup> 42 USC §2000e(j).

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

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

#### LEGAL FRAMEWORK OF REASONABLE ACCOMMODATION

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

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

<sup>13</sup> For an account of this process, see: Scotch, 1984 and Percy, 1989.

<sup>14</sup> See Chapter VI above and the discussion which follows below.

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

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

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

### ***United States***

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

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

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

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

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

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

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

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

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

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

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

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<sup>21</sup> (1979) 442 US 397 at 405 (footnote omitted).

<sup>22</sup> (1979) 442 US 397 at 406 (my emphasis).

<sup>23</sup> (1979) 442 US 397 at 410.

<sup>24</sup> See, for example: Egan, 1979; Butler, 1980; Forsyth, 1981.



handicapped persons" and excluding any mandate of affirmative action.<sup>26</sup> The decision is probably correct on its facts, but its *ratio decidendi* narrowed the scope of reasonable accommodation by regarding it as some form of "affirmative action" (and, therefore, suspect as preferential treatment) rather than as properly part of the non-discrimination standard. The confusion in the mind of the court itself is evident in the following passage:

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

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

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

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<sup>26</sup> (1979) 442 US 397 at 410-11.

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

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

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

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

was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign neglect...

In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed

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

<sup>29</sup> (1985) 469 US 287 at 292.

to proscribe only conduct fuelled by a discriminatory intent.<sup>30</sup>

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

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

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

Thus:

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

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

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

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<sup>30</sup> (1985) 469 US 287 at 295 and 296-7 (footnoted omitted).

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

<sup>32</sup> (1985) 469 US 287 at 300. See the italicised portion of the quotation in the text to footnote 26 above.

<sup>33</sup> (1985) 469 US 287 at 301.

<sup>34</sup> (1985) 772 F2d 759 (11th Cir); (1987) 480 US 273. The first instance decision is unreported.

the district court, which ruled that infection with a contagious disease did not bring her within the definition of the protected class and, even if it did, she was no longer "qualified" to teach because of her condition. The appellate court rejected the first finding and remitted the case for a rehearing as to whether the plaintiff was "otherwise qualified", with or without reasonable accommodation. On further appeal by the school board, however, the Supreme Court held by a majority that a person with a record of contagious disease was covered by section 504 and that tuberculosis was a protected disability.<sup>36</sup> The case was remanded for further findings as to whether the risk of infection, if any, rendered the plaintiff not "otherwise qualified" as a teacher. Brennan J, speaking for the majority, noted that:

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

The rehabilitation of reasonable accommodation in the US was complete.

### *Canada*<sup>37</sup>

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

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<sup>36</sup> The minority held that the dismissal was by reason of contagiousness rather than impairment and that contagiousness in itself was not a disability.

<sup>36</sup> (1987) 480 US 273 at 289 n<sup>19</sup>.

<sup>37</sup> See generally: Ratushny, 1986; Barrett, 1989; Taras, 1992.

<sup>38</sup> (Can) HRA s 16(1).

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

<sup>40</sup> *Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 (Can) SC.

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

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

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

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

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<sup>41</sup> Canadian Human Rights Commission, 1986: 4. See also: Berlin, 1985.

<sup>42</sup> See, for example: Barrett, 1989: 167-9, relying upon the earlier arguments of Gittler, 1978: 979.

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

<sup>44</sup> McKenna, 1992: 330.

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

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

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

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

### **Australia**

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

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<sup>47</sup> McKenna, 1992: 336-7.

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

<sup>49</sup> McKenna, 1992: 338.

<sup>50</sup> The role of employment equity legislation is discussed in Chapter XVI below.

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

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

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

with respect to the work required to be performed in the course of the employment or engagement concerned, it appeared to the employer..., on such grounds as, having regard to the circumstances of the case, it was reasonable to rely, that the... handicapped person, because of his... impairment- (a) would be unable to carry out that work; or (b) would, in order to carry out that work, require services or facilities which are not required by persons who are not... handicapped persons and which, having regard to the circumstances of the case, cannot reasonably be provided or accommodated by the employer...<sup>62</sup>

In Hunt J's view, this entitled an employer to reject an application if it appeared that the applicant's physical impairment would result in an inability to carry out the work or would require the provision of special facilities which would be unreasonable in the circumstances. It was for the employer to decide whether services or facilities could be reasonably provided. Section 49I was not a charter for affirmative action.<sup>63</sup>

Astor comments that the decision of Hunt J in *Jamal* created "significant problems for the employment prospects of people with disabilities" and demonstrated "how a well intentioned and much needed piece of legislation can rapidly become almost useless to help those it was designed to protect".<sup>64</sup> The result of *Jamal* would be to require disabled applicants for employment to demonstrate at the first hurdle that they are able to perform *all* the elements of the job in comparison with their able-bodied competitors. If they cannot perform all the elements of the position *as described by the employer*, or can do so only by adjustments to the manner or extent of performance, then the employer will not have treated them less favourably than in similar circumstances non-disabled persons would have been treated. They would have been treated differently because their inability to do the work without

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<sup>62</sup> (NSW) ADA 1977 ss 49I(1) and 49X(1).

<sup>63</sup> Thus Hunt J falls into the same trap as the US Supreme Court in *Davis* by assuming that reasonable accommodation is some form of preferential treatment.

<sup>64</sup> Astor, 1988: 79.

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

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

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

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

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<sup>55</sup> (1985) 469 US 287, discussed above.

<sup>56</sup> NSW ADB, 1979 and 1981.



employment problems arising from the ground of impairment... Strict literalism will always operate to legitimate the employer's decision and thereby retain the status quo.<sup>67</sup>

Waters observes that the net result is that the legislation:

may be of limited assistance to individuals whose handicaps have some moderate impact on their work capacities, but it is unlikely to be of much assistance to the more significantly impaired.<sup>68</sup>

He points out that *Jamal* is likely to influence the course of reasonable accommodation in those Australian jurisdictions, such as Western Australia,<sup>69</sup> whose comparable statutes are modelled upon the NSW template. Waters is more optimistic that the more objective language of the Victoria and South Australia legislation will produce a more flexible approach to reasonable accommodation in line with developments in the US.<sup>60</sup> However, the Victorian legislation, like that of NSW and Western Australia, fails to express reasonable accommodation as a positive obligation, but rather incorporates reference to it as part of the excusatory language of the exception clauses where discrimination is *permitted*; a flaw that is carried forward into recent Commonwealth legislation.<sup>61</sup> This is hardly calculated to raise reasonable accommodation as a priority in the minds of employers.<sup>62</sup> The error of drafting is perpetuated solely because disability is treated as merely one of a number of prohibited grounds of discrimination in a statutory context where the paradigm is one of equal treatment. The concept of reasonable accommodation of disabled persons fits uneasily into such a model.<sup>63</sup>

#### LIMITS OF REASONABLE ACCOMMODATION

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

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<sup>67</sup> Thornton, 1990: 114.

<sup>68</sup> Waters, 1990: 404.

<sup>69</sup> (WA) EOA 1984 s 66Q which is based on s 49I of the NSW Act.

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

<sup>61</sup> (Cth) DDA 1992 15(4).

<sup>62</sup> This criticism of weak draftsmanship is echoed by Johnstone, 1989: 729.

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

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

### ***Undue hardship defence***

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

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

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

<sup>65</sup> 42 USC §12111(10).

<sup>66</sup> 29 CFR §1630.2(p) Appendix. See also: Shaller and Rosen (1991: 419).

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

#### ***A costs ceiling or efficiency defence?***

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

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

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

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

<sup>68</sup> US House of Representatives, 1990b: 41. See Mayerson, 1991b: 519.

<sup>69</sup> 29 CFR §1630.2(p) Appendix.

<sup>70</sup> Dolatly, 1993: 537.

<sup>71</sup> Feldblum, 1991c: 95.

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

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

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<sup>72</sup> Thornburgh, 1991.

<sup>73</sup> Job Accommodation Network, 1987; Du Pont and Company, 1990.

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

<sup>75</sup> Jones, 1991a: 484; Mayerson, 1991b: 518.

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

<sup>77</sup> 29 CFR §1630.2(p)(2)(i) and Appendix.

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

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

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

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

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<sup>78</sup> Collignon, 1986: 206 (emphasis in the original).

<sup>79</sup> Collignon, 1986: 207.

<sup>80</sup> See Schaffer, 1991.

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

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

### REASONABLE ACCOMMODATION IN ACTION

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

#### *Examples of reasonable accommodation*

In the US legislation, reasonable accommodation includes:

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

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

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

<sup>83</sup> Dolatly, 1993: 544.

<sup>84</sup> 42 USC §12111(9). See further: Cooper, 1991; Weirich, 1991.

<sup>85</sup> 29 CFR §1630.2(o)(i).

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

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

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

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<sup>86</sup> 29 CFR §1630.2(o)(ii).

<sup>87</sup> 29 CFR §1630.2(o)(iii).

<sup>88</sup> 20 CFR §§1630.2(o)(2) Appendix and 1630.2(n) Appendix.

<sup>89</sup> (1979) 595 F2d 533 (10th Cir).

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

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

<sup>92</sup> 45 CFR §84.3(k)(1).

<sup>93</sup> (1987) 822 F2d 465 (4th Cir).

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

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

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<sup>94</sup> (1985) 623 FSupp 1181 (D Md).

<sup>95</sup> *Alderson v Postmaster General* (1984) 598 FSupp 49 (WD Okla).

<sup>96</sup> (1987) 480 US 283.

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

<sup>98</sup> Mayerson, 1991b: 515.

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



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

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

#### ***Implementing reasonable accommodation***

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

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

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<sup>100</sup> 29 CFR §1630.2(o) Appendix.

<sup>101</sup> 29 CFR §1630.5.

<sup>102</sup> Jones, 1991a: 483; Mayerson, 1991b: 510.

<sup>103</sup> 29 CFR §1630.2(o) and Appendix.

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

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

Feldblum argues that:

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

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

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

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

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

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<sup>105</sup> West, 1991b: 8-9.

<sup>106</sup> Feldblum, 1991c: 93-4.

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

<sup>108</sup> 29 CFR §1630.9 Appendix.

<sup>109</sup> Mayerson, 1991b: 516.

<sup>110</sup> 29 CFR §1630.2(o) Appendix.

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

***Extent and experience of reasonable accommodation***

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

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

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

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<sup>111</sup> 29 CFR §1630.9. An employer might request documentary evidence of the need for the accommodation.

<sup>112</sup> Frierson, 1992b.

<sup>113</sup> Nagi, 1975.

<sup>114</sup> LaPlante, 1991: 71.

<sup>115</sup> LaPlante, 1991: 71.

<sup>116</sup> US Department of Labor, 1982.

<sup>117</sup> Collignon, 1986: 217.

<sup>118</sup> Premus and Carnes, 1982.

American employers' fears that reasonable accommodation requirements would entail frequent and costly actions is not borne out by the evidence.<sup>118</sup> In one US study of the placement of severely disabled persons in federal government employment, less than 16 per cent of such persons required accommodation and, in the main, such accommodations as were required were incidental.<sup>120</sup> This finding was also corroborated by an investigation into compliance with section 504 of the RA 1973 by public agencies.<sup>121</sup> A further large scale study was undertaken of private sector employers contracting with the US federal government and, therefore, subject to section 503 of the RA 1973.<sup>122</sup> About 55 per cent of respondent employers had experienced the need to make reasonable accommodation for disabled workers, 17 per cent employed disabled workers without accommodation, and 28 per cent had no record of employing disabled persons. As to costliness, the consistent finding of detailed surveys of employers has been that expensive job modification or accommodation is rarely needed by disabled workers.<sup>123</sup> In one survey, just over half of reported accommodations cost nothing, a further fifth cost less than \$100 (at 1982 prices), while four-fifths of accommodations cost less than \$500.<sup>124</sup> A 1987 study found that 50 per cent of accommodations cost less than \$50 and 69 per cent cost less than \$500.<sup>125</sup>

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

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<sup>118</sup> See generally: Combs and Omvig, 1986.

<sup>120</sup> O'Neill, 1976.

<sup>121</sup> Johnson and Associates, 1980.

<sup>122</sup> US Department of Labor, 1982.

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

<sup>124</sup> US Department of Labor, 1982: Vol 1, 29; Collignon, 1986: Table 8.1.

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

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

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

### **BRITISH EMPLOYERS AND REASONABLE ACCOMMODATION**

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

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<sup>126</sup> US Department of Labor, 1982: Vol 1, 56-57 and 66; Collignon, 1986: 217-27.

<sup>127</sup> Collignon, 1986: 228-9.

<sup>128</sup> Collignon, 1986: 214.

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

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

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

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

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<sup>129</sup> Morrell, 1990: Table 22.

<sup>130</sup> Morrell, 1990: Table 23.

<sup>131</sup> Prescott-Clarke, 1990: Tables 12.1 and 12.2.

<sup>132</sup> Prescott-Clarke, 1990: Tables 12.3 and 12.4.

<sup>133</sup> Prescott-Clarke, 1990: 139 (emphasis in original).

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

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

Table XV: Specific aids and equipment needed

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

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

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

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<sup>134</sup> *Employment Gazette* Vol 101 N° 8 at 434 (September 1993).

<sup>135</sup> Martin, White and Meltzer, 1989: 84.



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

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

Table XVI: Special access and building needs

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

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

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

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

### **CONCLUDING REMARKS**

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

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

## CHAPTER XIV: DISABILITY, EMPLOYMENT QUOTAS AND PREFERENTIAL TREATMENT

### INTRODUCTION

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

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

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

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

<sup>3</sup> Such as sex, race, age or disability.

### *Quotas, preferences and discrimination theory*

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

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

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

<sup>5</sup> Pitt, 1992: 284.

<sup>6</sup> Pitt, 1992: 285.

<sup>7</sup> Pitt, 1992: 286. Of course, Pitt did not have disabled people in mind in the context of this quotation.

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

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

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

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

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

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

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

**Table XIX: Numbers of registered disabled persons**

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

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

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

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

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

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<sup>75</sup> Martin, White and Meltzer, 1989: Table 7.33.

<sup>76</sup> Prescott-Clarke, 1990: 74 and Table 8.1.

<sup>77</sup> Prescott-Clarke, 1990: 74.

<sup>78</sup> Prescott-Clarke, 1990: 79.

<sup>79</sup> MSC, 1979: para 58; MSC, 1981: para 4.4; MSC, 1985: para 2:4.

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

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

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

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

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

<sup>82</sup> Prescott-Clarke, 1990: 74 and Table 8.1.

<sup>83</sup> Prescott-Clarke, 1990: 75 and Table 8.2.

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

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

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

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

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<sup>84</sup> Martin, White and Meltzer, 1989: Table 7.36.

<sup>85</sup> Prescott-Clarke, 1990: 75 and Table 8.2.

<sup>86</sup> Prescott-Clarke, 1990: 75-76 and Table 8.3.

<sup>87</sup> Prescott-Clarke, 1990: Table 8.4.

<sup>88</sup> Prescott-Clarke, 1990: 78.

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

<sup>90</sup> DE, 1973: para 55 and Table 4.

### ***Enforcement of the quota***

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

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

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

<sup>92</sup> MSC, 1979: para 33; MSC, 1985: Table 3.

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

<sup>94</sup> MSC, 1985: para 2:11.

*existing* employees to register rather than leading to new engagements.<sup>96</sup> In 1975, for example, a campaign of strict enforcement of the quota scheme was conducted as a 6 month experiment in 6 towns. This resulted in an increased number of applications from disabled persons to be placed upon the register, some increases in the number of applications for exemption permits, and a small increase in the number of notified vacancies for disabled workers.<sup>96</sup> Two prosecutions also resulted, producing fines of £25 and £200 respectively. However, there was no noticeable change in the employment position of disabled persons as a consequence. Zealous enforcement of the law is thus seen to be counterproductive to the coterminous strategies for placement of disabled persons into employment. Emphasis is upon education, advice and encouragement rather than prosecution. The existence of the quota scheme appears to have had little impact upon the outlook or actions of employers who are below quota. Where employers are reminded that they are below quotas, it is often the case that their first response will be to persuade existing employees with disabilities to register under the 1944 Act.<sup>97</sup> The majority of employers in compliance with the scheme comply primarily out of a sense of social responsibility.<sup>98</sup>

It is highly unlikely that the approach to enforcing the disabled workers' quota will change in the near future. In 1992, judicial review proceedings were brought by a disabled individual against the Department of Employment, challenging the Government's apparent policy of not enforcing the 1944 legislation.<sup>99</sup> The plaintiff, a registered disabled person with multiple sclerosis, was concerned that the Department had failed to prosecute her former employer following her dismissal as a secretary "without reasonable cause" contrary to section 9 of the Act. The Department's defence was that it had no such policy of non-enforcement, but that it attempted to resolve cases of statutory breach by negotiation and advice before consideration would be given to prosecution. In practice, however, the prosecuting authorities are unlikely to recommend a decision to prosecute unless there is a high probability of success on the evidence. It is also suggested that prosecutions may not be in the interests of disabled persons and would thus not be in keeping with public policy generally. The case

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<sup>96</sup> NAO, 1987: para 5.11.

<sup>96</sup> MSC, 1979: para 34; MSC, 1981: para 4.9. The exercise is explained in more detail by Mr B Swindell (Head of Resettlement, MSC) in evidence to a parliamentary committee: HCEC, 1981: Q2.

<sup>97</sup> DE, 1973: para 54.

<sup>98</sup> MSC, 1981: para 4.6.

<sup>99</sup> *R v Secretary of State for Employment, ex parte Pirie* reported in brief in *Equal Opportunities Review* N° 45 (September/October 1992) at 9-10.

was withdrawn before the matter came to trial.

### ***Abuse of exemption permits***

While the proportion of employers fulfilling quota has been in free fall, the number of employers below quota but holding permits has risen inexorably. Table XXI shows that just over half of all employers subject to the scheme have been issued with exemption permits. Bulk permits now represent 98 per cent of all permits issued.<sup>100</sup> The issuing of bulk permits is designed to reduce the amount of time spent upon routine administration of the scheme. Consequently, the DE admits that it is difficult to ensure that the issue of a permit is justified by an employer's individual circumstances.<sup>101</sup> The Department suspects that many below-quota employers recruit non-disabled persons without first obtaining a permit and that many employers issued with bulk permits do not notify vacancies as they are supposed to do.<sup>102</sup> In view of the fact that the DE cannot withhold permission for an employer to recruit an able-bodied worker unless it is satisfied that a suitable registered disabled person is available for the position, and that the employer's view of suitability is likely to be decisive, the issuing of permits is often a formality.<sup>103</sup> There is also evidence that:

the process of permit application has become a matter of routine for many below quota firms - a twice yearly exercise which has only a minimal impact on their policies and practices.<sup>104</sup>

Research carried out in 1978 showed that many employers regard the provision of permits as a right rather than a discretionary concession, enhancing their view that permits provided automatic exemption from the law.<sup>105</sup>

### **REFORM OF THE QUOTA SCHEME**

Fifty-six per cent of disabled persons strongly favoured special legislation to help disabled people find and keep work and a further 38 per cent favoured such laws.<sup>106</sup> About 9 in

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<sup>100</sup> NAO, 1987: 20. There are no centralised records of the number of permits issued, but the number of employers to whom permits are issued is known. Between 1987 and 1991, for example, about 18,000 employers were issued with permits each year: HC Deb Vol 214 cols 706-8.

<sup>101</sup> DE, 1973: para 54.

<sup>102</sup> DE, 1973: para 54.

<sup>103</sup> DE, 1973: para 56; MSC, 1981: para 4.8.

<sup>104</sup> MSC, 1979: para 32.

<sup>105</sup> MSC, 1981: para 4.6.

<sup>106</sup> RSGB, 1978: Table 7.1.

| Year | Employers subject to quota but not complying<br>(figures in brackets = % of all employers subject to quota) |                             |
|------|---|-----------------------------|
|      | Issued with permits (%)   | Not issued with permits (%) |
| 1965 | 59.6 (27.9)   | 40.4 (18.9)                 |
| 1970 | 60.9 (34.9)   | 39.1 (22.4)                 |
| 1975 | 66.8 (40.7)   | 33.2 (20.2)                 |
| 1980 | 71.6 (46.5)   | 28.4 (18.4)                 |
| 1981 | 71.7 (47.6)   | 28.3 (18.8)                 |
| 1982 | 67.9 (46.3)   | 32.1 (21.9)                 |
| 1983 | 70.6 (48.4)   | 29.4 (20.2)                 |
| 1984 | 71.6 (49.9)   | 28.4 (19.8)                 |
| 1985 | N/A   | N/A                         |
| 1986 | 75.8 (55.5)   | 24.2 (17.7)                 |
| 1987 | 75.1 (56.1)   | 24.9 (18.6)                 |
| 1988 | 74.5 (56.7)   | 25.5 (19.4)                 |
| 1989 | 74.0 (57.1)   | 26.0 (20.1)                 |
| 1990 | 74.4 (58.2)   | 25.6 (20.0)                 |
| 1991 | 69.2 (55.1)   | 30.8 (24.5)                 |
| 1992 | N/A   | N/A                         |

Source: Extrapolated from MSC, 1979: Table 2;  
 HC Deb Vol 212 Col 119-20 (19 October 1992)

Table XXI: The issue of permits and quota compliance



every 10 disabled persons favoured or strongly favoured quota legislation.<sup>107</sup> On the other side of the fence, there is strong evidence that employers would favour changes being made to the quota scheme. Research in 1979 indicated that employers were generally happy with the quota scheme. They believed that special statutory protection was essential, but opposed strict enforcement or extra legislative obligations.<sup>108</sup> However, just over half the employers interviewed in the IFF Research survey thought that the scheme should be changed, with this opinion being the strongest held among large employers.<sup>109</sup> Less than one-third of employers would vote for the *status quo*. At least half of the employers interviewed thought that the quota scheme could be usefully amended by increasing awareness of the scheme, having different levels of quota for different employers, including all disabled persons within its scope, or providing incentives to disabled people to register. There was little support for making registration compulsory. Less than one-third of employers favoured changing the 3 per cent level, altering the definition of disability, making different permit arrangements, or altering enforcement procedures.<sup>110</sup>

It may be that any reform of the quota will be doomed from the start, as any successor scheme would be tainted by the failure of its predecessor.<sup>111</sup> Nevertheless, the arguments for retaining a statutory system imposing obligations upon employers were summarised by the MSC in its 1979 review of the quota scheme:

[1] Clearly expresses society's concern for the protected group; [2] Can set minimum standards which, if achieved, will offer some real protection to the group; [3] Can keep the issue before employers and the public by requiring procedures, submission of records or accountability to an enforcing authority; [4] Can be used, if appropriate, to force people to take action.<sup>112</sup>

The Commission considered five possible arguments for doing away with statutory protection.<sup>113</sup> First, the minimal impact of existing statutory measures suggests that non-statutory methods might achieve equally adequate protection for disabled workers. Second,

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<sup>107</sup> RSGB, 1978: Tables 8.1.1. and 8.2.1. Sixty-five per cent favoured the use of criminal sanctions against employers who did not comply with their quota obligations, but about 80 per cent opposed imprisonment (as opposed to a fine) as the appropriate sanction: Table 8.3.1 and 8.4.1.

<sup>108</sup> MSC, 1979: para 68.

<sup>109</sup> Morrell, 1990: Table 10.

<sup>110</sup> Morrell, 1990: Table 3.

<sup>111</sup> MSC, 1979: para 73.4

<sup>112</sup> MSC, 1979: para 65 (sub-paragraph numbering in the original omitted).

<sup>113</sup> MSC, 1979: para 67.

the bureaucracy associated with a flawed scheme diverts resources and staff time that might be better employed in helping persons with disabilities in other ways. Third, a statutory scheme that lacks credibility can be counter-productive. In order to make the scheme work, more rigorous enforcement would be necessary. This might antagonise employers and undermine efforts to encourage disabled employment opportunities through voluntary action. Fourth, the decline in registration might suggest that some disabled persons no longer require the protection of a statutory scheme. Fifth, the statutory scheme singles out disabled persons for special treatment. This conflicts with the merit principle and the right of disabled persons to full integration. To these arguments can be added a sixth objection. The quota scheme is an unambitious way of helping disabled workers, for it extends its influence only marginally beyond recruitment and says little about the quality of disabled employment opportunities once in work.<sup>114</sup> However, before we examine the possible abolition of the quota legislation, we shall first assess various proposals for its root and branch reform.

#### ***Disabled persons covered by the quota***

Whether the quota scheme is retained and amended or whether it is replaced, for example, by anti-discrimination legislation, some means of identifying disabled persons for statutory purposes will need to be devised.<sup>115</sup> One possibility would be to devise a multi-purpose system of identification, so that recognition as disabled for one purpose would count as recognition for all purposes. So, for example, receipt of certain social security benefits or assistance from social welfare services would also designate the individual as being a disabled person for the purpose of employment law. Another possibility would be to insist upon registration under the 1944 Act as a precondition to access to other rehabilitation, training and employment services. A third suggestion would be to provide inducements to register. Giving disabled persons incentives to register has been considered and rejected on more than one occasion.<sup>116</sup> In its 1981 review of the quota scheme, the MSC considered whether disabled people might be given incentives to register in the form of tax relief.<sup>117</sup> The Commission doubted whether any additional incentives would overcome disabled persons' existing reluctance to register and feared that it might simply lead to disabled *employees* moving onto the register, with a consequent artificial boost to quota compliance. Incentives based upon tax relief were also seen as costly options, as well as placing disabled people in

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<sup>114</sup> MSC, 1981: para 8.19.

<sup>115</sup> MSC, 1979: para 60; MSC, 1979: para 73.1.

<sup>116</sup> See, for example: MSC, 1985: 28.

<sup>117</sup> MSC, 1981: para 8.2.

a preferential position *vis-à-vis* other disadvantaged individuals.<sup>118</sup>

Allowing employers to count *unregistered* disabled persons towards quota compliance would seem superficially to be a more attractive option. It might be regarded as more equitable, might encourage a greater willingness to comply with the law, could improve the chances of pursuing employers in breach, and would result in a more easily administered permit system.<sup>119</sup> This solution, however, also brings its own difficulties. First, it would be difficult to identify those employees who would count as disabled for this purpose. Registration resolves that problem. It might be that this reform would still require some degree of certification (perhaps by DROs or their successors in the PACTs, employers themselves, occupational medical officers or general practitioners), but this presents problems for uniformity in treatment.<sup>120</sup> Second, why should employees who have not voluntarily chosen to identify themselves as disabled be labelled in this way, perhaps against their will and in contravention of medical confidentiality? Third, such a reform hardly improves the employment position of disabled people, but merely makes life easier for employers (although identifying disabled employees would create new problems for employers too). Fourth, logically an increase in the percentage of the labour force that is recognised as disabled should lead to an increase in the level of the quota; but to what level and with what further consequences for attainment and compliance? This latter difficulty, however, might be illusory now that there are better statistics on the numbers of disabled persons who are or seek to be economically active.

Despite these problems, survey evidence suggests that nearly 6 out of 10 disabled people would favour the inclusion of unregistered disabled persons in the quota count, and the large majority of these held to their opinion even when it was pointed out that this would mean that employers would need to know who was disabled.<sup>121</sup> Less than half the respondents could suggest alternatives to the voluntary registration system. Of these, 51 per cent suggested that disabled individuals could be identified from medical records, 13 per cent through hospitals, 11 per cent through social welfare services and 13 per cent through other

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<sup>118</sup> MSC, 1981: para 8.3.

<sup>119</sup> DE, 1973: para 68; MSC, 1979: para 77.1; MSC, 1981: para 8.10.

<sup>120</sup> MSC, 1979: para 77.1(i). The MSC reported that few employers spontaneously suggested extending the scheme to unregistered disabled persons and that most could see difficulties in the identification process. However, a small majority of disabled persons in 1979 supported this reform.

<sup>121</sup> RSGB, 1978: Tables 9.1.1 and 9.1.2.

public agencies holding such information.<sup>122</sup> These suggestions do not appear very appealing. In any case, and by whatever means, the inclusion of unregistered disabled people within the scope of the quota system would obviously create problems for enforcement and verification. Employers suggest that these problems could be overcome by keeping records for inspection, instituting check-ups on employers or requiring medical evidence of disability.<sup>123</sup> Employers were confident that they could correctly identify those members of their workforces who would be counted for this purpose, although there was recognition that some workers might conceal disability or that disabilities that did not affect working ability might be overlooked.

### ***Stricter enforcement***

Could the statutory scheme be more strictly enforced? A number of stricter enforcement strategies might be contemplated, including tighter permit procedures, more rigorous inspection, and prosecution of employers below quota.<sup>124</sup> It can be argued that stricter enforcement of the quota scheme would lead to more registered disabled persons obtaining a foothold in employment. In turn, this would encourage more disabled people to register and thus employers would find it easier to fulfil the quota obligation. A further consequence might be that more employers would be encouraged to attempt to meet the quota and this would create a virtuous circle of registration, employment and quota compliance.<sup>125</sup>

On the other hand, a number of objections have been raised to stricter enforcement.<sup>126</sup> First, it would be a futile exercise where the quota is not mathematically achievable because of the insufficient numbers of registered disabled persons. Second, it has been suggested that a lack of skills and experience among unemployed disabled persons means that there is a mismatch between disabled workers in the labour market and available vacancies.<sup>127</sup> Third, stricter enforcement would ensure that the scheme is compulsory, but this would be viewed as incompatible with a system of registration that is voluntary. Fourth, stricter enforcement might only lead to disabled employees being cajoled by employers into registration and this could undermine the employment security and prospects of unregistered disabled persons,

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<sup>122</sup> RSGB, 1978: Tables 9.2.1.

<sup>123</sup> Morrell, 1990: 7.

<sup>124</sup> DE, 1973: para 62.

<sup>125</sup> MSC, 1985: para 3:4.

<sup>126</sup> DE, 1973: para 62; MSC, 1981: para 4.8. See also: MSC, 1979: para 73.2.

<sup>127</sup> MSC, 1985: paras 2:6 and 2:7.

whether employed or unemployed. Fifth, it follows that stricter enforcement of the scheme would not necessarily lead to any improvement in the employment position of disabled persons. Sixth, given the numbers of *registrable* disabled persons already in employment, it is probable that some employers are already in compliance with the spirit of the scheme and yet could be penalised by stricter enforcement of it. Seventh, stricter enforcement might overlook the need to resettle disabled workers in the right job and lead to unsuitable workers being forced upon unwilling employers. Eighth, stricter enforcement would challenge the goodwill of employers and thus represent a diminishing of disabled employment prospects. Ninth, there are opportunity costs in stricter enforcement. Stricter enforcement would be bureaucratic and would lead to a diversion of administrative resources in a way that might not prove to be the best use of time and staff.

### ***Reduced quota***

Reduction of the quota has been frequently advocated, especially in tandem with stricter enforcement of the scheme.<sup>128</sup> If a more realistic target were to be set, compliance would be more easily achieved and enforcement strategies would be more readily accepted by employers. The level of the quota might be set to take a more accurate account of the size of the target population.<sup>129</sup> In 1973, by way of illustration, the DE considered that a realistic quota would be of the order of 2.0 to 2.5 per cent, at a time when average quota compliance was at a maximum possible level of 2.75 per cent.<sup>130</sup> Although this is a superficially attractive reform, it would mean that government had sanctioned a lower target by which employers were to measure their commitment to disabled employment opportunity. This might force quota compliance down even further and represent "retrospective approval of an unsatisfactory situation".<sup>131</sup> An alternative proposal might be to calculate the quota as a percentage of new hirings each year rather than as a percentage of the employer's workforce. This addresses the anomalous position that disabled employees who are settled in employment continue to count towards the quota. However, this proposal has been rejected in the past on the grounds that it would bear unevenly upon employers with a large staff turnover and consequent greater number of new engagements, as well as being

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<sup>128</sup> DE, 1973: para 63; MSC, 1979: para 76; MSC, 1981: para 8.5.

<sup>129</sup> MSC, 1979: para 76.1; MSC, 1981: para 5.5. Bolderson (1991: 117) records that the quota percentage was originally set at 2 per cent in 1946 and raised to 3 per cent in 1947. She indicates that the quota was fixed at a level which it was hoped would obviate the need for large scale applications for exemption permits.

<sup>130</sup> DE, 1973: para 64.

<sup>131</sup> DE, 1973: para 65; MSC, 1981: para 8.8. See also MSC, 1979: para 76.1 (extolling the virtue of setting a target that is difficult to achieve).

administratively difficult to enforce.<sup>132</sup> A further alternative would be to count *severely* disabled persons with more weighting for quota purposes. Again, this has been considered and rejected, on the ground of difficulty in classifying and identifying such persons.<sup>133</sup>

The views of disabled persons on the level of the quota are quite instructive. In a 1978 survey, 14 per cent favoured keeping the current percentage level. Only 5 per cent favoured reducing it. Not surprisingly, just over half the respondents championed a raised quota level, with a level of 5 per cent or 10 per cent commanding observable support.<sup>134</sup> About 8 in 10 respondents would accept a proposal to vary the quota size between different firms or different industries.<sup>135</sup> This idea was also supported by an influential parliamentary committee.<sup>136</sup>

### ***Abolition of the permit system***

It has been suggested that the issuing of bulk permits should be restricted.<sup>137</sup> About 1 in 5 disabled persons are opposed to the permit system.<sup>138</sup> Given the abuses of the permit system, a worthwhile reform might be to introduce an unqualified obligation on employers to fulfil the quota and achieve that by abolishing permits.<sup>139</sup> One problem with this suggestion is that it takes no account of the geographical distribution of disabled persons or the distribution of employment skills in the disabled population. Some employers would always have difficulties in meeting the quota because of insufficient or unsuitable disabled workers in a local labour market. The abolition of permits could only be made to work if regional or local variations in the quota percentage were to be permitted and that does not seem to be a practicable proposal.<sup>140</sup> An alternative solution might be to provide employers with a

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<sup>132</sup> MSC, 1979: para 77.1 (iii).

<sup>133</sup> MSC, 1979: para 77.1 (iv).

<sup>134</sup> RSGB, 1978: Table 9.3.1.

<sup>135</sup> RSGB, 1978: Tables 9.4.1 and 9.4.2.

<sup>136</sup> HCEC, 1981: para 8.

<sup>137</sup> MSC, 1985: paras 3:9 and 3:10.

<sup>138</sup> RSGB, 1978: Tables 8.1.1. and 8.2.1.

<sup>139</sup> DE, 1973: para 70; MSC, 1981: para 8.16.

<sup>140</sup> MSC, 1985: 49-51. Although this idea was supported by disabled respondents in a 1979 survey, it was rejected as being too difficult and costly to administer: MSC, 1979: para 76.2.

defence of reasonable cause where they are below quota.<sup>141</sup> This would switch the emphasis away from permits and onto enforcement and inspection. It does not, however, deal with the existing problem of how to challenge an employer's contention that certain jobs are unsuitable for disabled persons or that an available disabled person is not suitable for the vacancy in question. The DE is unlikely to be any more willing to second guess employers' judgements than it is in respect of permit applications. The only alternative would be to leave the issue to arbitration or to an industrial tribunal.

### ***Financial sanctions***

More radically, the enforcement of the quota via levies against recalcitrant employers has been urged, an approach favoured in a number of European models.<sup>142</sup> The DE's view that prosecution of firms for quota non-compliance is counter-productive leads to suggestions that there should be instead financial sanctions available against recalcitrant employers.<sup>143</sup> Employers would effectively be given a choice of fulfilling the quota or making a payment to a special fund for each unfilled quota place. Such a levy system could have a number of potential advantages.<sup>144</sup> First, it would be administratively convenient. Second, it would produce revenue that could be used in pursuit of other disabled employment strategies. Third, it would ensure a degree of equity in employers' contributions to disabled employment opportunities either directly, by fulfilling quota, or indirectly, by contributing to the financing of other policies. Fourth, it would retain a compulsory, but flexible, system and would take account of the different circumstances of different employers.

However, opponents of a levy scheme point out that, given the maldistribution of disabled persons geographically and in terms of skills and qualifications, financial sanctions would bear unevenly on some employers who would be penalised for local labour market conditions beyond their control.<sup>145</sup> The ability of employers to buy out their obligations to disabled workers is also hardly calculated to lead to an increase in disabled employment opportunities.<sup>146</sup> The MSC cited evidence that many German employers opt to pay the levy as a way out of their obligations to disabled people and then pass the costs on to their

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<sup>141</sup> DE, 1973: para 72.

<sup>142</sup> Brooke-Ross, 1984; Floyd and North, 1986.

<sup>143</sup> DE, 1973: para 74; MSC, 1979: para 77.2(ii); MSC, 1981: para 8.14.

<sup>144</sup> DE, 1973: para 75.

<sup>145</sup> DE, 1973: para 76.

<sup>146</sup> HCEC, 1981: para 11.

customers,<sup>147</sup> and there is equivalent evidence that French employers prefer to pay a contribution into a national development fund rather than attempt to attain quota.<sup>148</sup> Thus, the level at which the levy is fixed becomes crucial. Too low a level of levy will encourage employers to pay to avoid recruiting disabled individuals; too high a levy could lead to employers recruiting unsuitable disabled persons into unsuitable positions or bringing pressure to bear on unregistered disabled persons in the workforce to register. A levy system also over-emphasises the burdensome aspects of employing disabled persons and could retrench the negative attitudes of employers.<sup>149</sup> Furthermore, it is another form of preferential treatment of disabled persons and, unlike the German scheme of levies, could not be defended on the ground that it targeted protection upon a small group of *severely* disabled persons.<sup>150</sup>

Nevertheless, just over half (52 per cent) of disabled persons indicated support for the idea of making employers pay a levy while they remain below quota.<sup>151</sup> In contrast, support for the idea of placing a levy on employers who failed to engage sufficient numbers of disabled employees was not strong among employers. About two-thirds believed such reform to be inappropriate and only about one-fifth supported the idea.<sup>152</sup>

#### ***Abolition of the quota***

It may be that the political and legislative rationale for the statutory scheme has been irredeemably undermined,<sup>153</sup> leaving abolition inevitable. A further argument is that retention of a quota for disabled workers is unjustifiable so long as similar special treatment of other disadvantaged or minority groups does not exist.<sup>154</sup> However, the idea that the quota should be extended to cover other individuals facing difficulties or "handicaps" in

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<sup>147</sup> MSC, 1981: para 8.15.

<sup>148</sup> Reported in *European Industrial Relations Review* N° 207 (April 1991) at 5.

<sup>149</sup> DE, 1973: para 77.

<sup>150</sup> MSC, 1981: para 8.15

<sup>151</sup> RSGB, 1978: Table 9.5.1.

<sup>152</sup> Morrell, 1990: Table 9.

<sup>153</sup> McDonnell and Weale, 1984; Jones and Cullis, 1988.

<sup>154</sup> MSC, 1979: para 73.3. The use of quotas as a means of regulating age discrimination has been considered by at least one writer, although rejected on the basis of the ineffectiveness of the disabled persons' quota. See Buck (1992: 254) and further research footnoted there.



obtaining employment has never seriously been considered.<sup>156</sup> As far as a disabled quota is concerned, a Gallup Poll commissioned by *New Society* and the BBC in 1980 tested the attitude of the electorate to the quota scheme.<sup>156</sup> Sixty-nine per cent of voters supported the strengthening of the quota scheme to make it work, while only 4 per cent would have abolished the scheme. There appeared to be little variation between supporters of the then three main political parties on this point.

Nonetheless, there are some who see the abolition of the quota scheme as desirable or inevitable. Of these, a number would not replace the quota scheme, no doubt viewing it as an example of burdens upon business or unnecessary regulation of a free labour market. A second group would replace the quota by concentrating on improved employment and training services for disabled persons, as well as greater efforts in persuading and educating employers to employ disabled people.<sup>157</sup> A third view, is that employers should be given temporary or permanent subsidies to encourage the recruitment and retention of workers with disabilities.<sup>158</sup> An alternative version of this proposal would be to provide incentives to employers who fulfil their quota but continue to recruit disabled workers.<sup>159</sup> One person's subsidy is usually another person's levy (see immediately above). Both Tomlinson and Piercy rejected the subsidisation of disabled employment as objectionable in principle.<sup>160</sup> Subsidies would validate the erroneous view that disabled workers are less capable than non-disabled workers, and would reinforce the prejudice that disabled employees are a burden on business.<sup>161</sup> Wage subsidisation is unlikely to meet the approval of the trade union movement, which in the past has objected to the use of disabled workers as a form of cheap labour.<sup>162</sup> The Piercy Committee also feared that subsidies would be an expensive way of promoting disabled employment, would be difficult to administer, and that difficulties in

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<sup>156</sup> MSC, 1979: para 77.1(ii).

<sup>156</sup> Cited in MSC, 1985: 32.

<sup>157</sup> DE, 1973: paras 88-95.

<sup>158</sup> MSC, 1985: 38-9.

<sup>159</sup> MSC, 1979: para 77.2(ii). The MSC found that, in an employer survey, employers opposed levies as leading to greater interference and administrative burdens, as well as providing some firms with an excuse to ignore their social responsibilities. Levies appeared also to meet with little support among disabled people.

<sup>160</sup> See in particular Piercy, 1956: para 197.

<sup>161</sup> DE, 1973: para 83.

<sup>162</sup> DE, 1973: para 84.

determining who should be subsidised could lead to such a scheme growing out of control.<sup>163</sup>

## CONCLUDING REMARKS

Despite the catalogue of weaknesses that has been exposed in this chapter, the quota has shown remarkable durability and has survived largely because of the symbolic significance attached to it.<sup>164</sup> The quota has even been shown to be an attainable goal, albeit not without difficulties, given requisite political and managerial will.<sup>165</sup> Moreover, the SCPR survey concluded that there was an estimated 844,000 occupationally handicapped persons in employment. It further estimated that the proportion of all employees in employment who might be assessed as registrable under the 1944 Act would be approximately 4 per cent.<sup>166</sup> This suggests that the quota scheme could be made to work. It is remarkable too that the British and other European disabled quota systems continue to excite the interest of other countries and, in particular, the US,<sup>167</sup> although the advent of comprehensive disability discrimination laws elsewhere might stifle that interest for the foreseeable future.

Nevertheless, Britain's official attitude towards the quota has always been at best ambivalent. At the time of the 1973 review, the DE commented:

It cannot be gainsaid that the existence of the quota scheme may act as a constant suggestion that the employment of disabled people constitutes a burden which needs to be shared and that they are not as productive as able-bodied workers.<sup>168</sup>

On the other hand, the Piercy Committee regarded the quota scheme as providing a "sound basis for publicity" and as demonstrating the "industrial value of disabled persons".<sup>169</sup> The DE once thought that there was some merit in that view.<sup>170</sup> The scheme was seen as

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<sup>163</sup> Piercy, 1956: para 197; DE, 1973: paras 85-6.

<sup>164</sup> Bolderson, 1980.

<sup>165</sup> *Equal Opportunities Review*, 1989.

<sup>166</sup> Prescott-Clarke, 1990: 115.

<sup>167</sup> See for example: Stubbins, 1982; Kulkarni, 1983. A number of respected disability scholars take a positive view of quota systems, despite their flaws, and regard them as part and parcel of any disability rights regime. See for example: Cornes, 1984; Hahn, 1984. However, the introduction of disabled quotas into a country such as the US would require major changes in disability policy and civil rights thinking: Bordieri and Comninel, 1987: 55.

<sup>168</sup> DE, 1973: para 39.

<sup>169</sup> Piercy, 1956: para 154.

<sup>170</sup> DE, 1973: para 38.

emphasising employers' responsibilities towards disabled persons, encouraging and reinforcing the good employer. Furthermore, the quota could act as a spur to employers who might be tempted to ignore the problems of disabled employment and could furnish DROs (now PACTs) with vital opportunities to visit employers to discuss ways of improving employment opportunities for disabled workers. However, the bureaucratic and compulsory nature of the scheme is increasingly seen as objectionable, while policing the quota has not been easily accommodated alongside the public sector agencies' role in advising employers on placing and resettling disabled employees.

More recently, the DE's 1990 consultative document contains the results of the latest in a series of government reviews of disabled employment policy and legislation.<sup>171</sup> The consultative document proposes a number of improvements in the services offered to disabled persons and their employers, some of which are being implemented in 1993. Of central importance is the government's view that the statutory quota scheme of the 1944 Act has become unsatisfactory in operation and that the arrangements for registering the status of disabled persons have encouraged stereotyping. Although the document considers a number of legislative alternatives to the statutory quota scheme, it appears to signal that in the future there may be less reliance upon statutory regulation of disabled employment. More emphasis is likely to be placed upon education of employers, together with improved training and employment services to disabled persons. This is evidenced by the introduction of a new disability symbol that employers may use on their letterheads, documents and recruitment literature to indicate their commitment to good practice in the employment of disabled persons.

The voluntary approach will be returned to in the penultimate chapter below. As this chapter has sought to demonstrate, the prognosis for the future of statutory regulation of disabled employment rights is not good, and even the long-standing commitment to a limited form of preferential treatment is under threat, if not from repeal then at least from decay by neglect. If the disabled workers' quota were to be replaced or supplemented by anti-discrimination legislation, would the record of enforcement and the armoury of remedies be any more satisfactory than at present? This is the issue to be addressed in the next chapter.

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<sup>171</sup> DE, 1990.

## **CHAPTER XV: ENFORCEMENT AND REMEDIES IN DISABILITY DISCRIMINATION LEGISLATION**

### **INTRODUCTION**

It will be apparent from the discussion in the previous chapter that the reputation and authority of disability discrimination laws will rest very much upon how the law is enforced and what effective remedies are available for transgressions of its letter. The ultimate failure of the British disabled quota scheme might be largely explained by the inability of the authorities adequately to police and enforce the legislation, and the paltriness of such penalties as have been exacted from employers in breach. The failure to provide disabled people with an individual right of action to enforce their rights, such as they are, under the existing law, and the choice of the criminal justice system as the forum for executing the law, have both contributed to the resulting futility of the legislation. The setting of a new agenda for disability employment rights in Britain must also address the manner in which and the means by which any new discrimination or equal opportunity legislation is to be enforced. This will in turn raise questions concerning institutional and individual enforcement strategies, the role of judicial enforcement and the appropriateness of remedies. In this chapter we look at the possibility of the establishment of a Disablement Commission with institutional powers to enforce, administer and implement new legal objectives. We also look at what lessons might be learned from existing laws here and comparable laws abroad in respect of the justiciability of disability-related employment issues and the remedying of individual acts or broader patterns of disability discrimination.

### **INSTITUTIONAL ENFORCEMENT**

From time to time, it has been suggested that the Equal Opportunities Commission (EOC) and Commission for Racial Equality (CRE) should be merged to produce one body responsible for the overview and enforcement of equal opportunities legislation.<sup>1</sup> The obvious parallels are with the Equal Employment Opportunities Commission (EEOC) in the US, or the human rights commissions and councils in Canada, or the anti-discrimination or equal opportunity boards, commissions and commissioners in Australia. Merger has been rightly resisted on the suspicion that it is merely a pretext for public expenditure cuts in the financing of anti-discrimination initiatives. Furthermore, both the EOC and CRE have been lukewarm to any proposals that disability discrimination law, if enacted in Britain, would become part of their

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<sup>1</sup> See for example: HCEC, 1991: Q627.

individual portfolios.<sup>2</sup> Subsequently, disability rights activists themselves have seen the dangers that such recommendations would hold and that, in particular, disability would have to compete for attention and resources with other prohibited grounds in any grand anti-discrimination enforcement agency.<sup>3</sup> Attention has thus switched to the establishment of a Disablement Commission.

### *Proposed Disablement Commission*

A central feature of proposals in Britain for disability discrimination legislation has been the mooted establishment of a Disablement Commission.<sup>4</sup> Such a Commission would be charged with a number of functions. First, it would work towards the elimination of disability-informed discrimination. Second, it would have powers to carry out general investigations to ensure that the new law was being complied with. Third, the Disablement Commission would investigate individual complaints of non-compliance with the law and provide a conciliation service in respect of such complaints. Fourth, it could provide assistance, including legal and financial assistance, to disabled persons seeking to enforce their new rights under the legislation. Fifth, the operation of the legislation would be kept under review and the Commission would be responsible for submitting proposals for statutory amendments. Sixth, the Disablement Commission would be responsible for publishing codes of practice directed at the requirements of the legislation.

The Disablement Commission, if established, would be made up of a number of Commissioners (8-15 has been suggested as the appropriate number) under a full-time chairman, who would be a person with disabilities. It is proposed that 75 per cent of the seats on the Commission should be filled by disabled persons or their authorised representatives, and that Commissioners should hold office for up to 5 years, subject to reappointment. The Commission would be founded as a body corporate but would not be an

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<sup>2</sup> See for example: HCEC, 1990b: Q087-92.

<sup>3</sup> See in particular oral evidence given to the HCEC (1990a: 57-8). Prior to the enactment of the (Northern Ireland) Fair Employment Act 1989, it was suggested that omnibus discrimination legislation, encompassing race, sex, religious conviction and disability, might be adopted in the province, necessitating a merged enforcement agency: Department of Economic Development, 1986. This did not meet with universal approval and did not subsequently feature in the pre-legislative proposals: EOC for Northern Ireland, 1986; Fair Employment Agency, 1987. See the slightly more sympathetic response of the Standing Advisory Commission on Human Rights (1990: 74-5).

<sup>4</sup> This has been an essential part of many of the private members' bills discussed in Chapter IV above and, in particular, of the recent CRDP Bills. The account below draws, in particular, from the latest versions of those bills without citing individual clauses, so as to avoid confusing references to what is only draft legislation.

emanation of the Crown. It would not be subject to Crown immunity nor would its staff be civil servants. However, the Commission would rely upon public funding for its activities, expenses and payroll. Furthermore, the Secretary of State would have to promulgate regulations to address the powers and procedures of the Commission when carrying out individual or general investigations, including the power to issue non-discrimination notices or to take cases of discrimination to the tribunals or courts. The Commission would be expected to report annually to the Secretary of State and to Parliament.

It will be readily recognised that the template for the suggested Disablement Commission is that provided by the EOC and the CRE.<sup>5</sup> However, there are two noticeable differences between the proposed model and its progenitors. First, unlike the CRE and EOC,<sup>6</sup> the proposed Disablement Commission would not be given express research and education functions. This omission might be more than purely accidental. The 1980s have seen the calls for disability discrimination law met with the political response that more research is required to identify the incidence and experience of disability, while the preferred governmental approach to disability discrimination is a policy of education and persuasion. Disability rights activists would be understandably suspicious of enshrining this strategy in law and could be rightly concerned that the justiciability of these issues might be down-graded. It is worth recalling that in the original 1976 Anti-Discrimination Bill in New South Wales, physical disability and condition were included as "other grounds" of discrimination. However, disability was subsequently relegated within the statute that emerged as an issue solely for research (rather than regulation) by the newly-formed Anti-Discrimination Board.<sup>7</sup> However, not to give any new Commission here a research and education mandate appears short-sighted, whatever the tactical reasons for not so doing.

Second, and more significantly, there is no explicit legal requirement that the CRE and EOC should be constituted so as to represent an appropriate racial or gender mix of Commissioners, whereas disabled Commissioners are to be in the majority on a Disablement Commission.<sup>8</sup> Given the symmetry of race and sex discrimination legislation, it would

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<sup>5</sup> See generally SDA 1975 Part VI and Sch 3; RRA 1976 Part VII and Sch 1.

<sup>6</sup> See SDA 1975 s 54; RRA 1976 s 45.

<sup>7</sup> See Chapter IX above.

<sup>8</sup> This proposal does not appear to be modelled upon any similar provision in comparative disability discrimination laws elsewhere. In Australia and Canada, disability is part of omnibus discrimination legislation and the human rights commissions and anti-discrimination boards in these countries are not legally required to be representative of the groups for whose protection the law operates. The recent establishment of a federal Disability Commissioner

obviously send an undesired signal to employers if the EOC and CRE were to practice racial or sexual quotas or set-asides in their own constitutions. Disability discrimination law, on the other hand, would be asymmetrical and the same objection in principle could not be taken to the reservation of commissionerships for a pre-determined proportion of disabled persons. Furthermore, disabled persons, perhaps more keenly than women and ethnic minorities, have felt themselves to be commandeered by others (primarily the disability professions, charities, and organisations *for*, rather than *of*, disabled people) who have purported to speak on their behalf, and they would now seek a clear voice of their own. Moreover, it can be argued that first hand knowledge and experience of disability and disability discrimination are important qualifications for those who would shape the destiny of any new disability discrimination law.<sup>9</sup>

### ***Role of institutional enforcement***

Whatever body is charged with responsibility for disability discrimination law, one of its central functions will involve it in investigations of compliance and non-compliance with the legislation. The power to conduct formal investigations into suspected discriminatory activities of individuals or enterprises has been, at least on paper, an important weapon in the armoury of institutional enforcement.<sup>10</sup> However, in practice, both the EOC and CRE have been hidebound in the pursuit of formal investigations and subjected to judicial control that has blunted the edge of this weapon.<sup>11</sup> In turn, this has diminished the role of non-discrimination notices, issued as a result of a formal investigation, addressed to named parties, and requiring them to discontinue identified discriminatory acts or practices.<sup>12</sup> Moreover, little (if any) use has been made of the Commissions' powers to seek injunctive

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in the Australian Commonwealth does not include disability as part of the job specification: (Cth) DDA 1992 Part 6. In the US, although disability legislation is separately enacted, it is enforced by the EEOC, which is simultaneously charged with responsibility for civil rights law generally.

<sup>9</sup> This argument, as applicable to race and sex, is implicitly recognised in the actual make-up of the CRE and EOC.

<sup>10</sup> SDA 1975 ss 57-61; RRA 1976 ss 48-52.

<sup>11</sup> See, in particular: *R v CRE, ex parte Cottrell and Rothon* [1980] IRLR 279 Div Crt (CRE is discharging a quasi-judicial function and must observe natural justice and fair process); *Hillingdon London Borough Council v CRE* [1982] AC 779 HL (CRE may not carry out a formal investigation unless it has genuine belief, and not mere suspicion, that the party subject to investigation has committed discriminatory acts); *CRE v Prestige Group plc* [1983] IRLR 408 QBD (CRE must inform the party to be investigated so that representations can be made before any investigation commences). See also: *Science Research Council v Nassé* [1979] 3 All ER 673 HL.

<sup>12</sup> SDA 1975 ss 67-70; RRA 1976 ss 58-61.

relief against persistent discrimination.<sup>13</sup> Consequently, the burden of the EOC and CRE's main efforts in the enforcement area has been limited to assisting individual complainants (although, importantly, including advice and legal representation).<sup>14</sup> When empowering a new Disablement Commission, account must be taken of the experience of the CRE and EOC and of the limitations placed upon their authority by judicial control.

## COMPARATIVE PERSPECTIVES ON ENFORCEMENT

### *Canada*

Under the Canadian federal jurisdiction, where it is believed that an employer is discriminating on the grounds of disability, an individual or group of individuals may complain to the Canadian Human Rights Commission under Part III of the Human Rights Act.<sup>15</sup> The Commission may deal with the complaint provided that there are reasonable grounds for suspecting discriminatory practices and it is within the Commission's jurisdiction. The Commission might take the view that internal grievance or review procedures should be exhausted first, but otherwise the Commission will designate a person to investigate the complaint.<sup>16</sup> The investigator is vested with powers of entry and inspection while carrying out the investigation. At the conclusion of the investigation, a report is made to the Commission, which may request the appointment of a Human Rights Tribunal if an inquiry into the complaint is warranted.<sup>17</sup> Conciliation of the complaint may be attempted at this point if it has not already been so.<sup>18</sup> The Canadian Human Rights Tribunal, acting as a superior court of record, will inquire into the complaint and give the parties a hearing.<sup>19</sup> If a complaint was heard by the Canadian Human Rights Tribunal consisting of less than three

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<sup>13</sup> SDA 1975 ss 71-73; RRA 1976 ss 62-64.

<sup>14</sup> SDA 1975 ss 74-75; RRA 1976 ss 65-66.

<sup>15</sup> (Can) HRA s 40. Disability discrimination complaints make up about one-third of the Commission's caseload: Bhatia, 1990: 108. A member of the Commission's staff, Bhatia acknowledges that these complaints only scratch the surface of disability-related discrimination and that many more complaints would be forthcoming if the complaints procedure was more widely known about and more efficient.

<sup>16</sup> (Can) HRA ss 41 and 43.

<sup>17</sup> (Can) HRA s 44.

<sup>18</sup> (Can) HRA s 47. The Commission must approve the terms of any settlement of the complaint: s 48. Failure to comply with the terms of an approved settlement is a criminal offence: s 60.

<sup>19</sup> (Can) HRA ss 49-50. The Tribunal is appointed from a panel established under ss 48.1-48.5. The Commission is a party to the action and may appear and be represented before the Tribunal: s 51.



members, an appeal on a question of law or fact may be made to a Review Tribunal of three members established from the Human Rights Tribunal Panel.<sup>20</sup>

The administration, enforcement and overview of human rights laws in the Canadian provinces is placed in the hands of Human Rights Commissions or, in the case of British Columbia, a Human Rights Council, and, in the case of Québec, the *Commission des Droits de la Personne*.<sup>21</sup> The Commissions are usually charged with advancing the principle of equality and non-discrimination, promoting an understanding of and compliance with the legislation, researching and developing educational programmes designed to eliminate discriminatory practices, and encouraging and coordinating human rights programmes and activities.<sup>22</sup> Although the procedure for handling discrimination complaints varies from province to province only in respect of fine detail, the Alberta practice is not untypical. An individual complaint of discrimination is made to the Alberta Human Rights Commission, which will investigate the complaint and attempt to effect a settlement.<sup>23</sup> If a settlement is not reached, and if the complaint is not without merit, a board of inquiry is appointed with plenipotentiary authority.<sup>24</sup> The complainant has the initial burden of proving a *prima facie* case, but then the evidentiary burden moves to the employer to show a legitimate, non-discriminatory reason for the actions which form the basis of the complaint. An appeal from a decision of the board of inquiry is heard by the Court of Queen's Bench and may involve a question of law or of fact.<sup>25</sup> The procedure in the other provinces is very similar.<sup>26</sup> In Manitoba, for example, mediation is employed to attempt a settlement between the

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<sup>20</sup> (Can) HRA ss 55-56.

<sup>21</sup> (Alb) IRPA ss 14-15; (BC) HRA s 10; (Man) HRC ss 2-8; (NB) HRA ss 10-19; (NS) HRA ss 22-26A; (Ont) HRC ss 27-31; (PEI) HRA ss 16-19; (Queb) CHR&F ss 58-68; (Sask) HRC ss 21-25 (and the Human Rights Commission Act 1972); (YT) HRA ss 15-18.

<sup>22</sup> (Alb) IRPA s 16. See also: Alberta Human Rights Commission Procedure Regulations 1980 (Alb Reg 263/80); Commission Procedure Regulation 1990 (Alb Reg 150/90).

<sup>23</sup> (Alb) IRPA ss 19-20. Protection is afforded against complainants being victimised: s 11. The Commission has powers of investigation, entry and inspection: ss 21-26.

<sup>24</sup> (Alb) IRPA ss 27-30.

<sup>25</sup> (Alb) IRPA s 33.

<sup>26</sup> (BC) HRA ss 11-16 (and the Human Rights Code Board of Inquiry Regulations 1975 BC Reg 151/75, as amended by 137/82); (Man) HRC ss 22-27; (NB) HRA s 20; (NS) HRA ss 27-37; (Ont) HRC s 32-42; (PEI) HRA ss 21-28; (Queb) CHR&F ss 69-80; (Sask) HRC ss 27-30; (YT) HRA ss 19-23.

parties,<sup>27</sup> and any subsequent inquiry into the complaint is conducted by an adjudicator rather than a board of inquiry.<sup>28</sup> At the request of any person, the Manitoba Human Rights Commission is empowered to give an "advisory opinion" as to whether the Code has been contravened. Unless this opinion is revised or revoked, the person to whom it is issued is entitled to rely upon it as conclusive of the issue of whether they were acting in accordance with the Code.<sup>29</sup>

### ***United States***

Under the (US) RA 1973, sections 501 and 503 were largely enforced through administrative mechanisms overseen by the EEOC and the OFCCP. Individual complaints of discrimination would only be heard in the federal courts via a challenge for judicial review of an administrative law decision. The potential lack of a private right of action for disabled plaintiffs also dogged the early years of section 504, although the right of the federal courts to entertain individual complaints was subsequently established.<sup>30</sup> The same problems are not anticipated under the (US) ADA 1990. The enforcement of the ADA 1990 is ultimately in the hands of the EEOC and is discharged primarily by the investigation of individual claims of discrimination. The ADA 1990 adopts the administrative and judicial enforcement mechanisms and remedies available under Title VII of the Civil Rights Act 1964. Accordingly, disabled litigants in employment discrimination cases have the same rights and remedies as ethnic and racial minorities, women, and religious adherents. The first stage is to submit the discrimination complaint to the administrative processes of the EEOC.<sup>31</sup> This will include attempts to resolve the complaint by conciliated agreement. The second stage, if the complaint is not disposed of at the first stage, is to bring a private action in court.<sup>32</sup> The primary remedy available in a successful case will be injunctive relief, including an order for reinstatement and/or an order that the plaintiff be employed in a specific job and/or an order for monetary compensation for lost wages.<sup>33</sup> Compensatory or punitive damages would not

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<sup>27</sup> (Man) HRC ss 28-31.

<sup>28</sup> (Man) HRC ss 32-42.

<sup>29</sup> (Man) HRC s 21.

<sup>30</sup> *Consolidated Rail Corporation v Darrone* (1984) 465 US 624. The problem of a private right of action under the RA 1973 is discussed in Chapter VI above and is returned to in Chapter XVI below. See generally: Paolicelli, 1979; Schoon, 1979; Boller, 1982.

<sup>31</sup> 42 USC §2000e-5.

<sup>32</sup> 42 USC §2000e-5(f). Actions might also be brought by the EEOC or the Attorney General.

<sup>33</sup> 42 USC §2000e-5(g); *Shah v Mount Zion Hospital & Medical Center* (1981) 642 F2d

normally have been available.<sup>34</sup> However, section 102 of the Civil Rights Act 1991 now allows compensatory damages to be awarded in Title VII or ADA 1990 or RA 1973 litigation where *intentional* discrimination is found, and punitive damages in cases of malicious or reckless discrimination.<sup>35</sup> Nevertheless, claims for compensatory damages in disability discrimination cases might now be met with a defence that the employer has made "good faith" attempts, in consultation with the plaintiff, to make reasonable accommodation for disability.

It has been estimated that the EEOC will need an annual budget of \$15 million in order to carry out its enforcement functions under the ADA 1990.<sup>36</sup> Furthermore, the EEOC anticipated a caseload under the ADA 1990 of approximately 12,000 complaints per year. By the end of April 1993, 9 months after the Act first came into force, some 8,505 complaints had been received, comprising 15 per cent of the EEOC's caseload.<sup>37</sup> The EEOC data reveal that 48 per cent of complaints concerned disability-related dismissals, 21 per cent related to a failure to accommodate disability and 14 per cent went to alleged discriminatory recruitment and selection decisions. Nearly 10 per cent of filed complaints allege harassment, 7 per cent are derived from disciplinary decisions, 5 per cent from lay-offs and nearly 4 per cent go to employee benefits (the ADA's impact upon occupational health insurance and benefits, in particular, appears to be exercising employers). In what is believed to be the first case to be tried under the ADA regime, an executive director, dismissed by his employer when it was learnt that he had developed terminal brain cancer, was awarded \$577,000.<sup>38</sup> The award was made up of \$22,000 back pay, \$55,000 compensatory damages and

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268 at 272 (9th Cir).

<sup>34</sup> Because of restrictions under Title VII of the Civil Rights Act 1964: *Mosley v Clarksville Memorial Hospital* (1983) 574 FSupp 224 (MD Tenn); *DeGrace v Rumsfeld* (1980) 614 F2d 796 (1st Cir). Cf the opposite position under 42 USC §1981 (Civil Rights Act 1866), although see *Patterson v McLean Credit Union* (1989) 491 US 164 (restricting §1981 compensatory and punitive damages to recruitment and selection discrimination). See now §101 Civil Rights Act 1991. Compensatory or punitive damages might have been available under state fair employment laws.

<sup>35</sup> 42 USC §1977A. However, a cap is put upon compensatory and punitive damages (not including back pay or past pecuniary losses or possibly future loss of earnings) in sex, religion and disability suits depending upon the size of the employer: 15-100 employees (\$50,000), 101-200 employees (\$100,000), 201-500 employees (\$200,000) and over 500 employees (\$300,000).

<sup>36</sup> US Senate, 1989: 90-91; Yelin, 1991: 141.

<sup>37</sup> *HR Focus* (July 1993) at 3. See also Dolatly, 1993: 544.

<sup>38</sup> *EEOC v AIC Security Investigations Ltd* (1993) unreported (but see footnote 37).

\$500,000 punitive damages. The case is an early example of the EEOC's reinvigorated approach to discrimination damages after the reforms under the Civil Rights Act 1991 and prefaced in a policy statement issued by the EEOC in July 1992.<sup>39</sup>

### ***Australia***

In New South Wales, complaints and allegations of discrimination are initially put to the Anti-Discrimination Board for investigation.<sup>40</sup> If the complaint is not dismissed at this early stage, an attempt will be made to resolve the issue by conciliation,<sup>41</sup> failing which the complaint will be referred to the Equal Opportunity Tribunal (EOT).<sup>42</sup> After an inquiry by the EOT, the complaint may be dismissed or upheld and, if upheld, the EOT may declare the parties' rights, award damages, order that discriminatory conduct should not be repeated, require that the plaintiff be employed, reinstated or promoted (as befits the nature of the complaint), and/or declare void any contract or agreement made in contravention of the legislation.<sup>43</sup> An order of the EOT is enforceable in the ordinary courts, while its decisions are appealable to the NSW Supreme Court on a question of law. The position in Queensland is little different, except that original complaints are handled by the Anti-Discrimination Commission and adjudicated upon by the Anti-Discrimination Tribunal.<sup>44</sup> In South Australia and in Western Australia, the roles of investigation and adjudication are filled respectively by the Equal Opportunity Commission and the Equal Opportunity Tribunal,<sup>45</sup> while in Victoria the relevant bodies are the Equal Opportunity Commission and the Equal Opportunity Board.<sup>46</sup> The recently enacted Commonwealth disability discrimination law provides for complaints of disability discrimination to be referred to the Human Rights and Equal Opportunity Commission.<sup>47</sup> At the first stage, an inquiry will be held by the Disability Discrimination

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<sup>39</sup> *Enforcement Guidance: Compensation and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (reprinted in *Daily Labor Reporter* N° 131, E-1, 7 August 1992).

<sup>40</sup> (NSW) ADA 1977 s 89.

<sup>41</sup> (NSW) ADA 1977 s 92.

<sup>42</sup> (NSW) ADA 1977 s 94.

<sup>43</sup> (NSW) ADA 1977 s 113.

<sup>44</sup> See generally: (Qld) ADA 1991 ss 134 *et seq.*

<sup>45</sup> See generally: (SA) EOA 1984 ss 93 *et seq.*; (WA) EOA 1984 ss 75 *et seq.*

<sup>46</sup> (Vic) EOA 1984 ss 44 *et seq.*

<sup>47</sup> (Cth) DDA 1992 s 69.

Commissioner,<sup>48</sup> who will endeavour to settle the matter by conciliation, before referring the matter back to the Commission.<sup>49</sup> The Commission will hold a formal inquiry into the complaint and the parties will enjoy rights of appearance and legal representation.<sup>50</sup> Again, conciliation plays a role in the inquiry and the Commission must take all reasonable steps to attempt an amicable settlement.<sup>51</sup> If the complaint is not dismissed by the Commission, it may make a declaration of the parties' rights and may make positive orders and/or award compensation.<sup>52</sup>

## JUDICIAL ENFORCEMENT

It will be clear from the foregoing account that disability discrimination is a justiciable issue, but that in Canada and Australia disability discrimination complaints tend to be handled within the machinery of institutional enforcement, albeit with quasi-judicial overtones. The emphasis upon inquiry and alternative dispute resolution, particularly the use of conciliation, is noteworthy. The issue is also dealt with in an environment, exemplified by the use of special boards of inquiry or anti-discrimination and equal opportunity tribunals, that allows expertise in discrimination questions to come to the fore in adjudication. In contrast, in the US, disability-related litigation takes place in the mainstream federal courts or administrative law courts and is treated as just another example of litigious matter. This raises the question of the appropriate forum for disposing of disability discrimination complaints if discrimination law in Britain were to be extended to cover this forbidden ground.

Earlier proposals for disability discrimination legislation envisaged that the county courts would hear assertions that the law had been breached. However, the Civil Rights (Disabled Persons) Bills of recent parliamentary sessions have pointed to the industrial tribunals as the appropriate arena for disputes concerning disability in employment. This follows the pattern adopted for sex and race discrimination applications.<sup>53</sup> Clearly, the industrial tribunals are a more fitting medium for the resolution of disability-related actions for *employment* discrimination, and certainly preferable to the ordinary courts, on the one hand, or the other specialist administrative tribunals, on the other hand. It might be argued, for instance, that

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<sup>48</sup> Established under Part 6 of the Act.

<sup>49</sup> (Cth) DDA 1992 ss 71-76.

<sup>50</sup> (Cth) DDA 1992 ss 77-102.

<sup>51</sup> (Cth) DDA 1992 s 93.

<sup>52</sup> (Cth) DDA 1992 s 103. The declarations or orders are enforceable in the federal courts.

<sup>53</sup> SDA 1975 s 63; RRA 1976 s 54.

bodies such as the Medical Appeal Tribunal or Social Security Appeal Tribunal already have "expertise" in disability issues. However, these bodies might be expected to take a welfarism approach to disability discrimination law, would have little experience of discrimination or employment concepts, and would be associated with the medical model of disability which new rights would set out to challenge. Nevertheless, the industrial tribunal system might not be the perfect solution to the problem of adjudication.

The evidence suggests that the industrial tribunals and those involved in their jurisdictions already lack understanding of discrimination and of the law that attempts to confront it.<sup>54</sup> It has been suggested that discrimination cases should be assigned to a specialist division of the industrial tribunal system,<sup>55</sup> allowing tribunal members to establish expertise by continuous contact with a discrimination caseload. Furthermore, the importance of ensuring that at least one member of the tribunal has experience of disability, whether personal or otherwise acquired, is essential if disabled plaintiffs are to have confidence in the system. Although it was intended that in sex or race discrimination claims at least one member of the tribunal would be a woman or a person with special knowledge of race relations, in practice this has not been achieved, and this failure does not provide grounds for appeal.<sup>56</sup> It is suggested that, assuming employment-related disability discrimination complaints will be assigned to industrial tribunals, a special panel of disabled persons or persons with knowledge of disability may need to be established by regulation and that one member of the tribunal should be drawn from that panel to hear such complaints. Whether or not a specialist division of tribunals is established to deal with disability discrimination cases, the training of tribunal members will have to take on board comprehension of the nature and experience of disability and the subtle forms in which disabled people encounter discrimination.

Although, in the view of the present writer, the industrial tribunals are, in the absence of a practical alternative, the best forum for hearing disability-related complaints, the system as a whole remains flawed. It is not intended to rehearse here the arguments in the debate about the efficacy of industrial tribunals,<sup>57</sup> but a few summary points should be made. There is the problem of access to the tribunal system. For disabled litigants that means *physical*

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<sup>54</sup> Leonard, 1987b.

<sup>55</sup> See the arguments and counter-arguments weighed in Justice, 1987.

<sup>56</sup> *Habib v Elkington & Co Ltd* [1981] ICR 435 EAT.

<sup>57</sup> A good account of the problems inherent in assigning discrimination cases to industrial tribunals may be found in the context of sex discrimination law in Morris and Nott, 1991: Chapter 8.

access to and within the buildings housing the industrial tribunals, but it also refers to the difficulties of enforcing rights in an adversarial system. Access to legal advice and representation will be a crucial aspect of any meaningful rights to be protected from prohibited actions in the workplace. Given complex questions about the definition of disability, fitness or qualification for work and the requirements of reasonable accommodation, disabled plaintiffs will require not only legal expert assistance, but also access to sources of information and expert witnesses who can attest to those issues. The potential cost of pursuing these new rights may also be prohibitive, especially in the early cases where fundamental principles will need to be established. The role of the proposed Disablement Commission will be pivotal here. Once before the tribunal, questions concerning the burden of proof, discovery of documents and legal procedure generally will determine the chances of success, just as they do in discrimination and employment protection cases generally. Disability rights activists should not be seduced into believing that the enactment of a disability discrimination statute will produce readily enforceable rights and remedies.

## REMEDIES

In the nature of things, concern to establish the shape and scope of the principle that discrimination is unlawful has often led to the question of available remedies being overlooked or given second order priority. However, as Morris and Nott observe in the context of gender discrimination:

The remedies available to a successful complainant should not only be aimed at compensating the victim in a way commensurate with the injury suffered but should also deter a repetition of the unlawful act. One way to achieve deterrence is to ensure a level of compensation which is more than nominal and a system of enforcement which provides for further significant sanctions against non-compliance.<sup>68</sup>

Unfortunately, in British discrimination law, the available remedies have neither compensated adequately nor deterred sufficiently.<sup>69</sup> Recent developments in the US under the Civil Rights Act 1991 suggest that disability discrimination litigation in that jurisdiction will begin to produce effective and compensatory remedies (see discussion at page 394 above). In this section, we look at the availability of remedies under existing British legislation and compare and contrast it with the position in Canada.

### *Compensatory damages*

In Britain, discrimination compensation is calculated as if it were an award of damages for a

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<sup>68</sup> Morris and Nott, 1991: 161.

<sup>69</sup> Evidence for this can be found in Leonard, 1987a.

statutory tort.<sup>60</sup> In principle, this means that in employment cases a successful plaintiff should be entitled to lost wages, both up to the date of the hearing and as to the future. However, in complaints of discrimination in appointment or promotion (as opposed to dismissal), the essence of the case is one of lost opportunity rather than denied benefits. Accordingly, the British courts have been reluctant to allow the recovery of such financial loss predicated upon a speculation as to the outcome of a non-discriminatory process. In practice, therefore, the plaintiff's redress will usually be limited to compensation for out-of-pocket expenses and injury to feelings.<sup>61</sup> Nevertheless, even then, damages for injury to feelings have been comparatively small (usually of the order of £100), although in isolated cases a court has been minded to make a more generous award,<sup>62</sup> and more recently it has been suggested that £500 is now the more appropriate figure.<sup>63</sup> But even when pecuniary damages are accounted for, discrimination awards are not generous. In a study of sex discrimination cases in the early 1980s, it was found that the average award in recruitment complaints was just under £300.<sup>64</sup> Although over the last decade, this bench-mark has improved, the most recent tribunal statistics covering the period 1990-91 show that the average award in race discrimination cases is £1,749, while in sex discrimination cases the median award is £1,142. It is only in rare cases that a plaintiff manages to breast the £2,000 mark.<sup>65</sup>

The picture is probably coloured by the fact that the British legislation places a ceiling upon the amount of compensation that can be awarded in an individual case. The current maximum limit is £11,000 from 1 June 1993.<sup>66</sup> This is bound to force down the average level of awards as the tribunals will be naturally unwilling to make awards at the upper end of the

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<sup>60</sup> SDA 1975 s 65(1)(b); RRA 1976 s 56(1)(b). The award of compensation must be regarded as just and equitable in the first place, although thereafter the award is calculated upon common law principles: *Hurley v Mustoe (N° 2)* [1983] ICR 422 (EAT).

<sup>61</sup> SDA 1975 s 66(4); RRA 1976 s 57(4). For the principles of assessment of general damages in discrimination cases see: *Alexander v Home Office* [1988] ICR 685 CA.

<sup>62</sup> See, for example: *Noone v North West Thames Regional Health Authority* [1988] ICR 813 CA (£3,000 for severe injury to feelings in a race discrimination case); cf *Coleman v Skyrail Oceanic Ltd (t/a Goodmos Tours)* [1981] ICR 864 CA.

<sup>63</sup> *Sharifi v Strathclyde Regional Council* [1992] IRLR 259 EAT.

<sup>64</sup> Leonard, 1987a: 14.

<sup>65</sup> *Employment Gazette* Vol 99 N° 12 (December 1991).

<sup>66</sup> SDA 1975 s 65(2) and RRA 1976 s 56(2) by reference to EP(C)A 1978 s 75. The current limit is set by the Unfair Dismissal (Increase of Compensation Limit) Order 1993 SI 1993/1348.



scale for discrimination claims that they might regard as run-of-the-mill. However, it does seem at best ambivalent towards the objectives of the law to design a discrimination remedy akin to a statutory tort, but then put a cap upon the amount of compensation that might be recovered. Placing an upper limit upon compensation (inclusive of *pecuniary* damages) is not a feature of the discrimination laws of the three common law jurisdictions that have been used as the basis of this comparative study. Pecuniary damages are at large and the only ceiling placed upon awards might be that element relating to non-pecuniary compensation. For example, Canadian federal legislation sets out to compensate the plaintiff for lost wages and expenses without limitation but, in the case of wilful or reckless discrimination or discrimination resulting in injury to feelings or self-respect, the payment of special compensation may be made only up to \$5,000.<sup>67</sup> British Columbia allows an award of special additional compensation of up to \$2,000.<sup>68</sup> In cases of wilful or reckless discrimination contrary to Ontario human rights law, a defendant may be ordered to pay damages for mental anguish of up to \$10,000.<sup>69</sup> In cases of wilful contravention of the Saskatchewan Code involving injury to feelings or self-esteem, an award of additional compensation of up to \$5,000 may result.<sup>70</sup> Strictly speaking, these provisions establish an unassailable right to this head of damages, where such a right might not otherwise exist at common law, rather than represent an artificial restraint upon the calculation of the award.

By pointing to the analogue of sex and race discrimination statutes as the basis of proposals for disability discrimination law, British disability rights activists risk inviting a similarly imposed ceiling of £11,000 (or its up-rated equivalent) on compensation. However, the recent European Court of Justice decision in *Marshall v Southampton and South-West Hampshire Area Health Authority (N° 2)* is likely to prove pivotal.<sup>71</sup> The Court rules that the British SDA 1975 is contrary to Article 6 of the EC Equal Treatment Directive 76/207 in setting an upper limit to recoverable compensation in sex discrimination complaints. European Community law requires that a plaintiff be made whole where true equality of opportunity has been denied.

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<sup>67</sup> (Can) HRA s 53. It is within the Commission's jurisdiction to award interest upon any compensation to be paid: *Attorney-General of Canada v Rosin* (1991) 91 CLLC ¶17,011 (Can) FCA.

<sup>68</sup> (BC) HRA s 17. The (BC) Human Rights Amendment Act 1992 (SBC 1992 c 43) has subsequently lifted this limit on damages and provides a general power to award compensation for injury to dignity, feelings and self-respect.

<sup>69</sup> (Ont) HRC s 41.

<sup>70</sup> (Sask) HRC ss 29-31.

<sup>71</sup> [1993] IRLR 445 (ECJ). See the commentary on the decision by Napier (1993).

If monetary compensation is the instrument of remedial action, then damages must be adequate and the loss sustained by the plaintiff must be made good in full. No distinction is made between pecuniary and non-pecuniary losses. The immediate effect of the decision directly assists only employees of public bodies and organs of the state, but it is clear that British law will have to be amended so as to allow private sector employees to enjoy a remedy without constraint.<sup>72</sup> Although this does not naturally follow from the decision itself, it is probable that the Government would have to amend the RRA 1976 simultaneously, in order to avoid invidious comparisons between the scope of remedies for sex and race discrimination. This would redound to the benefit of any proposed disability discrimination reforms.

### ***Compensation and intentional discrimination***

Where there is a complaint of indirect sex or race discrimination, and the complaint is successfully made out, the plaintiff is not entitled to any monetary compensation unless the indirect discrimination was intentional.<sup>73</sup> As *indirect* discrimination is almost invariably *unintentional* by its very nature, this exception would appear to bear very hard upon those whose exclusion from equal opportunities is the result of the erection of unjustifiable barriers to employment. On its face, this provision would appear to allow recovery of compensation for indirect discrimination only where an employer has used facially neutral but deliberately exclusionary criteria calculated to disadvantage women or minorities as a pretext for actual discrimination. The blurring of the distinction between direct and indirect discrimination by the House of Lords judgment in *James v Eastleigh Borough Council*<sup>74</sup> might be seen as having pulled the sting of the exception, but the ramifications of the decision have yet to be worked through. The denial of damages for unintentional indirect discrimination does not seem defensible and a change in the law has been suggested.<sup>75</sup> Moreover, it is questionable whether the denial of an adequate remedy in such cases withstands the robust view of the ECJ on the deterrent effect of national remedies for sex discrimination delivered in *Marshall (N° 2)* above.

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<sup>72</sup> In the meanwhile, private sector plaintiffs might have a cause of action against the Government for inadequate implementation of the Directive under the principle of state compensation enunciated in *Francovich v Italian Republic* [1992] IRLR 84 ECJ.

<sup>73</sup> SDA 1975 s 66(3); RRA 1976 s 57(3).

<sup>74</sup> [1990] ICR HL.

<sup>75</sup> EOC, 1988.

### ***Exemplary damages***

While compensatory damages, if used imaginatively, can make a plaintiff whole, such an award might not act as a sufficient punishment of the discriminator or as an adequate deterrent to other employers. Exemplary or punitive damages may be more appropriate.<sup>76</sup> At common law, exemplary damages may be awarded where there has been oppressive, arbitrary or unconstitutional action by government servants or where the defendant's conduct has been calculated to accrue a profit that exceeds any compensation paid to the defendant. The leading case in discrimination law relies upon the first of these grounds. In *Bradford Metropolitan City Council v Arora*,<sup>77</sup> a race discrimination case, exemplary damages were awarded against a local authority for the actions of its senior officers. The tribunal awarded the sum of £1,000 in this respect and this was upheld by the Court of Appeal. Nevertheless, in Britain the award of compensation under this head has and will continue to be rare, possibly because a claim for exemplary damages should be specifically pleaded. By way of comparison, discrimination contrary to the Québec Charter entitles the victim to obtain "the cessation of [such discrimination] and compensation for the moral or material prejudice resulting therefrom".<sup>78</sup> In the case of intentional interference, exemplary damages may be awarded. Also in a case of a malicious contravention of the Yukon Territory Act, exemplary damages may be awarded. Unusually, if the complainant has acted frivolously or vexatiously, the board of adjudication can award the defendant party its costs against the complainant and order the complainant to pay damages for injury to reputation.<sup>79</sup> In Manitoba, where there is evidence of malice or recklessness, an employer might be ordered to pay a penalty or exemplary damages of up to \$2,000 in an individual case and up to \$10,000 in any other case.<sup>80</sup>

### ***Positive remedies***

There has been a tendency in discrimination law, as in employment law generally, to regard monetary compensation as being the primary remedy. This is undoubtedly due to the

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<sup>76</sup> The general principles for the award of exemplary damages are set out in *Rookes v Barnard* [1964] AC 1129 (HL); *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL); and *AB v South West Water Services Ltd* [1993] 1 All ER 609 (CA).

<sup>77</sup> [1991] ICR 226 (CA).

<sup>78</sup> (Queb) CHR&F s.49.

<sup>79</sup> (YT) HRA ss 24-24.1.

<sup>80</sup> (Man) HRC s 43. An order may not have the effect of removing a person from an employment position accepted in good faith: s 44. The parties usually bear their own costs, unless either party has acted frivolously or vexatiously: s 45. An order is enforceable as a court judgment: s 48.

reluctance of the tribunals and courts to fashion a remedy that has the effect of creating specific performance of a contract for personal services. This must also be especially so in cases where no contract has yet been formed because of the intervening discrimination. However, both the SDA 1975 and the RRA 1976 contemplate that a tribunal or court might grant positive remedies to a successful plaintiff. First, an order may be made declaring the rights of the parties in relation to the complained of act.<sup>81</sup> Second, the judicial body may make a recommendation that the employer take action to obviate or reduce the adverse effect upon the plaintiff of the discrimination in question. A failure to comply with such a recommendation without reasonable justification entitles the plaintiff to original or increased compensation.<sup>82</sup> The British tribunals and courts have resiled from an interpretation of these positive remedies that would lead to judicial approval of positive discrimination. So, for example, the tribunal cannot recommend that the successful plaintiff be appointed to next available suitable vacancy.<sup>83</sup> Similarly, a recommendation may not be made that the plaintiff should be promoted forthwith, for such an action may transgress the merit principle and cause counter-discrimination affecting other employees.<sup>84</sup> Such timidity is not to be found in other jurisdictions.

In Canada, the Canadian Human Rights Tribunal may order a defendant to cease a discriminatory practice, to take measures to prevent future discrimination (including adopting an affirmative action plan), or to provide the plaintiff with the rights, opportunities or privileges which have been denied (such as engagement or reinstatement).<sup>85</sup> In addition, if the Tribunal finds the complaint to be substantiated:

but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such disability, the Tribunal shall (a) make such order... for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or (b) if the Tribunal considers that no such order can be made, make such recommendations as it considers appropriate...<sup>86</sup>

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<sup>81</sup> SDA 1975 s 65(1)(a); RRA 1976 s 56(1)(a).

<sup>82</sup> SDA 1975 s 65(1)(c),(3); RRA s 56(1)(c),(3) (subject to the statutory maximum).

<sup>83</sup> *Noone v North West Thames Regional Health Authority (N° 2)* [1988] IRLR 530 CA.

<sup>84</sup> *British Gas plc v Sharma* [1991] ICR 19 EAT.

<sup>85</sup> (Can) HRA s 53. It is within the Commission's jurisdiction to award interest upon any compensation to be paid: *Attorney-General of Canada v Rosin* (1991) 91 CLLC ¶17,011 (Can) FCA.

<sup>86</sup> (Can) HRA s 53(4).

Thus the Tribunal may also order an employer to adapt its premises or facilities to accommodate a disabled plaintiff, subject to avoiding costs or business inconvenience constituting undue hardship.

In the Canadian provinces, a board of inquiry may order that the discrimination should cease, that future contraventions should be avoided, that the complainant be extended the rights which have been violated by the discriminatory act, or that lost income and expenses for up to two years prior to the complaint be compensated for by the defendant. Alternatively, a board of inquiry may order any other action which it deems proper, so as to put the complainant in the position that would have prevailed but for the discrimination.<sup>87</sup> In cases of disability-based discrimination in Saskatchewan, a board of inquiry may order additionally that facilities be arranged to ensure that physical access is not impeded and that proper amenities are provided for disabled persons. However, this is subject to the defendant showing that the cost and business inconvenience involved in meeting such an order would cause undue hardship. This presently means:

intolerable financial cost or disruption to business occasioning such costs in the circumstances, but does not include, *inter alia*, the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for physically disabled persons of a kind that must be provided by law for persons of both sexes.<sup>88</sup>

However, an amendment, which is not yet in force, would allow regard to be had to the effect of the order upon the financial stability and profitability of the business, the value of existing amenities, structures and premises in comparison with the cost of providing proper amenities or physical access, the essence or purpose of the business, and (disregarding personal preferences) its workforce, clients and customers.<sup>89</sup> In Manitoba, an unsuccessful defendant may be required to adopt and implement an affirmative action programme or other special programme, if there has been a pattern or practice of contravention.<sup>90</sup> In a case of disability-based discrimination where the contravention of the Code involves the impeding of access of physically disabled persons or the failing to provide them with proper amenities in a building or facility, the adjudicator may *recommend* that this state of affairs be remedied. The adjudicator shall not make such an order if it is established that cost or business

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<sup>87</sup> See for example the Alberta model: (Alb) IRPA ss 31-31.1. An order for costs may also be made. An order of the board of inquiry is enforceable as an order of the court: s 32.

<sup>88</sup> (Sask) HRCReg s 1(d).

<sup>89</sup> (Sask) Reg 144/91 s 3.

<sup>90</sup> The adjudicator has jurisdiction to supervise or vary such an order, with the Commission's assistance, until there is full compliance: (Man) HRC s 47.

inconvenience would result and undue hardship would be caused.<sup>91</sup> Once a complaint has been lodged and remains to be disposed of, the Commission can seek an interlocutory order of the court to restrain conduct which is alleged to contravene the Code.<sup>92</sup>

The Canadian approach is illustrated by the sex discrimination case of *Canadian National Railway Company v Canadian Human Rights Commission*.<sup>93</sup> The Human Rights Tribunal ordered the employer to cease discriminatory recruitment practices on terms that would require the employer to hire a quota of women until their participation in blue collar jobs in the employer's undertaking was equal to the proportion of women in blue collar jobs in Canada as a whole. It was argued that the Tribunal had exceeded its jurisdiction in attempting to remedy past discrimination rather than preventing future recurrence of discriminatory practices. However, that argument was rejected on the ground that, to prevent discrimination against the identified groups protected by the Act, the statute must be given a fair, large and liberal interpretation. The Tribunal's order had been designed to tackle systematic discrimination and to prevent similar discriminatory practices reoccurring, rather than to compensate past victims of discrimination or to provide fresh opportunities for individuals previously refused employment. It was permissible to seek out and to destroy past patterns of discrimination in order to ensure that future applicants did not face the same discriminatory barriers which had blocked the employment opportunities of earlier generations. The application of this philosophy is demonstrated in a disability discrimination case also. In *Cameron v Nel-Gor Castle Nursing Home*,<sup>94</sup> a successful plaintiff was awarded compensation for lost wages and damages for injured feelings. Moreover, the employer was also directed to cease and desist discriminatory hiring practices, and ordered to offer the disabled plaintiff the next available vacancy. Furthermore, in a number of provincial decisions at first instance, boards of inquiry have ordered employers to adopt an affirmative action programme to prevent future contraventions of human rights codes.

### ***Criminal sanctions***

The use of criminal sanctions as a means of enforcing special legislation on behalf of disabled persons is, of course, a particular feature of the law in Britain and in continental Europe. The quota provisions of the DP(E)A 1944 are in principle enforceable within the criminal justice

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<sup>91</sup> (Man) HRC s 43(4). Such a decision of an adjudicator is subject to judicial review: (Man) HRC s 50.

<sup>92</sup> (Man) HRC s 54. See also s 55.

<sup>93</sup> (1985) 20 DLR (4th) 668 (Can) FCA; (1987) 40 DLR (4th) 193 (Can) SC.

<sup>94</sup> (1984) 84 CLLC ¶17,008 (Ont) HRC.

system. The use of the criminal law and criminal penalties might also be a limited feature of anti-discrimination laws in general: for example, in respect of discriminatory advertisements or persistent discriminatory practices.<sup>95</sup> In the Canadian provinces, however, more extensive use (or potential for use) of the criminal process exists. For example, a failure to comply with a provision of the New Brunswick Human Rights Act is also a criminal offence and a fine of \$100-5,000 may be levied.<sup>96</sup> Breach of the Nova Scotia legislation is also a criminal offence for which a fine of up to \$1,000 is payable.<sup>97</sup> In Ontario, with the consent of the Attorney-General, a criminal prosecution may also be pursued, as an infringement of any right under the Code is a criminal offence punishable by a fine of up to \$25,000.<sup>98</sup> In Prince Edward Island, an infringement of the Act or a non-compliance with a ministerial order is a criminal offence punishable with a fine of \$100-500 or 30 days imprisonment, in the case of an individual, and a fine of \$200-2,000 in any other case. The burden of proof in this instance is the civil one. The appropriate Minister may also seek a court order to injunct a convicted party from further offences.<sup>99</sup> Failure to comply with a recommendation of the Québec Commission can result in an injunction being sought.<sup>100</sup> Moreover, employment discrimination is a criminal offence under this province's Charter.<sup>101</sup> In Saskatchewan, a failure to comply with an order of a board of inquiry or interference with the rights of a person under the Code is a criminal offence. In the case of an individual, this may result in a fine of \$500-2,000; in any other case, the fine is \$2,000-3,000.<sup>102</sup> Where an employer has been convicted of suspending, transferring, laying-off or dismissing an employee contrary to the Code, the court may order reinstatement with compensation.<sup>103</sup> A prosecution may

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<sup>95</sup> See generally: SDA 1975 Part IV; RRA 1976 Part IV.

<sup>96</sup> (NB) HRA s 23. A prosecution requires ministerial consent: s 24. In such criminal proceedings arising from employment discrimination, the court may order reinstatement and/or lost wages up to the date of conviction: s 25. An order enjoining further violations may be issued and enforced as an order of the Supreme Court: s 27.

<sup>97</sup> (NS) HRA s 29. A prosecution requires ministerial consent: s 30. An order may also be made to injunct further offences: s 32.

<sup>98</sup> (Ont) HRC s 44.

<sup>99</sup> (PEI) HRA ss 29-32.

<sup>100</sup> (Queb) CHR&F ss 81-83.

<sup>101</sup> (Queb) CHR&F ss 87-89.

<sup>102</sup> (Sask) HRC s 35.

<sup>103</sup> (Sask) HRC s 40.

be instituted by a trade union, occupational association or employers' organization.<sup>104</sup> In addition, the Commission may seek a court injunction to prevent a person convicted of an offence under the Code from continuing or repeating the offence, and the court may also issue such an injunction in private proceedings under the Code.<sup>105</sup> In limited circumstances, infringement of the Yukon Territory Act is a criminal offence punishable by a fine of up to \$2,000.<sup>106</sup> Following the commencement of either civil or criminal proceedings, the Supreme Court may grant a temporary injunction to restrain allegedly discriminatory conduct or to require compliance with the Act, pending the completion of the proceedings. Finally, in Manitoba, in a serious case of the Code being contravened, the Minister may consent to a criminal prosecution.<sup>107</sup> A fine of up to \$10,000 may be imposed. Despite these many examples of the use of criminal law to address disability discrimination, however, little is known or understood about the impact of the criminal justice process upon employers and disabled people.<sup>108</sup>

### CONCLUDING REMARKS

In the final analysis, carefully drafted discrimination statutes are often only as good as their procedural and remedial frameworks allow them to be, however far-sighted their substantive provisions might be. The ability of disabled persons to challenge incidents and patterns of disability-informed discrimination rests entirely upon those parts of discrimination legislation that provide a cause of action, a route to litigation and an array of enforceable responses to identified unlawful actions, policies or practices. The law's emphasis upon the individual-based complaint process of the British SDA 1975 and RRA 1976 is often blamed for the alleged failure of the legislation to root out systematic and institutionalised discrimination. The want of formal class action procedures in this country also leads to a failure to learn the lessons of discriminatory episodes beyond the confines of the individual case. The treatment of discrimination complaints in isolation, and as being limited to their peculiar circumstances, frequently results in the repetition of unlawful behaviour and the consolidation, rather than demolition, of discriminatory policies and practices. With these limitations of the traditional anti-discrimination legal model in mind, we turn in the following penultimate chapter to look

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<sup>104</sup> (Sask) HRC s 36.

<sup>105</sup> (Sask) HRC s 38.

<sup>106</sup> (YT) HRA ss 27-29.

<sup>107</sup> (Man) HRC s 51.

<sup>108</sup> The question appears to be entirely ignored in the literature and would seem to warrant empirical research.



at legal strategies that go beyond enforcement and that seek to provide lasting solutions to disability disadvantage.

## CHAPTER XVI: BEYOND ENFORCEMENT: POSITIVE ACTION, CONTRACT COMPLIANCE AND EQUAL OPPORTUNITY PLANNING

### INTRODUCTION

The weaknesses of the individual complaint-based anti-discrimination law and the alleged failure of institutional enforcement in the field of gender and race discrimination have led many commentators to argue for a fresh approach. It is noteworthy, for example, that at the same time as US disability rights activists were pressing for comprehensive disability discrimination laws, in Canada - where such laws had been in place under human rights legislation for some time - Canadian disability advocates were looking to employment equity principles (involving the use of statistics, goals and timetables) to replace or supplement the reduced momentum of the non-discrimination principle as applicable to disabled persons. In Britain, too, the last decade or so has seen increasing interest in ideas of fair participation and equality of opportunity, employing methodologies that go beyond a simple proscription of direct or indirect discrimination on prohibited grounds. In this final substantive chapter, we examine some of these trends as they might apply to disabled employment rights and, in particular, we look at the role of positive action, contract compliance and equal opportunity policy-making.

### POSITIVE ACTION

#### *Meaning of positive action*

As understanding of discrimination has deepened, concern over the efficacy of the individual complaint-based model of legal enforcement of anti-discrimination norms has led to consideration being given to alternative strategies of "positive action" or "affirmative action".<sup>1</sup> As McCrudden explains, "affirmative action" is the term used in the US:

to refer to actions taken to identify and replace discriminatory employment practices, and to develop practices which result in the greater inclusion and participation in the work force of women and minorities.<sup>2</sup>

In Britain, the term "positive action" is usually preferred. Positive action can play a role in the range of judicial remedies available to courts and tribunals to address findings of discrimination. For example, an order might be made that the successful plaintiff in a discrimination action should be promoted or that the unsuccessful employer-defendant should dismantle a discriminatory recruitment practice. In the present context, however, concern is with *voluntary* positive action or with positive action that is encouraged or required by the

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<sup>1</sup> McCrudden, 1986: 219.

<sup>2</sup> McCrudden, 1986: 220-1.

legal framework itself.

McCrudden identifies five types of possible (although not necessarily permissible) positive action.<sup>3</sup> First, employers might take steps to eradicate discrimination by identifying and replacing unjustifiably discriminatory practices bearing upon one group rather than another. Close scrutiny of selection tests for inherent bias would illustrate this approach. This is not only permitted in existing discrimination law, but is an implicit legal duty. Second, enterprises might adopt "facially neutral but purposefully inclusionary policies" in order to increase the representation in the work force of minority group members without directly using a prohibited ground to do so. McCrudden gives the example of recruiting from among the unemployed or within a certain local catchment area to demonstrate this point. The problem with this form of positive action is that it will usually amount to direct or indirect reverse discrimination.<sup>4</sup> Third, employers might institute an outreach programme to ensure that groups that have suffered discrimination in the past are made aware of employment opportunities and encouraged to apply for them. If necessary, minority group members might be extended the assistance of training programmes designed to qualify or re-skill these groups to compete for those opportunities. Outreach, however, does not extend into the selection or promotion process itself, and there the minority group members must compete on merit. With that limitation in mind, outreach appears to be permitted by existing discrimination legislation.<sup>5</sup> Fourth, positive action might involve a degree of reverse discrimination, where employers address the under-representation of a disadvantaged group by according group members preferential treatment in recruitment, selection, promotion or employment security. The adoption of a quota of jobs for particular minorities is the manifest example of this type of positive action. As we have seen in an earlier chapter, this transgresses existing sex and race discrimination law. Fifth and finally, employers might redefine "merit" by including membership of a group or group characteristics as a relevant qualification for a job. The classic example is the recruitment of Afro-Caribbean applicants for positions as social workers providing welfare services to the Afro-Caribbean community. This form of positive action is permitted within narrow terms by the "genuine occupational qualification" exceptions under the Sex Discrimination and Race Relations Acts.<sup>6</sup>

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<sup>3</sup> McCrudden, 1986: 223-5.

<sup>4</sup> Despite McCrudden's arguments (1986: 230-2), this form of positive action is fraught with difficulty and unlikely to meet with the approval of the British legal system.

<sup>5</sup> SDA 1975 ss 47-47; RRA 1976 ss 37-38.

<sup>6</sup> SDA 1975 s 7(2)(e); RRA 1976 s 5(2)(d).

### ***Positive action and disability***

In Britain, the absence of a symmetrical (or even an asymmetrical) disability discrimination law has permitted by default, although not required, employers to utilise any or all of the above five forms of positive action in respect of disabled workers. The use of outreach techniques is in fact recommended by the Code of Good Practice on the Employment of Disabled People.<sup>7</sup> Employers are also encouraged there to review job descriptions and requirements, and application and selection procedures, to ensure that disabled applicants are not inadvertently excluded from employment opportunities.<sup>8</sup> Disabled workers may also have benefitted through some local authorities' policies that direct new job opportunities towards applicants on the unemployment register or within a narrowly defined local labour market. The use of "reverse discrimination" is mandated, of course, by the quota scheme under the 1944 Act, and some public sector employers have used the quota, in tandem with a redefinition of merit, so as to increase the representation of disabled people in their workforce.<sup>9</sup>

Nevertheless, positive action, in general, and towards disabled workers, in particular, remains in the realms of voluntarism in Britain. While the enactment of a disability discrimination statute would undoubtedly encourage some employers to take positive action towards disabled persons, the experience of other countries suggests that a positive action mandate, to be effective and universal, has to be enshrined in law. One way in which this might be done is through statutory contract compliance techniques.

### **A ROLE FOR CONTRACT COMPLIANCE?**

In the US during the 1970s and 1980s, the message that hiring disabled workers was good for business was often heard.<sup>10</sup> Appeals to the commercial instincts of employers as a tactic for promoting the employment opportunities of minorities are frequently seen as a signal of weak or non-existent legislation regulating social discrimination in the labour market. Indeed, market forces have recently been recruited to demonstrate the futility of anti-discrimination laws in the first place and to argue the case for allowing a micro-economic solution to the problem of employment discrimination.<sup>11</sup> However, harnessing commercial energy to the

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<sup>7</sup> Para 5.3. See also paras 5.4-5.5.

<sup>8</sup> Paras 5.2 and 5.6-5.19.

<sup>9</sup> For an account of the efforts of the London Borough of Lambeth in this respect, see: *Equal Opportunities Review*, 1989. See also the experience of Manchester City Council recounted in *Equal Opportunities Review*, 1992: 15-18.

<sup>10</sup> See, for example: Williams, 1972; Pati and Adkins, 1980.

<sup>11</sup> Epstein, 1992: *passim*.

cause of equal opportunity and the anti-discrimination principle is not necessarily incompatible with the role of legal regulation. Contract compliance techniques have been a feature of ensuring fair labour standards for many decades.

### *Meaning and use of contract compliance*

Contract compliance has been described in the following terms:

With contract compliance the public sector insists that the firms from which it buys goods or services meet certain minimum employment standards. Rather than leaving it to other agencies to ensure that those standards are honoured, the purchasing body itself, or an agency acting directly on its behalf, seeks to ensure that they are met or that they will be met within a reasonable time. If the purchasing body cannot satisfy itself, at least on this latter point, then the firm forfeits the right to tender for public sector contracts.<sup>12</sup>

In other words, unless contractors meet specified employment standards for their workforce, they will lose the right to compete for or retain business contracts with the public sector. Contract compliance ensures that the purchasing power of the public sector is employed in the pursuit of social policy.<sup>13</sup> Although contract compliance is often thought of as a fairly modern phenomenon, a form of contract compliance was practised in government contracting in Britain since 1891 by virtue of the House of Commons Fair Wages Resolutions.<sup>14</sup> In essence, a fair wages clause in government contracts insisted that contractors should observe minimum wage and labour standards, enforceable through compulsory arbitration, and subject to the ultimate sanctions of contract termination and removal from the lists of approved tenderers.<sup>15</sup> However, central government fair wages clauses did not address discrimination other than anti-union policies and practices, although government contracts since 1969 required contractors to conform with the Race Relations Act 1976.<sup>16</sup> Furthermore, the last Fair Wages Resolution (of 1945) was rescinded by the Government with effect from 1983 and, with the advent of compulsory competitive tendering, other public sector

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<sup>12</sup> Carr, 1987: 2.

<sup>13</sup> In principle, there is nothing to prevent the private sector using contract compliance but, altruism apart, there are few motives for doing so. In practice, therefore, contract compliance techniques are almost invariably used by central and local government or by organs of the state. However, one exceptional illustration of a form of "contract compliance" is the monitoring of suppliers by Marks and Spencer plc. Evidence cited in Institute of Personnel Management, 1987: 5.

<sup>14</sup> The use of fair wages clauses in local government pre-dates this development by two years: Carr, 1987: 9.

<sup>15</sup> See Bercusson, 1978.

<sup>16</sup> Institute of Personnel Management, 1987: 4, where it is doubted whether these clauses are effectively monitored or enforced.

employers resiled from including non-commercial considerations in their contractual arrangements.<sup>17</sup>

The use of contract compliance as a tool of equal opportunity policy developed in the US during the early 1940s to combat racial discrimination in the defence industries.<sup>18</sup> Since 1965, moreover, with the signing of Executive Order N° 11246 and the establishment of the Office of Federal Contract Compliance (OFCCP), contract compliance and affirmative action were placed upon a firmer footing and extended to embrace discrimination on the grounds of race, colour, religion, gender and national origin.<sup>19</sup> In Britain, nevertheless, fair wages resolutions aside, *statutory* contract compliance has not been a feature of the anti-discrimination and equal opportunity battery. Instead, such experiments with contract compliance as there were occurred in local government on a *voluntary* basis, although undoubtedly inspired by the specific duty of local authorities under race discrimination law to promote equality of opportunity.<sup>20</sup> This encouraged a small number of councils to utilise their tendering procedures and commercial contracts to attempt to project the effects of their commitment to equal employment opportunity to third parties with whom they did business.<sup>21</sup> The brave new world of contract compliance was short lived, however, as the Local Government Act 1988 effectively outlawed the inclusion of non-commercial conditions in local authority contracts and restricted the ability of local government entities to vet contractors during the tendering stage.<sup>22</sup>

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<sup>17</sup> Fredman and Morris, 1989: 460-1.

<sup>18</sup> See Carr, 1987: 3 for an account of this initiative.

<sup>19</sup> 3 CFR §339 and 42 USC §2000e.

<sup>20</sup> RRA 1976 s 71. There is no parallel provision in the SDA 1975. The use of s 71 as a plank for the pursuit of socio-political activity by local authorities has been fraught with difficulty. See, for example: *Wheeler v Leicester City Council* [1985] AC 1054 HL and *R v Lewisham London Borough Council, ex parte Shell UK Ltd* [1988] 1 All ER 938 Div Ct.

<sup>21</sup> The leading proponent of this strategy was the now defunct Greater London Council. See: *Industrial Relations Review and Report*, 1986: 3-5; Carr, 1987: 10-16. Other examples of contract compliance practitioners are detailed in Institute of Personnel Management, 1987: *passim*. For an analysis of the legal basis, if any, upon which contract compliance has been practised in the public sector, see: Fredman and Morris, 1989: Chapter 12.

<sup>22</sup> Local Government Act 1988 ss 17-18 and 25 and see subsequently *R v London Borough of Islington, ex parte Building Employers' Confederation* [1989] IRLR 382 Div Ct. For an account of the impact of the 1988 legislation upon contract compliance, see Fredman and Morris, 1989: 464-9.

### ***Contract compliance and disabled persons***

In Britain, the primary emphasis in the use of contract compliance methods has been in fostering improved employment opportunities and conditions for ethnic minority workers. Women and other disadvantaged social groups have tended to take second place in the order of priorities. Nevertheless, disability has featured as an issue in voluntary contract compliance programmes. For example, the Greater London Council's pre-contract procedures took account of the percentage of disabled employees engaged by any firm tendering for a contract. Successful tenderers would be expected to liaise with the appropriate authorities to attempt the fulfilment of statutory and extra-statutory obligations towards this group.<sup>23</sup> In spite of this, there is little, if any, evidence of the effect of such programmes upon disabled employment. Now the Local Government Act 1988 surely prevents any further use of local authorities' purchasing power to advantage disabled workers.<sup>24</sup>

If a comparative perspective is adopted, it is clear that disabled persons in other countries do enjoy the formal protection of *statutory* contract compliance programmes. In Canada, the Federal Contractors Programme applies to employers with over 100 employees bidding for federal contracts for the supply of goods and services valued at at least \$200,000.<sup>25</sup> Such employers must observe the principle of employment equity in their workforce and this extends to disabled persons. The sanctions available where the principle is being ignored include the eventual exclusion of employers from tendering for federal contracts. The federal government has the right to review employers' records in order to assess efforts being made, levels of compliance and results achieved. Among the Canadian provinces, Ontario also uses contract compliance to address employment discrimination by providing that it is an implied term of every Ontario government contract and sub-contract that the right to equal treatment in employment without discrimination on the ground of disability shall not be infringed during the performance of that contract.<sup>26</sup> A similar provision applies in respect of government

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<sup>23</sup> *Industrial Relations Review and Report*, 1986: 5; Carr, 1987: 15.

<sup>24</sup> By virtue of s 17(5)(a). An attempt was made during the passage of the draft legislation to include a clause that would allow local authorities to ask tenderers and contractors questions relevant to the Code of Good Practice on the Employment of Disabled People. See for example: HC Bill 54 (1987-88) cl 19 (as amended on Report). This clause did not survive the further scrutiny of the Bill.

<sup>25</sup> The programme is a government initiative taken under employment equity legislation. See Chapter VIII above.

<sup>26</sup> (Ont) HRC s 26(1). See also Manitoba's contract compliance measures: (Man) HRC s 56(1).

grants and loans.<sup>27</sup> 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).<sup>28</sup>

In the US, a form of contract compliance is implicit in section 504 of the RA 1973. As discussed in Chapter VI above, section 504 insists that disabled persons shall not be excluded from participation in any programme or activity receiving federal financial assistance or conducted by an arm of the federal government. This mandates equal employment opportunity and prohibits disability-based discrimination where employers are the beneficiaries of federal funding. However, as this gives the individual directly enforceable rights against the employer and does not strictly involve the medium of *commercial* contracting, it is not a true example of contract compliance techniques in practice. Such an example is provided by section 503 of the Act, which makes separate provision for disabled persons to benefit from contract compliance theory. This is such an important illustration of the genre that it deserves separate treatment.

## DISABILITY AND CONTRACT COMPLIANCE IN THE UNITED STATES

### *Section 503 of the Rehabilitation Act 1973*

In the US, section 503 of the federal RA 1973 introduced statutory contract compliance as a means of promoting equal employment opportunities for disabled workers.<sup>29</sup> Its basic provisions have been set out and reproduced in Chapter VI above. Any employer contracting with the federal government is required to take affirmative action to employ and advance disabled persons if the value of the contract exceeds \$2,500. This provision covers procurement contracts for goods or services and construction contracts. It also applies to any similar sub-contracts which exceed \$2,500 and which are entered into by a federal contractor in order to carry out the main contract.<sup>30</sup> Every relevant contract with the federal government must incorporate a provision requiring the federal contractor, when employing persons to carry out the contract, to take affirmative action to employ and advance in

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<sup>27</sup> (Ont) HRC s 26(2).

<sup>28</sup> (Ont) HRC s 26(3).

<sup>29</sup> 29 USC §793(a). Authority under this section was delegated to the Secretary of Labor by Executive Order N° 11758, 15 January 1974 (39 *Federal Regulations* 2075) as amended. Regulations implementing s 503 have been enacted by the OFCCP: 41 CFR Part 60-741.

<sup>30</sup> 41 CFR §60-741.2. The prime contractor and sub-contractor must include an affirmative action clause in the sub-contract either expressly or by reference: 41 CFR §60-741.20.



employment qualified disabled persons.<sup>31</sup> The terms of the model affirmative action clause are reproduced in Text Box 21.

Federal contractors holding contracts in excess of \$50,000 and employing over 50 employees are subject to additional obligations. Within 120 days of the relevant contract commencing, such employers must prepare and maintain an affirmative action programme at each of their establishments.<sup>32</sup> The programme must set out the employer-contractor's policies, practices and procedures regarding affirmative action in respect of all employment practices and in respect of all levels of employment.<sup>33</sup> It must be available for inspection upon request by any employee or applicant and, for this purpose, information about the availability and accessibility of the programme has to be posted at each workplace.<sup>34</sup> The programme must be kept under review and up-dated annually, provided that any significant changes that result are communicated to employees and would-be employees.<sup>35</sup> The contractor-employer must invite individuals who may be covered by the legislation to come forward if they wish to take advantage of the affirmative action programme. A model form of invitation is reproduced in Text Box 22. Such action on the part of a disabled person has to be voluntary and treated as confidential and in accordance with the legislation. A refusal by disabled persons to identify themselves as potential beneficiaries of an employer-contractor's affirmative action programme is not to be the subject of adverse treatment.<sup>36</sup> Compliance with the particular requirement to develop an affirmative action programme does not relieve the employer of any obligation to take affirmative action in respect of a person of whose disability the employer already has knowledge, but equally the employer is not obliged to search its medical files to identify disabled persons who are not otherwise known or who have not come forward

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<sup>31</sup> 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.

<sup>32</sup> 41 CFR §60-741.5(a). This may be integrated with any other affirmative action programmes. Originally, affirmative action plans had to be filed with the Department of Labor, but the evidence suggested that the Department found it impracticable to process and review the submitted plans, so this requirement was dropped in 1976: Percy, 1989: 204.

<sup>33</sup> 41 CFR §60-741.6(a). The policies, practices and procedures must accord with the standards set in 41 CFR §60-741.6, which are discussed below.

<sup>34</sup> 41 CFR §60-741.5(d).

<sup>35</sup> 41 CFR §60-741.5(b).

<sup>36</sup> 41 CFR §60-741.5(c)(1). An employee is not precluded from coming forward under the affirmative action programme on some later occasion: 41 CFR §60-741.5(c)(2).

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- (a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
  - (b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.
  - (c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.
  - (d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligations under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.
  - (e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.
  - (f) The contractor will include the provisions of this clause in every subcontract or purchase order of \$2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

Source: 41 CFR §60-741.4

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**Text Box 21: Affirmative action clause under section 503 Rehabilitation Act 1973**

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1. This employer is a government contractor subject to section 503 of the Rehabilitation Act of 1973, which requires government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. If you have such a handicap and would like to be considered under the affirmative action program, please tell us. Submission of this information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals, and regarding necessary accommodations, (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment, and (iii) government officials investigating compliance with the Act shall be informed.
  
  2. If you are handicapped, we would like to include you under the affirmative action program. It would assist us if you tell us about (1) any special methods, skills and procedures which qualify you for positions that you might not otherwise be able to do because of your handicap, so that you will be considered for any positions of that kind, and (2) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.

**Source: Appendix B to 41 CFR Part 60-741**

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**Text Box 22: Invitation to participate as beneficiary of affirmative action programme**

voluntarily.<sup>37</sup>

### ***Affirmative action programmes***

Whether or not a government contractor is required to devise a *formal* affirmative action programme, all employers subject to section 503 must consider the effect of the affirmative action mandate upon their policies, practices and procedures. Personnel processes call for review to decide whether:

present procedures assure careful, thorough and systematic consideration of the job qualifications of known handicapped applicants for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available.<sup>38</sup>

If necessary, the personnel procedures must be modified and, in any event, must be designed so as to allow compliance with the affirmative action obligation to be monitored. The OFCCP suggests, but does not require, that employers adopt model procedures contained in the section 503 regulations.<sup>39</sup> Application or personnel forms might be annotated so as to identify vacancies for which a known disabled applicant was considered. Such forms should be easily retrievable for internal and external review in investigations and compliance activities. Disabled employees' personnel or application records might identify each promotion and training programme for which the individual was considered. Where a disabled employee or applicant is turned down for any employment opportunity, the form should contain a statement of the reason for that outcome, including a comparison with the qualifications of the successful and unsuccessful candidates, and a description of any accommodations considered.<sup>40</sup> The application form or personnel record should also describe any accommodation undertaken by the employer to place a disabled individual in a job where the individual was successful in being hired, promoted or trained for that position.

As part of an affirmative action programme, contractors must provide and adhere to a schedule for the review of job qualification requirements.<sup>41</sup> Insofar as such requirements tend to screen out qualified disabled persons, the employer must ensure that they are job-related, consistent with business necessity and essential for the safe performance of the job.

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<sup>37</sup> 41 CFR §60-741.5(c)(3). It follows also that compliance with this requirement does not absolve the employer from disability-based discrimination under the legislation at large: 41 CFR §60-741.5(c)(4).

<sup>38</sup> 41 CFR §60-741.6(b).

<sup>39</sup> Appendix C to Part 60-741. For an insiders' view of the role of the OFCCP under s 503 see: DeLury, 1975.

<sup>40</sup> The statement should be available to the disabled person on request.

<sup>41</sup> 41 CFR §60-741.6(c)(1).

Affirmative action generally dictates that the application of job qualification requirements in the employment process should accord with these principles and the burden of so proving is upon the contractor.<sup>42</sup> However, the section 503 regulations allow federal contractors to conduct pre-employment medical examinations of applicants "provided that the results of such an examination shall be used only in accordance with the requirements of" these provisions.<sup>43</sup> Any inquiry or medical examination relating to an individual's physical or mental condition must lead to the information thus gleaned being treated as confidential.<sup>44</sup> Naturally, section 503 requires federal contractors to make reasonable accommodation to the limitations of a disabled applicant or employee.<sup>45</sup> If applicants or employees identify themselves as disabled persons desirous of benefitting under the contractor's affirmative action programme, where the contractor is obliged to invite such identification, the contractor must seek the advice of the applicants or employees in question regarding their proper placement and appropriate accommodation.<sup>46</sup> The extent of the obligation to accommodate can take account of business necessity and financial cost and expenses, and reasonable accommodation need not be made if it can be shown that it would impose an undue hardship on the conduct of the business.

#### ***Affirmative action in practice***

By requiring federal contractors to review their employment policies and practices, the OFCCP causes these employers to question whether their personnel procedures provide the required affirmative action necessary for the proper employment and advancement of disabled workers. The law requires that contractors must act upon the findings of such internal review. Accordingly, if the evidence shows that affirmative action is absent or deficient, contractors:

shall undertake appropriate outreach and positive recruitment activities... [and] the scope of a contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment

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<sup>42</sup> 41 CFR §60-741.6(c)(2).

<sup>43</sup> 41 CFR §60-741.6(c)(3); *cf* 45 CFR §84.14.

<sup>44</sup> 41 CFR §60-741.6(c)(3). Supervisors and managers may be informed of any work or duty restrictions and of any accommodations necessary. First aid and safety personnel may be informed (where and to the extent appropriate) if the disabled person might require emergency treatment. Government officials investigating compliance with the law must also be informed. Confidentiality is thus subject to practical exceptions.

<sup>45</sup> 41 CFR §60-741.6(d).

<sup>46</sup> 41 CFR §60-741.5(c)(1).

practices are adequate.<sup>47</sup>

The OFCCP regulations suggest a number of types of activities which might be undertaken, but the list is merely illustrative and not designed to be prescriptive or exhaustive.

The OFCCP suggests that contractors might develop effective internal communication of its affirmative action obligations.<sup>48</sup> The intention is to foster understanding, acceptance and support among all levels of management and the workforce, and to encourage the taking of necessary steps to aid the contractor in complying with the affirmative action obligation. In the OFCCP's words:

A strong outreach program will be ineffective without internal support from supervisory and management personnel and other employees, who may have had limited contact with handicapped persons in the past.<sup>49</sup>

This policy dissemination within the workplace is crucial. This might be achieved via inclusion in the contractor's policy manual or by publication in any in-house media (such as company newspapers and annual reports).<sup>50</sup> The policy statement should be posted on bulletin boards. Alternatively or in addition, special meetings with managers and supervisors could be conducted to explain the policy's intent and the individual responsibility for implementing it. Similar meetings could be arranged for other employees, but in both cases the commitment and positive attitude of senior management towards the policy must be manifest. Affirmative action policy can also be the subject of employee orientation or induction programmes and management training sessions. Trade union officials should be made aware of the policy, their co-operation secured, and non-discrimination clauses written into collective agreements.<sup>51</sup> Existing contractual provisions should be tested to ensure that they are non-discriminatory. It should be made clear that disabled workers will not face harassment or victimisation for seeking to exercise their rights to equal opportunity.

It is further recommended by the OFCCP that internal procedures need to be in place to

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<sup>47</sup> 41 CFR §60-741.6(f).

<sup>48</sup> 41 CFR §60-741.6(f)(1).

<sup>49</sup> 41 CFR §60-741.6(g).

<sup>50</sup> Company publications might also assist the establishing of disabled role models: for example, by including articles on the achievements of disabled employees or by ensuring the proper visual representation of disabled persons in employee handbooks and recruitment literature.

<sup>51</sup> See also 41 CFR §60-741.9 as to the OFCCP's role in facilitating the co-operation of trade unions, recruitment agencies and training organisations in furthering the affirmative action goal.

ensure that the policy is being implemented and is made operational.<sup>52</sup> The employer's commitment to increase disabled employment opportunities should be reiterated and reinforced periodically.<sup>53</sup> The assistance and support of recruiting sources might be enlisted as an additional means of underpinning that commitment.<sup>54</sup> Recruitment through disabled educational and training institutions might be attempted and contacts forged with social services agencies, disability organisations and so on as a conduit for advice, technical assistance and referral of potential employees.<sup>55</sup> A further approach to policy implementation is to review employment records to discover whether the employment skills of existing disabled employees in the organisation are being fully utilized and developed, and whether such employees are available for promotion and transfer.<sup>56</sup> Written dissemination of the company's policy on disabled employment opportunities should be made to sub-contractors, customers and suppliers, requesting appropriate action on their part.<sup>57</sup> A supplementary course of action, and the clearest example of outreach, is the taking of positive steps to attract qualified disabled workers outside the workforce who have the required skills and who could be recruited with affirmative action. Such workers can be located through local branches of disabled organisations and organisations of disabled people.<sup>58</sup> Finally, to repeat a point already made above in another context, employers might include disabled workers when employees are pictured in consumer, promotional and recruitment advertising.<sup>59</sup>

The responsibility for implementing an affirmative action policy is a matter which should be identified at all stages of espousing a policy and attempting to make it operational. The OFCCP recommends that an executive manager should be designated to manage the

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<sup>52</sup> 41 CFR §60-741.6(f)(2).

<sup>53</sup> 41 CFR §60-741.6(f)(3).

<sup>54</sup> 41 CFR §60-741.6(f)(4): *eg* employment and rehabilitation agencies, sheltered workshops, trade unions, organisations of and for disabled people, colleges and educational agencies, etc.

<sup>55</sup> 41 CFR §60-741.6(f)(5)-(6).

<sup>56</sup> 41 CFR §60-741.6(f)(7).

<sup>57</sup> 41 CFR §60-741.6(f)(9).

<sup>58</sup> 41 CFR §60-741.6(f)(10).

<sup>59</sup> 41 CFR §60-741.6(f)(8).

employer's affirmative action activities.<sup>60</sup> He or she should be clearly identified with the policy and associated programmes, and must be given the necessary support and staff to implement the policy. The section 503 regulations pinpoint seven key implementation activities for the responsible director or manager of an employer's affirmative action policy:

- (1) development of policy statements, affirmative action programmes and internal and external communication techniques;
- (2) identification of problem areas in the implementation of the affirmative action programme, in conjunction with line management and disabled employees, and development of solutions;
- (3) design and implementation of auditing and reporting systems;
- (4) liaison between the contractor and the OFCCP;
- (5) liaison between the contractor and disability organisations, and arrangement of active corporate involvement in community service programmes for disabled people;
- (6) informing management of latest developments in affirmative action;
- (7) arranging career counselling for disabled employees.

The latter four activities do not require further explication for the purpose of this study, but the former three points warrant expansion. First, the responsibility for implementing an affirmative action policy requires the development of techniques of policy communication. The OFCCP advocates including regular discussions with managers, supervisors and employees in order to check policy compliance.<sup>61</sup> Supervisors should be made aware that, among the criteria by which their performance is being judged, their efforts and achievements in affirmative action are being evaluated. Second, identifying problems and developing solutions is particularly important in respect of the employer's reasonable accommodation obligations.<sup>62</sup> Third, the design and implementation of audit and reporting systems should ensure that the effectiveness of the programme is being measured and that the need for any remedial action is being indicated. The degree to which the company's affirmative action objectives are being attained should be determinable, while whether each workplace or location under the employer's control is complying with the relevant law must be confirmed.<sup>63</sup> Such systems should also ascertain whether disabled employees have had the opportunity to participate in all the employer's educational, training, recreational and social

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<sup>60</sup> 41 CFR §60-741.6(h).

<sup>61</sup> 41 CFR §60-741.6(h)(1).

<sup>62</sup> 41 CFR §60-741.6(h)(2).

<sup>63</sup> 41 CFR §60-741.6(h)(3).



activities.

Once affirmative action policies and procedures are in place, contractors might be careful to ensure that good practice is being observed in the development and execution of their programmes. The OFCCP lists a number of *desiderata*.<sup>64</sup> Job qualification requirements, once reviewed to eliminate adverse impact upon disabled workers, should be made available to all employees and managers involved in recruitment, screening, selection and promotion. The selection process should be free of stereotyping disabled persons in a way which limits their employment opportunities. Personnel involved in employment processes (including the disciplinary process) should be carefully selected and trained in order to safeguard the integrity of the affirmative action policy or programme. Employers should ensure that representatives from recruiting sources are formally briefed so that the effects of the company's affirmative action policy are not dissipated beyond its boundaries.<sup>65</sup> Ideally, disabled employees should be part of the personnel staff or team and should be generally available as role models in community activities, such as career days. Recruitment in schools should incorporate special efforts to make contact with disabled pupils, while companies should consider work placement and work study connections with rehabilitation facilities and specialist schools so as to encourage disabled persons to enter the workplace. The OFCCP encourages contractors to "use all available resources to continue or establish on the job training programs".<sup>66</sup> Contractors should request state employment security agencies to refer disabled workers for consideration under an affirmative action programme.<sup>67</sup>

#### ***Breach of contract compliance obligations***

Two practices which could run counter to the spirit of affirmative action are given special consideration in the section 503 regulations. First, in employing or promoting a disabled individual, a federal contractor may not offer a reduced rate of pay to take account of any disability income, pension or benefit received from another source.<sup>68</sup> Second, contracts

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<sup>64</sup> 41 CFR §60-741.6(i).

<sup>65</sup> The OFCCP recommends plant tours, explanations of current and future vacancies, job descriptions and worker specifications. Explanations of selection processes and recruitment literature should be an integral part of these briefings, and formal arrangements should be made for referral of applicants, follow-up with sources, and feedback on disposition of applicants: 41 CFR §60-741.6(i)(4).

<sup>66</sup> 41 CFR §60-741.6(i)(9).

<sup>67</sup> 41 CFR §60-741.8.

<sup>68</sup> 41 CFR §60-741.6(e).

between the contractor-employer and a sheltered workshop do not count as affirmative action as a substitute for the employment and advancement of disabled individuals within the employer's direct workforce.<sup>69</sup> However, such contracts might be part of an affirmative action policy where the sheltered workshop undertakes training of disabled persons and the contractor has undertaken to place the newly qualified trainees in its workforce at full rates of pay.

A disabled person who contends that a federal contractor is in breach of the affirmative action clause of a contract covered by section 503 may complaint to the federal Department of Labour:

If any individual with handicaps believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with handicaps, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.<sup>70</sup>

This leads to an investigation of the complaint by the OFCCP.<sup>71</sup> First, however, it is envisaged that normally the complaint will be pursued through the contractor's internal review procedures. If the complaint is not resolved within 60 days, the matter must be resolved by the OFCCP, if necessary using alternative dispute resolution methods. Compliance with section 503 obligations does not necessarily determine that the contractor is in compliance with other disability discrimination laws, and the reverse proposition is also true.<sup>72</sup> However, where there is a clear breach of section 503, and the matter cannot be resolved by informal means, the section 503 regulations allow for judicial enforcement proceedings to enforce the contractor's affirmative action obligations.<sup>73</sup> Furthermore, the Department of Labor, through the OFCCP, may then take such action as the facts and circumstances warrant,<sup>74</sup> consistent with the terms of such contract and the applicable laws and regulations.<sup>75</sup> In particular, the

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<sup>69</sup> 41 CFR §60-741.6(j).

<sup>70</sup> 29 USC §793(b). The s 503 regulations lay down procedures for handling complaints: 41 CFR §§60-741.24-.26.

<sup>71</sup> 41 CFR §60-741.26.

<sup>72</sup> 41 CFR §60-741.1.

<sup>73</sup> 41 CFR §60-741.28.

<sup>74</sup> 41 CFR §60-741.27.

<sup>75</sup> Note the following national interest defence:

The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set

federal government contracting party may withhold progress payments under the contract, or cancel or terminate the contract, or debar the contractor from future federal contracting opportunities. In such cases, the contractor is entitled to a formal hearing before an administrative law judge.<sup>76</sup>

***A future role for contract compliance?***

At first blush, the US model of affirmative action for disabled persons under contract compliance appears quite an attractive option for those advocates of disability rights legislation. However, some points and limitations should be borne in mind. Although the section 503 regulations require contractors to keep records appertaining to compliance with the statutory provisions, and these are available for inspection by OFCCP compliance officers, in reality scrutiny of contractors' policies and practices is random and thinly spread. Testimony suggests that only about 10 per cent of contractors subject to section 503 are troubled by compliance reviews.<sup>77</sup> An earlier audit of the OFCCP in 1977 had been critical of the OFCCP's implementation of section 503 and had pointed up the lack of a procedure for conducting comprehensive compliance reviews.<sup>78</sup> The agency had adopted a reactive response, triggered by complaints, rather than a proactive approach to compliance. The result was that a survey of federal contractors conducted in 1978 found that 90 per cent were not complying with the regulations in some way, 25 per cent had not adopted an affirmative action plan, 44 per cent had no outreach programme, and 17 per cent did not practise reasonable accommodation.<sup>79</sup> Legal commentators were justly critical of the OFCCP's lack of aggressiveness and patent weakness in enforcing section 503 and protecting disabled employment expectations.<sup>80</sup> However, less than a decade later, these same criticisms were once again being voiced.<sup>81</sup>

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forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination:  
contained in 29 USC §793(c).

<sup>76</sup> 41 CFR §60-741.29.

<sup>77</sup> Brigham, 1985: 118-9. At the time of this testimony, David Brigham was Deputy Director and Handicapped Employment Officer with the US Department of Labor, Veterans and Handicapped Division, OFCCP.

<sup>78</sup> Evidence cited by Percy, 1989: 205-6.

<sup>79</sup> Reported in Percy, 1989: 206.

<sup>80</sup> See for example: O'Dea, 1980.

<sup>81</sup> Percy, 1989: 209.

Moreover, although there is evidence that contract compliance techniques have had a positive effect upon the employment chances of women and racial minorities,<sup>82</sup> there is little or no comparable evidence assessing the impact of section 503 upon disabled persons.<sup>83</sup> Intuition suggests that there must be some effect, but the measure of that effect and its quality is unknown.<sup>84</sup> Furthermore, notwithstanding the fact that section 503 has been interpreted judicially as importing a non-discrimination requirement, there has been much confusion and doubt about whether the section affords a disabled complainant a private right of action in the federal courts or whether enforcement is limited to proceedings before and by the OFCCP.<sup>85</sup> Federal appellate authority determines that section 503 does not create a private cause of action and that complainants are limited to the invocation of the OFCCP enforcement mechanisms.<sup>86</sup> Attempts to argue that disabled individuals have *locus standi* to sue a contractor on the basis that it is in general breach of its duty to take affirmative action towards disabled people, or that a disabled employee is a third party beneficiary of the commercial contract in question, have also failed.<sup>87</sup> The only other course of action available to a disabled plaintiff is to seek judicial review of an OFCCP decision with which he or she disagrees.<sup>88</sup>

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<sup>82</sup> See, for example, the review of the relevant evidence in Leonard, 1984.

<sup>83</sup> In contrast, there is research into the economic impact of s 503 on businesses and, in particular, the ability of small firms to compete for government contracts in the face of contract compliance regulations: Premus and Carnes, 1982.

<sup>84</sup> Some evidence of positive effects can be gleaned from a report of the US Department of Labour (1982). This source demonstrated that federal contractors had begun to change their attitudes and policies towards disabled workers, especially in respect of making reasonable accommodation. That study is referred to in more detail in Chapter XIII above.

<sup>85</sup> This question has dominated the legal literature on s 503. See, for example: Paolicelli, 1979; Schoon, 1979; *Michigan Law Review*, 1981; Boller, 1982.

<sup>86</sup> See, for example: *Beam v Sun Shipbuilding & Dry Dock Co* (1982) 679 F2d 1077 (3rd Cir); *Davis v United Airlines* (1981) 662 F2d 120 (2nd Cir), *certiorari denied* (1982) 456 US 965; *Simpson v Reynolds Metals Co* (1980) 629 F2d 1226 (7th Cir); *Simon v St Louis County* (1981) 656 F2d 316 (8th Cir), *certiorari denied* (1982) 455 US 976; *Fisher v City of Tucson* (1981) 663 F2d 861 (9th Cir), *certiorari denied* (1982) 459 US 881; *Rogers v Frito-Lay* (1979) 611 F2d 1074 (5th Cir), *certiorari denied* (1980) 449 US 889; *Hoopes v Equifax Inc* (1979) 611 F2d 134 (6th Cir).

<sup>87</sup> See, for example: *Simpson v Reynolds Metals Co* (1980) 629 F2d 1226 (7th Cir); *Hodges v Atchison, Topeka and Santa Fe Railway* (1984) 728 F2d 414 (10th Cir), *certiorari denied* (1984) 104 SCt 97. These limitations in s 503 will be of no surprise to British employment lawyers familiar with the similar drawbacks to individual enforcement of fair wages clauses: *Simpson v Kodak Ltd* [1948] 2 KB 184.

<sup>88</sup> See, for example: *Moon v US Department of Labor* (1984) 747 F2d 599 (11th Cir), *certiorari denied* (1985) 105 SCt 2117.

In spite of these reservations, contract compliance undoubtedly has a role to play in the enfranchisement of disabled persons' employment rights. By going beyond the simple anti-discrimination principle and by mandating a degree of positive action on behalf of disabled workers, contract compliance provides a detailed framework within which employers can develop policies and practices with the prior approval of the state. Businesses contracting with the public sector will know that their commitment to good practice and fair employment standards will not disadvantage them in the tendering process and besides will even give them an edge over competitors who compete on the basis of low labour costs resulting from poor labour standards. On the other hand, governments subscribing to neo-classical economic theory will view contract compliance schemes as an unwarranted interference with the free play of the market and as an undue burden upon business, although a libertarian view might suggest that the elimination of morally abhorrent discrimination through the use of commercial pressures is more desirable than direct interference in business via social regulations such as anti-discrimination laws.<sup>89</sup>

#### **EQUAL OPPORTUNITY POLICIES AND PLANNING**

Statutory contract compliance lies at the crossroads between positive or affirmative action in one direction and equal opportunity plans and policies in the other direction. While contract compliance legislation is neither a necessary nor sufficient condition for equal opportunity planning, it is clear that there must be some form of legal imperative if employers are to be encouraged to include disabled persons in corporate personnel policy.

#### ***Legal spurs to policy formulation: the view from abroad***

In the US, section 503 of the RA 1973 has encouraged and required the development of equal opportunity policy-making. Without equal opportunity plans and policies, employers lack the foundations upon which to build such positive action practices as the law permits or demands. Section 501 also requires the executive branch of the federal government - in its role as an employer - to develop and implement affirmative action plans for the hiring, placement and advancement of disabled persons.<sup>90</sup> This section has been much neglected

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<sup>89</sup> This is essentially the position of Epstein (1992) on the place of legal controls of labour market inequalities. He believes that only the public sector labour market should be regulated and that both negative and positive discrimination should be otherwise permitted in the private sector. His thesis is that market forces should determine which private sector enterprises survive and that it will be those businesses which make the best use of *all* available skills and talents, without regard to race, gender, age or disability, that will eventually prosper. Rule-making to harness public sector spending power to promote equality of opportunity is unobjectionable in Epstein's world of repealed discrimination laws.

<sup>90</sup> 29 USC §791(b). This is discussed in more detail in Chapter VI above.

in the literature on disability rights in the US.<sup>91</sup> Although subsequently disability rights activists would be critical of the RA 1973 for its failure to address disability discrimination in the private sector, section 501 was crucial in the establishment of the credentials of the non-discrimination principle as it applies to disability. In remarkable contrast to the position in Britain, where such law as applies to disabled employment is directed at the private sector and is adopted in the public sector only by concession, section 501 required the federal government and its agencies to become model employers and to show the way towards disabled employment opportunities.

Percy notes that in the early years of section 501, visible change was generated in the employment practices of federal agencies, which began to devise and implement affirmative action plans covering disabled workers.<sup>92</sup> The US Civil Service Commission, upon whom responsibility for section 501 was originally bestowed, recorded that:

Overall, we have observed a considerable increase in the interest and commitment to the program among agencies. One major accomplishment has been the development of an awareness by non[-]handicapped persons toward the capabilities, employment problems, and needs of handicapped individuals...

[However], we found a wide range of quality in the plans. Some agencies displayed a keen interest in developing and implementing strong programs with ideas and methods that went beyond the suggested model. Other agencies submitted plans that can be classified as barely meeting minimum requirements.<sup>93</sup>

Despite this initial success, "[t]he evidence to date suggests mixed ratings for the federal government in implementing affirmative action in federal employment of persons with disabilities".<sup>94</sup> The overview of section 501 was transferred to the EEOC in 1978 and in its 1986 annual report, for example, the Commission estimated that while 5.9 per cent of the US labour force were classifiable by reference to "targeted" disabilities (including blindness, deafness, paralysis and mental disabilities), less than 1 per cent of federal government employees represented this group. The EEOC also reported that, as a result of on-site reviews of federal agency affirmative action programmes covering disabled persons, 93 per cent had appointed a disabled programme coordinator of seniority,<sup>95</sup> 37 per cent of sites were found

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<sup>91</sup> An honourable exception is Percy (1989: 196-202) on whom this portion of the chapter draws.

<sup>92</sup> Percy, 1989: 196-7.

<sup>93</sup> US Civil Service Commission, 1975: 13 and 27, cited by Percy, 1989: 197.

<sup>94</sup> Percy, 1989: 201.

<sup>95</sup> Although most spent only 10 per cent of their time on disability issues, only 14 per cent had been adequately trained and only 25 per cent had their disabled employment responsibilities written into their job descriptions.

to be accessible to disabled persons to some degree and 55 per cent of the reviewed installations had clearly defined disabled recruitment goals.<sup>96</sup>

### ***Equal opportunity planning and the role of statistics***

McCrudden observes that the role of statistics in discrimination and equal opportunity laws has been a controversial one.<sup>97</sup> He notes that statistics might be used in any of three ways. First, statistical information is an important ingredient of monitoring by employers for indirect discrimination resulting from their policies and practices. In this sense, statistics are used as a "diagnostic tool". Second, such information might be used as a "benchmark of success". Employers need to take a periodic snapshot of the work force in order to be able to judge whether discrimination is being eliminated and whether minority members are being properly represented in the numbers of job applicants, interviewees, appointments, promotions, and so on. In this sense, statistics might inform the setting of goals and timetables; that is, the employer sets a target by which the success of equal opportunity policies or positive action programmes will be assessed. For example, there might be an expectation (but no more than an expectation) that a certain percentage of a disadvantaged group will be encouraged to apply for jobs and/or be engaged in the next 12 months. Third, statistics could be used "as ends in themselves".<sup>98</sup> In this case, an employer decides to achieve as an objective the hiring or promotion of a specified percentage of minority group members, either absolutely or as a proportion of the existing workforce. This third use of statistics draws a distinction between goals or targets and timetables, on the one hand, and quotas, on the other hand. Confusion over this distinction and the means by which it is maintained is at the heart of the controversy about the use of statistics in equal opportunity policy and practice. McCrudden recommends that, for the avoidance of doubt about the legitimacy of using statistics in the first and second senses outlined here, statutory authority for statistics collection and analysis should be provided.<sup>99</sup>

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<sup>96</sup> US Equal Employment Opportunity Commission, 1986: 148-51, cited in Percy, 1989: 201-2.

<sup>97</sup> McCrudden, 1986: 225.

<sup>98</sup> McCrudden, 1986: 226.

<sup>99</sup> McCrudden, 1986: 236. He also opines that there should be a legal *requirement* on employers to monitor the composition of their work force. The model of the (Northern Ireland) Fair Employment Act 1989 might prove an interesting exemplar for disability discrimination law. Consideration of that Act's provisions on positive action, fair participation and equality of opportunity are beyond the scope of the present study. See generally: McCrudden, 1992. In particular, the statute's requirement that employers should monitor the work force for its religious composition might be usefully studied by disability rights reformers.

Affirmative action planning in the US under section 503 deliberately eschewed the setting of numerical goals because of the difficulties in determining disabled characteristics and numbers.<sup>100</sup> The setting of goals and timetables, and the collection of data to analyze disabled employment levels, is nevertheless encouraged under section 501.<sup>101</sup> In Canada, however, the use of statistics, goals and timetables is more overtly favoured. The federal Employment Equity Act 1985 requires federal employers of size to set annual goals for the implementation of employment equity. A timetable within which these goals are to be achieved must be laid down.<sup>102</sup> The law requires employers to publish annual statistics showing the total workforce and the number of disabled persons employed. Furthermore, a statistical breakdown must be provided, showing what occupational groups the employer has and the degree of representation of disabled persons in each occupational group. Information about salary ranges in the employer's work force and the degree of representation of disabled persons in each range must also be highlighted. The statistical report must detail the number of employees hired or engaged, promoted and terminated (whether retired, resigned or dismissed, but not including temporarily laid off or absent by reason of illness, injury or labour dispute), with the degree of representation of disabled persons in those numbers.<sup>103</sup> The use of statistics is also a feature in selected provincial legislation in Canada,<sup>104</sup> and in the Australian Commonwealth in respect of public sector employment.<sup>105</sup> In the final analysis, however, there is still little evidence that the use of statistics, goals and timetables has radically improved the employment position of disabled persons in those sectors of the economy to which these examples apply. By way of illustration, in Canada it has been estimated that disabled persons constitute 9-17 per cent of the population, but that on 1990

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<sup>100</sup> Percy, 1989: 207.

<sup>101</sup> Percy, 1989: 199 referring to EEOC instructions to federal agencies for the implementation of s 501.

<sup>102</sup> EEA 1985 s 5. See Chapter VIII for further detail.

<sup>103</sup> EEA 1985 s 6 and the Employment Equity Regulations 1986. A failure to comply with this reporting requirement is a criminal offence punishable under s 7 by a fine of up to \$50,000. See further: Employment and Immigration Canada, 1986 (containing the detailed guidance to Canadian employers on their obligations under the EEA 1985).

<sup>104</sup> See, for example, the use of statistics under Québec's Charter of Human Rights and Freedoms and its Affirmative Action Programme Regulations. See Chapter VIII for further detail. The (BC) Human Rights Amendment Act 1992 (SBC c 43) now also provides for affirmative action and employment equity programmes. See also Ontario's Employment Equity Bill 1992.

<sup>105</sup> Under the (Cth) Equal Employment Opportunity (Commonwealth Authorities) Act 1987, discussed in Chapter IX above. See also the mandating of equal opportunity management plans in the Australian states.



figures approximately 19 per cent of employers subject to the (Can) EEA 1985 did not employ any disabled persons at all. The same source reveals that, whereas Canadians with disabilities make up 5.4 per cent of the Canadian work force, only 2.4 per cent of the work force is covered by the EEA regime.<sup>106</sup>

## VIEW FROM BRITAIN

It is appropriate that in this final substantive section of the final substantive chapter we should return to Britain. The agenda set by this study has been to learn the lessons from abroad for the development of a new legal model of disabled employment rights in this country. The Conservative Government since 1979 (and, indeed, previous governments by default) has argued that the case for legislation to combat disability discrimination can be countered with a more effective case for a policy of education and persuasion. The evidence presented in Chapter III above concerning the labour market status of disabled persons and the continued incidence of discrimination might be sufficient to suggest that this non-interventionist tactic has failed. However, such evidence is necessarily historic, and it might be said that employers are learning to put their own house in order. What proof is there that the voluntarist approach is working?

### *Disability and equal opportunity policies*

The enactment of sex and race discrimination laws have undoubtedly fostered the development of equal opportunity policies among employers. There is little hard data to suggest how widespread such policies are or what percentage of the labour market is covered by them.<sup>107</sup> Neither the SDA 1975 nor the RRA 1976 require employers to devise, adopt and implement such policies,<sup>108</sup> although undoubtedly employers who wish to avoid or

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<sup>106</sup> Employment and Immigration Canada, 1991a. This source also reveals that disabled persons' share of public sector employment opportunities has barely improved since the introduction of the EEA 1985 requirements. The latest statistics show that disabled persons have increased their representation with EEA employers from 2.4 per cent to 2.50 per cent over the space of 12 months: Employment and Immigration Canada, 1992. This is an increase from 1.6 per cent in 1987 just before the EEA came into force. The Act is currently under review: Employment and Immigration Canada, 1991b.

<sup>107</sup> Much, if not all, of the relevant literature in sex and race discrimination law is concerned with the examination of equal opportunity policies based upon a small number of case studies or a non-random sample of employers. These accounts tell us much about the *quality* of such policies but little about their *quantity* or distribution.

<sup>108</sup> Both the EOC and the CRE recommend that employers should adopt, implement and monitor an equal opportunity policy to obviate unlawful discrimination and promote equality of opportunity. See: *Code of Practice for the Elimination of Discrimination on the Grounds of Sex and Marriage and the Promotion of Equality of Opportunity in Employment* (1985) paras 33-40; *Code of Practice for the Elimination of Racial Discrimination and the Promotion of*

alleviate challenges of discrimination would be well advised to do so. Personal observation suggests that many large, well-known employers have put such policies in place, but for most small and medium-sized British businesses an equal opportunity policy is a luxury or a matter of no concern and priority. Even among those enterprises that designate themselves as "equal opportunity employers", the suspicion remains that this is a cosmetic title, without the underpinning of a written policy or the back-up of detailed practices and procedures.<sup>109</sup>

When it comes to the issue of disability and employment, the absence of an anti-discrimination command in law deprives employers of any real incentive to make policy in this area. On its own, the 1944 Act contains little that would cause employers voluntarily to regulate their internal procedures. Although companies legislation requires employment policy in respect of disabled people to be recorded in the directors' annual report, this applies only to larger, incorporated businesses and hardly sets a challenging agenda.<sup>110</sup> The statement must describe *any* policy applied by the company for giving full and fair consideration to job applications from disabled people (having regard to their particular aptitudes and abilities), for continuing the employment of (and arranging appropriate training for) employees who become disabled during employment with the company, and for training, career development and promotion of disabled persons employed by the company. Unless the directors have taken all reasonable steps to ensure that such a statement is included in the annual report, a failure to publish a corporate disability employment policy is an offence. While formal compliance with this provision is widely observed, the measure has produced some pretty anodyne statements and little proof that the policy, once adopted, is either acted upon or periodically reviewed.<sup>111</sup>

It is suspected that many, but not all, equal opportunity employers tend to add additional disadvantaged groups to policies dealing with women and ethnic minorities, despite the lack of legal compulsion to do so. cursory examination of recruitment advertisements, for example, indicates that disability is frequently added to the catalogue of grounds upon which employers disdain to discriminate. Nonetheless, research indicates that only 21 per cent of employers have a formal written policy regarding the employment of disabled persons, but

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*Equality of Opportunity in Employment* (1984) paras 1.1-1.4 and 1.33-1.43.

<sup>109</sup> See the evidence presented to HCEC, 1991: QQ697-8.

<sup>110</sup> CA 1985 s 234 and Sch 7 para 9. It should be noted that company law merely requires a *statement* of policy to be disclosed; it does not require there to be a written or detailed policy, let alone one that is made operational.

<sup>111</sup> See Doyle, 1987a.

a large proportion were unable to say how such policy was implemented.<sup>112</sup> Of those able to identify their policy implementation methods, about a quarter employed regular monitoring methodology. Some 14 per cent of employers implement policy through management and employee involvement, but about the same number allocate responsibility to an executive manager. Setting recruitment targets was used by 7 per cent of employers who implemented policies and 5 per cent insisted on regular reports to senior management.<sup>113</sup> Among employers with no formal disabled employment policy, the most commonly encountered attitude was that disabled persons would be considered on merit. Three-quarters of such employers stated that they would not discriminate against disabled workers and 4 in every 100 claimed that they would positively encourage applications from disabled job-seekers.<sup>114</sup> Nevertheless, 13 per cent of employers said that they would only employ disabled persons for certain types of job and 6 per cent stated that they would not employ disabled workers under any circumstances.

In spite of this, or maybe because of it, there is a groundswell of opinion that employers should be obliged to develop disabled employment policies. A large majority (80 per cent) of disabled respondents to a survey question - about attitudes to employers being obliged to publish what they have done and plan to do about employing disabled people - supported the imposition of such an obligation.<sup>115</sup> As to where such plans should be published, the most frequently mentioned places were the national press or newspapers, local press, and job centres, employment offices or careers offices. There was little support for the existing, limited practice of publishing disabled employment policies in company annual reports, although there was measurable support for the use of in-house company publications, notice-boards and posters.<sup>116</sup>

### ***Code of Good Practice***

The stimulus, such as it is, for the development of disabled equal opportunity policies is provided by the Employment Service's *Code of Good Practice on the Employment of Disabled People*, first issued in 1984 and up-dated in March 1993.<sup>117</sup> It suggests that companies

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<sup>112</sup> Morrell, 1990: 12.

<sup>113</sup> Morrell, 1990: Table 17.

<sup>114</sup> Morrell, 1990: 13.

<sup>115</sup> RSGB, 1978: Table 9.6.1.

<sup>116</sup> RSGB, 1978: Table 9.6.2.

<sup>117</sup> See Doyle, 1987a.

should adopt sound and effective policy objectives in the employment of persons with disabilities.<sup>118</sup> The Code suggests seven objectives that employers might take up. First, the company should seek to be recognised in the community as a provider of disabled employment opportunities. Second, disabled applicants should know that they will be treated fairly and on their merits. Third, it would normally be expected that the employer will retain employees who become disabled while in service. Fourth, the employer should plan the integration of disabled workers, with any necessary accommodations in the work or working environment. Fifth, disabled employees are entitled to expect that the employer will develop their skills and potential, offering them training and promotion opportunities on ability. Sixth, non-disabled co-workers should readily accept their disabled colleagues without distinction. Seventh, the company should ensure that it is meeting its legal obligations towards disabled persons.

This list of *desiderata* can only be achieved by drawing up a written policy that fits the circumstances of the individual firm, involves all staff and management, sets objectives for managers, and identifies the means by which the policy will be achieved. To be effective, policy values must be shared, so the Code stresses the importance of developing a policy by consultation with staff and communicating the resultant policy to them.<sup>119</sup> Coordination of policy should be placed in the hands of an executive.<sup>120</sup> Regular assessment or monitoring of policy is desirable and:

Although numbers alone cannot give the whole picture, one of the best indications of the success of a policy is whether the company offers people with disabilities their full share of opportunities.<sup>121</sup>

Significantly, the Code makes direct reference to the statutory 3 per cent quota of registered disabled persons as a measure of achievement and states that the quota "should be regarded as a minimum for people with disabilities as a whole in any company's workforce".

Part Two of the Code deals with detailed advice on how to put policy into practice. It addresses existing legal obligations as a prelude to an account of the identification of disabled people, the range of disabilities and the effectiveness of disabled employees. The Code provides detailed guidance on recruitment of disabled persons, including dealing with

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<sup>118</sup> Part One of the *Code of Good Practice on the Employment of Disabled People* addressed to directors and senior managers.

<sup>119</sup> *Ibid* para 10.3.

<sup>120</sup> This is amplified in paras 9.1-9.3 of the Code, which provide a form of job description for such a role.

<sup>121</sup> *Ibid* Part One.

questions of safety, attendance, health, pension scheme eligibility, alterations to premises or equipment, communications, manual dexterity, and physical effort. It advises employers on how to draw-up job descriptions and job requirements without inadvertently excluding disabled applicants. Recommendations on outreach and recruitment methods are furnished. Selection procedures, the Code suggests, should be examined to ensure that disabled candidates are treated on merit and practical advice is offered on the design of application forms, as well as arrangements and procedures for interviewing disabled candidates and the pitfalls of health screening. Once in work, Part Two of the Code counsels employers to give particular attention to the needs of disabled employees in respect of induction, health and safety, workplace integration, training and promotion, and redundancy. For employees who become disabled while in employment, firm and useful guidance is given to employers on taking decisions that will affect the newly-disabled employee. A strong steer is given towards consideration of positive options that include retention in the same job or in alternative work, removal to part-time work or job-sharing, delayed return to work, other flexible working arrangements (including trial periods or working from home) and the knock-on effects of disability (for example, impact upon salary). Advice upon employment termination as a last resort is also proffered.

The Code is undoubtedly a mine of information, advice and assistance, and should not easily be dismissed. However, unlike the EOC and CRE codes of practice, the Code wants for legislative underpinning and depends upon the good sense and goodwill of employers for its implementation. Nevertheless, the penetration of the Code in both the public and private sector appears to be less than complete. Morrell found that by 1987 only 19 per cent of employers had had contact with the Code, although the chances of having knowingly received the Code increased with the size of the firm.<sup>122</sup> More encouragingly, however, her research shows that, where the Code has infiltrated the enterprise, it was reaching the senior decision-makers, such as managing directors, senior managers, department heads and personnel officers.<sup>123</sup> Among those who had read the Code, 35 per cent were of the opinion that it was very good, and a further 51 per cent that it was fairly good, as a point of reference. There were few criticisms of its content, style or readability, although its layout was not altogether welcomed.<sup>124</sup> Morrell comments that:

The major benefit of the Code of Good Practice appeared to be its usefulness in increasing awareness and highlighting the issue of employing people with disabilities.

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<sup>122</sup> Morrell, 1990: Table 30.

<sup>123</sup> Morrell, 1990: 20-21 and Table 32.

<sup>124</sup> Morrell, 1990: 21.

It would appear that the booklet had encouraged employers to stop and think about their current employment practices and consider the opportunities for people with disabilities in the workplace and the help that is available for employers.<sup>125</sup>

About two-fifths of employer respondents who had received a copy of the Code indicated that they had used or planned to use it.

It is interesting to note Morrell's finding that 80 per cent of employers purported not to have received a copy of the Code. This is surprising given the widespread publicity that the Code received at launch and subsequently, and the government agencies' perceptions that the Code had been widely disseminated. A possible explanation, apart from sheer forgetfulness, is that the Code may have reached the enterprise but had failed to filter into the different levels of management. A quarter of the employers who had not received the Code were at least aware of it, and a majority expressed an interest in obtaining a copy.<sup>126</sup> This group found that the sections of the Code dealing with assistance for newly-disabled employees, the recruitment of disabled persons, employers' pertinent legal obligations and the position of disabled employees at work potentially useful.<sup>127</sup> Significantly, however, only 3 per cent of employers who had not received the Code were interested in its provisions on drawing up a disabled employment policy. The message seems to be that there is a long way to go before voluntarism can produce a commitment to equal opportunity planning.

#### ***Voluntarism, education and persuasion***

The voluntary approach nevertheless holds sway. In 1977, the Government launched a major programme to encourage and to educate employers about the employment of disabled persons ("Positive Policies"). Following a review of disabled employment services in 1982, the Disablement Advisory Service was established to promote progressive personnel policies and practices in respect of disabled people, a role now discharged by the Employment Service's Placing, Assessment and Counselling Teams (PACTs). In addition, under the "Fit for Work" award scheme, commenced in 1979, annual awards were made to employers who, by their record and performance, have promoted equal opportunities for disabled people at work.<sup>128</sup> That scheme has since been replaced from 1991 by the so-called "Two Ticks" initiative. This allows employers to use a disability symbol, redesigned in 1992, to show

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<sup>125</sup> Morrell, 1990: 21.

<sup>126</sup> Morrell, 1990: 22.

<sup>127</sup> Morrell, 1990: Table 34.

<sup>128</sup> Recipients of the award numbered about 100 each year and were bestowed a presentation plaque, desk ornament and a citation, as well as the right to use the award's emblem on company documents: Berthoud *et al*, 1993: 41.

commitment to good practice in the employment of disabled persons and to identify themselves to disabled workers as being positive about those workers' abilities. This scheme is the ultimate in voluntarism because, unlike the "Fit for Work" awards, the Employment Service does not assess or judge whether an employer is meeting the criteria for the use of the symbol. Employers themselves decide whether to award themselves "two ticks". All that the Employment Service asks is that employers who award themselves this distinction should make five commitments to action.<sup>129</sup> First, to interview all minimally qualified disabled applicants and consider them on ability. Second, to ask disabled employees on an annual basis what steps the employer might take to ensure that they develop and use their abilities in employment. Third, make every effort to retain in employment newly-disabled staff. Fourth, develop disability awareness among key employees in order to make the firm's commitments to disabled employment operational. Fifth, review those commitments on an annual basis, monitor achievements, plan improvements and communicate the results to the workforce.

The voluntary principle has been adopted by employers as well as by government. The Employers' Forum on Disability is a group of organisations that have signed an Agenda for Action.<sup>130</sup> The Forum is concerned with the training and employment of disabled persons and provides help and information to other employers on good practice, specialist services, legislation and other issues. The Agenda contains ten points for action to which subscribers are committed. Most significantly in the context of the present discussion, these action points include a commitment that the employment of disabled persons will form an integral part of equal opportunity policies and practices. The Agenda also deals with staff training and disability awareness, reasonable accommodations in the work environment, outreach initiatives in the recruitment process, and equality of opportunity in career development, training and work experience. Forum members pledge to give the fullest support to newly-disabled employees with a view to retaining their services in some way. A novel commitment is the promised recognition and response to disabled people as customers, suppliers, shareholders and members of the community, as well as a commitment to the participation of disabled employees in employment policy-making. Finally, a company that subscribes to the Agenda undertakes to monitor its progress in implementing these action points, audit performance annually, review progress at board level, and publish achievements and

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<sup>129</sup> The symbol is designed to be used on letterheads and company literature, but should not be used in connection with the provision or promotion of commercial products or services.

<sup>130</sup> An account of the short history of the Employers' Forum on Disability can be discovered in an interview with the Director of the organisation (Susan Scott-Parker) in *Equal Opportunities Review* N° 41 (January/February 1992) at 36-7.

objectives to employees and in the directors' annual report. Quite apart from the Employer's Forum on Disability, undoubtedly a number of employers have given attention to disabled employment policies and there numerous published examples of good practice.<sup>131</sup> Employing disabled people has been seen as being "good for business". However, the effect of these various initiatives to educate and encourage employers to extend equal opportunities to disabled workers is hard to gauge.

### **CONCLUDING REMARKS**

It is ironic that in this penultimate chapter we would appear to have come around full circle and returned to the position that exists in Britain today in respect of disabled employment opportunities. Despite the evidence that points to the contrary, governments have resisted the pressures for legislative action to address disability discrimination in the labour market, while at the same time implicitly recognising that there might be a problem that is at least worthy of resolution by education and persuasion. In this chapter, it has been shown that the comparative evidence suggests that positive action, contract compliance and equal opportunity planning might have some role to play in any new legal regime of disabled employment rights in Britain. Indeed, a by-product of the received wisdom that disabled disadvantage can be addressed by voluntary action is that many of the ideas explored here are already part and parcel of the official political reaction to disabled persons and their employment. The only missing ingredient is legal compulsion. In the writer's view, contract compliance and employment equity principles, with appropriate use of statistics, goals and timetables, would require employers to develop positive attitudes, policies and practices towards disabled job-seekers and employees. However, such legal strategies must be seen as complementary to and not a substitute for effective anti-discrimination laws.

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<sup>131</sup> See, for example, the case studies and other accounts in: Incomes Data Services Ltd, 1981; Doyle, 1987a; Birkett and Worman, 1988; Leach, 1989; Incomes Data Services Ltd, 1992.



## CHAPTER XVI: CONCLUSION

In this study, the writer has attempted to present a case from a number of different angles or perspectives for the enactment of disability discrimination laws in Britain. The social and economic data presented paint a bleak picture of the lives and experience of disabled people. Disability produces vulnerability and marginality in all aspects of the daily tableau of persons with disabilities. It often results in multiple "handicaps", as the effects of disability are felt directly in the medical and health dimensions, and then indirectly in the spheres of education, transport, physical access and the built environment, social and welfare services, income and wealth, housing, health services, leisure activities and social interaction, and, above all in the present context, in competitive employment. We have sought to demonstrate that *disability* does not equal *inability* to work. Yet the statistical evidence shows that disabled people suffer a rate and length of unemployment that is far in excess of that visited upon any other minority group. While there are many studies that tend to confirm the employability of disabled workers, it is disappointing to note the continued expression of negative attitudes by employers towards disabled people.

Despite assertions to the contrary, the poverty and disadvantage of many disabled individuals is the product of prejudice, ignorance and sheer thoughtlessness. The research of other students of disability rights points to the crucial influence upon disabled employment opportunities of a form of social discrimination that is akin to that experienced by racial and ethnic minorities and women. If social and employment discrimination informed by gender and race has been treated as a subject fit for regulation and proscription, then the arguments for similar responses to disability discrimination are, it is suggested, equally compelling. Moreover, the passage of legislation to prohibit discrimination against disabled people would represent a fundamental change in society's attitudes towards disability and the disabled community. In short, it would constitute a shift from charity and welfarism to civil rights and integration.<sup>1</sup>

If this argument is accepted, which of course hitherto has not been the case in government circles, then it is tempting to see disability as being a new prohibited ground of discrimination within the framework already erected by sex and race discrimination laws. However, the experience of the US disability rights legislation (and comparable experience in Canada and Australia) suggests that existing equal opportunities laws are not necessarily the most

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<sup>1</sup> Burgdorf, 1991: 426

appropriate or efficacious means of addressing disability discrimination.<sup>2</sup> As this study has sought to show, disability discrimination throws up unique problems and issues that cannot be readily resolved within a framework erected to redress other forms of social discrimination. As a US federal district court in New Hampshire observes, "attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole".<sup>3</sup> In particular, it will be clear that the disability discrimination legal model must include the ingredients of reasonable accommodation and must provide means for removing structural and environmental barriers to integration and participation.<sup>4</sup>

In Britain, however, the case for disability discrimination legislation is often made without being heard. It is still the case that our legislators adhere to the view that the plight of disabled workers is the result of the limitations of disability and of disabled persons themselves, and the notion that disability is often a social construct and the subject of negative social forces is implicitly rejected. Even when the counter-analysis is accepted, the current political orthodoxy insists that legislation is not the best means to assist disabled persons to compete in the labour market. The present Government, in particular, subscribes to the view that regulation of disabled employment rights would be a burden upon business and damaging to the employment prospects of disabled people because it risks the withdrawal of employers' goodwill. Instead, the strategy for assisting disabled persons into work is based upon voluntarism and focuses upon the role of education and persuasion. Nevertheless, as Daunt asserts:

The notion that government must make a choice between *compelling employers and persuading them* is simplistic. The point sometimes made by employers' organizations that if they are effectively compelled by legislation to employ disabled people, their goodwill is going to be lost and they will no longer co-operate should be seen as a negotiating position.<sup>5</sup>

In fact, the evidence suggests that employer goodwill towards disabled workers is quite mythical and nothing more than a talisman against the perceived evils of regulation and compulsion. In the present author's view, trust in the voluntary approach and the willingness of employers to see the equation of their own self-interests with the rights and expectations of the disabled community is sorely misplaced. The case for special legislation to enfranchise disabled workers remains a strong and persuasive one.

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<sup>2</sup> Burgdorf, 1991: 429-31.

<sup>3</sup> *Garrity v Gallen* (1981) 522 FSupp 171 at 206.

<sup>4</sup> See generally: Rebell, 1986.

<sup>5</sup> Daunt, 1991: 63 (emphasis in original).

However, before we consider the introduction of anti-discrimination legislation on behalf of disabled Britons, the failure of existing legal formulae to provide a real menu of employment rights for persons with disabilities must be accounted for. It has been rightly said that:

[T]he positive effects of legislation, and in particular measures which impose quotas of disabled workers on employers, have been somewhat disappointing. Except in Germany, quota systems, introduced at a time of universal economic growth, have proved difficult to operate and have up till now failed as guarantees of equal opportunity in times of relative restraint.<sup>6</sup>

It is indeed ironic that quotas should at present hold such a fascination for those who advocate a new legal strategy for sex and race discrimination - one that would concentrate upon results rather than process - given the patent failure of disabled workers' quota schemes in many countries. Nevertheless, in the present writer's view, quota legislation should continue to play a part in special disability legislation in the short to medium term, but with emphasis and resources placed upon enforcement. The experience of the German, and to a lesser extent the French, quota models might be revisited with profit, and the linking of quota obligations with levies and subsidies is worth detailed reconsideration in the context of disabled employment. Strong laws require strong remedies and enforcement. In Britain, the failure of half a century of quota obligations can largely, albeit not entirely, be explained by a lack of commitment to and weakness in the policing of such special legislation as already existed.

It is clear, however, that even a renewed commitment to quota legislation will not adequately address the employment problems of disabled workers. We return again to the conviction that the anti-discrimination principle needs to be harnessed to the task of ensuring the equal treatment and fair participation of disabled people in the labour market. It is contended that individual and institutional disability discrimination demands a cause of action and an individual remedy. The point has been made several times in this study that increasingly disability rights advocates are looking to the US for inspiration in the campaign for achieving equal opportunity rights. Research in the US during the 1980s found that 70 per cent of disabled Americans believed that their lives had improved in the previous decade and two-thirds opined that federal legislation had provided better opportunities for disabled persons and had assisted them a great deal or somewhat.<sup>7</sup> Three-quarters (75 per cent) of respondents wished to see anti-discrimination laws strengthened further. Disabled Britons too are optimistic that such laws would greatly enhance their lives and status here.

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<sup>6</sup> Daunt, 1991: 60.

<sup>7</sup> Louis Harris and Associates, 1986.

This would seem to suggest that the Americans with Disabilities Act 1990, and its progenitor, the Rehabilitation Act 1973, provide a ready-made model for legislation that could be adopted in Britain. In fact, such statutes do provide a very important exemplar of how to enact new rights for a recognised minority and, in the particular context of disability, illustrate the importance of ensuring that such laws are comprehensive in their scope. Thus disability discrimination legislation must apply in both the public and the private spheres, and above all must be extended beyond the control of discrimination in the labour market by addressing the hopes of disabled people in education, housing, transport, communications and public accommodations. As has been noted in earlier chapters, the recent Civil Rights (Disabled Persons) Bills are clearly patterned after the ADA 1990 and it is to the US that disability rights activists are now looking for further instruction. In spite of this, the present writer would advocate some caution and more imagination. There is a danger, especially through the private members' bill procedure, that the language of the ADA 1990 is being adopted almost wholesale without proper regard for differences in terminology, culture and interpretation in the two jurisdictions. The lessons of the comparative method must be heeded. The experience and examples of Canadian and Australian legislation provide a deeper mine of raw materials that can be quarried in the production of any new legislation. The strengths and weaknesses of these laws elsewhere must be recorded, and the best of the comparative models should be recruited to the development of disability discrimination measures in Britain. This would require not simply the transplantation of the non-discrimination principle, but also the borrowing of techniques in affirmative action, contract compliance and equal opportunity planning.

If anti-discrimination and equal opportunity legislation is the way ahead for disabled workers' rights, the limitations of legal formulae must be recognised.<sup>8</sup> Legislation cannot hope completely to redress the vulnerability of disabled people in the labour market, and political and economic power must be used to enfranchise disabled workers.<sup>9</sup> The anti-discrimination model may only be capable of containing overt discrimination while defusing social pressure for radical change in favour of disabled persons.<sup>10</sup> As in the US,<sup>11</sup> recognition in law that disabled persons are a disadvantaged group in the employment field is a necessary, but not sufficient, condition to mandating remedial action and equal rights. Statutory commitment to

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<sup>8</sup> *Harvard Law Review*, 1984. See the arguments to like effect employed by Lustgarten in respect of race relations laws: Lustgarten, 1986 and 1987.

<sup>9</sup> Acton, 1981; Bordieri and Comninel, 1987.

<sup>10</sup> Oliver, 1984; 1985; 1986.

<sup>11</sup> Weiss, 1974.

equal opportunities and equal treatment can assist the integration of this minority group, but the limits of the law must be understood and accounted for.

In the US, many writers believe that the law has only partly succeeded in empowering disabled people, largely because of inadequate enforcement, conflicting interpretation and limited scope.<sup>12</sup> That is certainly a criticism that can be levelled at the RA 1973. Commenting on the ADA 1990, a statute in which so much hope is invested, Yelin notes that the legislation:

bars discrimination against persons with disabilities in employment, but it may not convince employers that such persons will be productive or [that they should] purchase the equipment to help them do their jobs. In short, *the law cannot guarantee work*.<sup>13</sup>

He regards section 504 of the RA 1973, upon which the 1990 legislation was modelled, as a "bellwether for the ADA", but observes that section 504 produced mixed results for the employment of disabled persons in the federal employment sector.<sup>14</sup> Yelin's analysis suggests that the disability anti-discrimination legislation:

was not successful in ensuring that persons with disabilities shared in the employment gains occurring... when government employment was expanding. Later, the legislation did not prevent workers with disabilities from bearing a disproportionate share of the retrenchment in government employment.<sup>15</sup>

That is borne out by the statistical data. Between 1970 and 1982, the US federal government workforce grew from 4.5 million to over 6 million strong, increasing its proportional representation in the national workforce from 5.7 to 5.8 per cent (a growth of 2 per cent in relative terms). In contrast, the number of disabled persons in government employment increased from 0.45 million to 0.62 million, increasing its proportion of the government workforce from 9.9 to 10.2 per cent (a growth of 3 per cent in relative terms). However, from 1982 to 1987, the government workforce shrank by 11 per cent in absolute terms and by 19 per cent in relative terms. The impact of this shrinkage was disproportionately felt by disabled workers. The number of disabled government employees declined by 18 per cent in absolute terms and by 8 per cent in relative terms (compared with a decline of 10 per cent in the absolute numbers of government employees without disabilities and a 2 per cent *increase* in relative terms for that group). The best that might be said is that the legislation might have had a role to play in ensuring that disabled workers in the federal employment

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<sup>12</sup> See for example: Flaccus, 1986a; McCluskey, 1988; Tucker, 1989a.

<sup>13</sup> Yelin, 1991: 130 (my emphasis).

<sup>14</sup> Yelin, 1991: 136.

<sup>15</sup> Yelin, 1991: 137.

sector fared less badly than their disabled counterparts in the economy as a whole.<sup>16</sup>

From an economist's viewpoint, the limits of the law must also be marked. For example Johnson, although sympathetic to the notion of disability discrimination laws, shows an economist's caution to the costs-benefits analysis of such laws. In the context of reasonable accommodation, Johnson propounds the view that:

Case-by-case determinations of the effect of an impairment on the capacity to perform a job are difficult to generalize. Decisions must be influenced by the combined, idiosyncratic effects of an individual's qualifications and impairment compared to the workplace and job of one employer. This type of decision does not establish strong precedents that would inform employers and impaired workers of their respective rights and responsibilities... Although the question of the costs of case-by-case determinations relative to the benefits of reducing discrimination is an empirical one, it seems likely that the costs of enforcing laws relating to handicap discrimination are high relative to enforcement costs for other forms of discrimination.<sup>17</sup>

He argues that a concept of reasonable accommodation that would comport with efficiency would lead employers to invest in accommodations to the point where the marginal cost of the accommodations is equal to the marginal benefit as measured by the increase in the productivity of the accommodated disabled worker. However, beyond that point an employer's taste for positive discrimination (or, more accurately, fair treatment) in favour of disabled workers must in principle become sated. As a result, we might expect that disability discrimination laws will only assist those disabled workers whose profile accords most closely with "able-bodied" employees, and that severely disabled persons, or workers with unusual or radical disabilities, will be excluded from the law's protection in practice.

Nonetheless, these arguments as to the limits of disability discrimination law merely counsel us to address and scrutinise the detail and scope of any law reform that might be proposed. It is clear from the experience of the ADA 1990 that any disability rights legislation in Britain must aim for a high level of statutory specificity. The development of new legal standards should not be left to chance or to the vagaries of judicial interpretation. Burgdorf observes that:

the impetus for statutory specificity stems from idiosyncrasies of disability discrimination, which demand more statutory guidance than general mandates not to

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<sup>16</sup> In the previous chapter it was also noted that Canadian employment equity laws have had only a marginal impact upon the labour market share and employment opportunities of disabled workers.

<sup>17</sup> Johnson, 1986: 259. Some answers to the empirical questions posed by economists like Johnson in the context of the ADA 1990 might well be answered in due course by on-going, longitudinal research into the before and after effects of the new legislation. See: Blanck, 1991 and 1992.

discriminate.<sup>18</sup>

However, the same observer notes that specificity is a "double-edged sword". Detailed legislation creates rigid law requiring legislative intervention to amend unforeseen interpretations of substantive provisions; a problem that is less insurmountable in "legislation" through regulations or codes of practice. Furthermore, detailed guidance as to the spirit of the law is perhaps best left to regulatory agencies or commissions. Burgdorf also points out that legislators may find it more difficult to disagree with statements of broad principle, but easier to pick holes in precisely defined legal standards.<sup>19</sup>

With those words of caution ringing in our ears, nevertheless, it is right to end upon a note of optimism and positive expectation. Equal rights for disabled workers is an idea and ideal whose time has come. Lessons from abroad must be learnt before any new disability discrimination law can be made to work. In the context of discrimination law at large, the means to enforce the non-discrimination principle will need to be looked at afresh, and reforms in respect of disability provide a ripe opportunity for such reassessment. It may be also that the enactment of disability discrimination legislation will influence the shape of sex and race discrimination laws, or inspire the development of legal responses to other forms of social discrimination. In particular, the reasonable accommodation concept might be one that could be usefully expressed as a component part of gender and race discrimination directives. The case for disability discrimination law is a compelling one. The comparative method assists us to make that case and to design the law's response to the disadvantage and vulnerability of a forgotten minority.

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<sup>18</sup> Burgdorf, 1991: 510.

<sup>19</sup> Burgdorf, 1991: 511.

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