

2005

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Citation Information

Pooran, Brendon D. and Wilkie, Cara. "Failing to Achieve Equality: Disability Rights in Australia, Canada, and the United States." *Journal of Law and Social Policy* 20. (2005): 1-34.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol20/iss1/1>

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FAILING TO ACHIEVE EQUALITY: DISABILITY RIGHTS IN AUSTRALIA, CANADA, AND THE UNITED STATES

BRENDON D. POORAN* AND CARA WILKIE**

RÉSUMÉ

Au cours du quart de siècle écoulé, la discrimination contre les personnes handicapées a attiré de manière accrue l'attention au niveau mondial en tant que question de droits de la personne. En conséquence, l'Australie, le Canada et les États-Unis ont déployé des efforts pour garantir la protection de cette section de la communauté à travers diverses initiatives législatives et d'initiatives à orientation prédéterminée. Cet article propose une comparaison critique des mécanismes de règlement de différends en matière des personnes handicapées et des arrangements en place pour le suivi des rapports de mise en oeuvre. Pour atteindre cet objectif, l'article examine dans quelle mesure les dispositions législatives en place favorisent les droits et libertés des personnes handicapées dans ces trois pays.

Cette étude s'inscrit dans le cadre de l'émergence d'une approche fondée sur la reconnaissance des droits des personnes handicapées. Un examen législatif exhaustif des dispositions de protection législative dans chacun de ces pays aux niveaux constitutionnel, fédéral et provincial ou d'État, fournit le fondement pour une analyse comparative qui vise les protections constitutionnelles, les Lois anti-discriminatoires applicables, les programmes de prestations spécifiques et les manifestes volontaires sur les droits de la personne. Les conclusions tirées à la fin établissent un constat du succès, ou du manque de succès, des efforts consentis par chaque gouvernement pour mettre en pratique ses politiques.

INTRODUCTION

Persons with disabilities face significant challenges in living conditions, degrading inhumane treatment, lack of adequate housing, health care, education, employment, and social exclusion.¹ As discrimination against persons with disabilities continues to gain momentum as a human rights issue, it is essential that proper monitoring be developed. To this end, numerous international jurisdictions have followed the lead

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1. Council of Canadians with Disabilities, "CCD Calls for UN Convention on Rights of Persons with Disabilities," online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/publications/international/0103.htm>>.

of the United Nations in advancing the rights of the disability community through novel policy and legislation over the past two decades.

To assist Disability Rights Promotion International (DRPI) in its goal of developing and establishing monitoring capacity and a structure for examining disability rights, we compared the disability rights dispute-resolution mechanisms and reporting arrangements in Australia, Canada, and the United States.² This paper provides a critical comparison of disability rights dispute-resolution mechanisms and implementation reporting arrangements in Australia, Canada, and the United States. We will examine how effectively the legislative schemes promote the rights and freedoms of people with disabilities.

The primary objective of this paper, beyond canvassing the disability protections generally, is to evaluate the effectiveness of each country's disability-related protections in comparison with the policy for which they were adopted. A comprehensive analysis of each country's legislative protections for people with disabilities will provide the contextual background for the comparative analysis that follows. We examine legislation, in each of the three jurisdictions, at the constitutional, federal, and state or provincial levels. One state from each country serves as a case study for comparative purposes. The states or provinces chosen are among the most populous in each national jurisdiction and have been proactive and somewhat novel in the removal of barriers and commitment to full participation of persons with disabilities in society. An analysis of the Australian, Canadian, and American approaches demonstrates that each country's protections vary in depth, approach, and structure, but all are somewhat similar in purpose.

CONCEPTS OF DISABILITY

To appreciate the current state of disability-related legislation, a brief overview of the human rights paradigm is warranted. Disability was initially conceptualized by a medical model where "the individual has a condition (a deficit which is unwanted or which in the past caused something unwanted in the individual)".³ Disability focused on diagnosable medical impairments, and the solution to disability was treatment and cure.⁴ Consequently, disability-related legislation that was based on this model treated individuals with disabilities as patients needing paternalistic attention.

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2. Disability Rights Promotion International is a collaborative human rights project, funded by the Swedish International Development Agency, working to establish an international monitoring system for disability rights. The main purpose of DRPI is to credibly gather and process data to effect change—whether locally, nationally, or internationally.
 3. David Pheiffer, "The Conceptualization of Disability" in *Research in Social Science and Disability*, vol. 2, ed. by Sharon Barnatt & Barbara Altman (Amsterdam & New York: Elsevier Science Ltd., 2001) 29.
 4. G. Quinn & T. Degener, *Human Rights & Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York & Geneva:

Following the medical model, the social paradigm of disability developed, which located the disability in society, not within the individual:

It is not individual limitations, of whatever kind, which are the cause of the problem but society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation. Further, the consequences of this failure does not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalised throughout society.⁵

The disability no longer resided within the individual, but in the “social, attitudinal, architectural, medical, economic and political environment” that failed to adapt to the disparate needs of the community.⁶ This model therefore focuses on the removal of barriers that lead to disparities in opportunity; it is society that requires adaptation, not the individual.⁷

From the social model, developments focused on the entitlements of human rights and dignity, a movement that sought valuation of people based on their inherent self-worth rather than their economic contributions. As the disability movement redirected the focus from the needs of individuals to their rights, people with disabilities were recognized as rights-bearing individuals.

CANADA

Constitutional Rights

With the introduction of the Charter of Rights and Freedoms, Canada became the first country to grant constitutional protection to various minority groups including people with physical or mental disabilities. Yvonne Peters, author of “The Constitution and the Disabled,” states, “[h]uman rights protection and the constitutional guarantee of equality have been instrumental in providing an analysis of disability-based discrimination.”⁸ Earlier versions of section 15(1) did not include a list of enumerated grounds; however, after months of lobbying, disability advocates convinced the government to include a specific reference to persons with physical and mental disabilities.⁹

Office of the United Nations High Commissioner on Human Rights, 2002) at 14.

5. Mike Oliver, “The Individual and Social Models of Disability,” online: University of Leeds <<http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/in%20soc%20dis.pdf>>.
6. J.E. Lord, “Understanding the Role of an International Convention on the Human Rights of People with Disabilities” (12 June 2002), online: National Council on Disability <http://www.ncd.gov/newsroom/publications/pdf/unwhitepaper_05-23-02.pdf> [Lord].
7. *Ibid.*
8. Yvonne Peters, “The Constitution and the Disabled” (1993) 2 Health L. Rev. 1 at para. 26.
9. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at s. 15.

Constitutional challenges on disability may be brought in conjunction with the guarantee of life, liberty, and security of the person.¹⁰ The 1986 Supreme Court decision of *Eve v. Eve* represented the first major victory for the disability community.¹¹ The Court found that legislation should not be interpreted as authorizing third party consent to the sterilization of persons with intellectual disabilities solely for contraceptive purposes. Such authorization would violate the liberty and equality rights of the individual.

In *Law v. Canada (Minister of Human Resources Development)*, the court adopted a contextual approach to analyzing discrimination in an attempt to avoid the weaknesses of a formalistic or mechanical approach. In developing this approach, Iacobucci J. noted that the purpose of section 15(1) is

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹²

At the heart of the Court's interpretation is this concept of human dignity. Iacobucci J., referring to the Court's earlier judgments, explained that human dignity relates to feelings of self-respect, self-worth, physical and psychological integrity, and empowerment. The maintenance of human dignity requires that individuals be treated according to their specific needs, capacities, and merits.¹³

The definition of disability under section 15(1) of the *Charter*, adopted in the Court's decision in *Granovsky v. Canada*, is the restriction of activity because of a medical loss of abnormality. The Court qualified this definition by importing considerations of social and environmental factors:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.¹⁴

Courts therefore should not only identify the medical condition of the appellant but also analyze how environmental factors and social constructs affect his or her situation. This definition of disability, combined with the human rights purpose of section 15, results in a definition that also includes unintentional discrimination. The courts recognize that regardless of the form of discrimination, "the results are the same. It is

10. *Ibid.* at s. 7.

11. *Eve (Mrs.) v. Eve*, [1986] 2 S.C.R. 388.

12. *Law v. Canada (Minister of Human Resources Development)*, [1999] 1 S.C.R. 497 at para. 51.

13. *Ibid.* at para. 53.

14. *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at 724.

a violation of human rights law and contrary to the guarantee of equality set out in the Charter.”¹⁵

Given that the *Charter* influences legislative action, it effectively addresses systemic discrimination. However, it is worth noting that constitutional litigation is extremely costly, time consuming, and complex. While statutory anti-discrimination tools lack legislative persuasion, they are, in comparison, an inexpensive and expedient means of addressing direct discrimination.

Federal

Canada has a comprehensive, federal anti-discrimination statute that protects individuals from discriminatory practices within the federal sphere of jurisdiction. The *Canadian Human Rights Act*¹⁶ works in conjunction with other pieces of federal legislation that also seek the full participation of people with disabilities in Canadian society.¹⁷

The government adopted the *CHRA* to enforce individual equal opportunity to make life choices, without discriminatory obstacles.¹⁸ Although it is not entrenched in the *Constitution*, the courts interpreted the *CHRA* purposively as a reflection of the fundamental values of Canadians. It therefore holds quasi-constitutional status. In the event of legislative conflict, the *CHRA* has primacy over other laws unless there is a clear contrary legislative pronouncement.¹⁹

The *CHRA* primarily prohibits discrimination within four areas of societal interaction: goods, services, and facilities; commercial premises and housing; employment; and employee organizations. As opposed to the *Charter*, which applies only to acts of government officials, the *CHRA* applies to all entities within the legislative jurisdiction of the federal government, including the national police force, federal Crown corporations, and telecommunications. Additionally, the *CHRA* applies to federal private business and the governments of the Northwest Territories and Nunavut.²⁰ In a recent decision, the Supreme Court held that the *CHRA* also applies to at least some employees of the House of Commons, despite the Speaker’s assertions of parliamentary privilege.²¹

15. J. Penney, “A Constitution for the Disabled or a Disabled Constitution? Toward a New Approach to Disability for the Purposes of Section 15(1)” (2002) 1 J.L. & Equality 83 at 99.

16. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*].

17. See e.g. *Employment Equity Act*, S.C. 1995, c. 44; *Canada Pension Plan Act*, R.S.C., 1985, c. C-8.

18. *CHRA*, *supra* note 16 at s. 2.

19. *Ibid.* at s. 66.

20. *Ibid.* at ss. 2, 63, 64.

21. *Canada (House of Commons) v. Vaid*, [2005] S.C.J. 28.

Definitions

Approximately eight years after the *CHRA* was enacted, the Supreme Court interpreted the act to include adverse-effects discrimination.²² As a result, the element of intent was no longer a requirement to find discrimination. So long as an act negatively affected a person because of his or her individual characteristics, protection may be sought under the *CHRA*. This decision had significant impact on the recognition of persons with a disability and their unique, often unmet, needs. The concept of a “duty to accommodate” gained legal recognition when the Supreme Court held that an employer must demonstrate that it attempted to accommodate an employee’s needs to the point of undue hardship.²³ In 1998, the Parliament codified this concept in the *CHRA*. For a standard to qualify as a bona fide occupational requirement (BFOR), the employer must demonstrate that accommodation of individual needs would impose undue hardship on the accommodator in light of health, safety, and expense.²⁴

Shortly after the recognition of adverse-effect discrimination, the Supreme Court further expanded upon the concept of discrimination by recognizing systemic inequity as a prohibited form of discrimination. The Court viewed systemic discrimination in employment as “discrimination that results from the simple operation of established procedures of recruitment, hiring, and promotion, none of which is necessarily designed to promote discrimination.”²⁵ In response, the Canadian government adopted systemic remedies, such as the *Employment Equity Act*, that focuses on achieving equality in the workplace through special measures.

The *CHRA* uses the medical model of disability by requiring a complainant to have a “previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.”²⁶ The explicit inclusion of drug and alcohol dependence as a disability is particularly significant, as few other jurisdictions protect people with substance dependencies from discrimination. While the legislation prohibits discrimination on the eleven enumerated grounds in section 3, a definition for discrimination itself is not provided. The *Act* simply describes discriminatory practices as adverse differentiation or denial on a prohibited ground.²⁷

A person would not be found guilty of a discriminatory practice if one of the defences outlined in the *CHRA* could justify the act. Most are fairly subjective; however, certain provisions of the section require that a standard or practice be a BFOR. For a practice to qualify as a BFOR, it must be demonstrated that accommodation would impose

22. *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561.

23. *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

24. *CHRA*, *supra* note 16 at s. 5(2).

25. Canada, Department of Justice, *Canadian Human Rights Act Review* (Ottawa: The Canadian Human Rights Review Act Panel, June 2000) at 4.

26. *CHRA*, *supra* note 16 at s. 25.

27. *Ibid.* at s. 5.

undue hardship in light of health, safety, and cost.²⁸ Therefore, if the respondent can prove that there was a bona fide reason for the differential treatment, the discriminatory action in question would not be found to violate the *CHRA*. However, “in proving the merits of such a requirement or justification, the respondents must establish that the needs of the person with the disability could not have been accommodated, short of undue hardship.”²⁹

Process and Remedies

The *CHRA*, as anti-discrimination legislation, is primarily reactive and complaint driven. People who have been discriminated against and who have legal status in Canada may initiate the process by filing a complaint with the Canadian Human Rights Commission (the Commission). The Commission may assist in the settlement of the complaint, or appoint a conciliator, and must review and approve any settlement reached. The Commission may also dismiss the complaint after conducting an investigation of the situation if it finds no evidential support for the accusation. If settlement is not possible and the Commission finds that the complaint is valid, it will refer the case to the Canadian Human Rights Tribunal (the Tribunal). The Tribunal administers the hearing and renders a decision that can be appealed to the Federal Court.

Remedies under the *CHRA* are outlined in the *Act*. The Tribunal may dismiss the complaint if the member(s) hearing the case find that it is not substantiated.³⁰ If the member(s) find the complaint substantiated by the evidence, a range of remedies are available at the Tribunal’s discretion. First, the Tribunal may order the respondent to make available the rights, opportunities, or privileges that were denied to the complainant at the first reasonable occasion. The respondent may also be liable for monetary compensation to cover any costs or expenses incurred by the complainant and in some instances may be ordered to pay up to \$20,000 for any pain and suffering or for wilfully or recklessly engaging in the discriminatory practice.³¹ The panel also has the authority to force the respondent to address the discriminatory practice at a systemic level by ordering the implementation of a special program. A special program is any plan, arrangement, rule, policy, or legislative provision designed to prevent, eliminate, or reduce the disadvantage experienced, or likely experienced, by disadvantaged groups.³²

28. *Ibid.* at s. 15.

29. ARCH, “Canadian Human Rights Act,” online: ARCH: A Legal Resource for Persons with Disabilities <http://www.archlegalclinic.ca/publications/disorders/A73_2003_002616/02_accomodation/04_CHRA.asp>.

30. *CHRA*, *supra* note 16 at s. 53(1).

31. *Ibid.* at s. 53(2).

32. Canadian Human Rights Commission, “Policy on Special Programs,” online: Canadian Human Rights Commission <http://www.chrc-ccdpc.ca/legislation_policies/special_programs-en.asp?highlight=1>.

There are several provisions in the *Act* that specifically refer to accessibility and accommodation standards for people with disabilities. Accommodation is approached from two different angles, though both serve similar purposes. Organizations are encouraged to create adaptive environments for people with disabilities, and the government can implement regulations that address accessibility.³³ Both provisions bar any recourse to a complaint regarding disability discrimination as a result of the plan.

Ontario

Ontarians who have experienced discrimination can file a complaint with the Ontario Human Rights Commission. The Commission is responsible for administering the Ontario *Human Rights Code* (*OHRC*),³⁴ which prohibits discrimination based on enumerated grounds, including disability. Numerous other Ontario statutes and regulations address equal treatment for persons with disabilities.³⁵

In recent years, Ontario has also taken steps toward systemic remedies for inaccessibility. Both the *Ontarians with Disabilities Act* (*ODA*)³⁶ and the *Accessibility for Ontarians with Disabilities Act* (*AODA*)³⁷ require Ontario to plan to eliminate barriers.

Ontario Human Rights Code

Similarly to the *CHRA*, the *OHRC* prohibits discrimination against people with disabilities in employment, services, facilities, and housing, but the *OHRC* applies to those entities within the legislative power of the Ontario legislature.³⁸ One other notable distinction between the two pieces of legislation is the *OHRC*'s more detailed definition of disability. The *OHRC* defines disability as "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness."³⁹ The definition includes mental impairment, intellectual disabilities, learning disabilities, or mental disorder. As a result, people with intellectual disabilities, who often experience relatively low visibility, are entitled to receive an equal amount of recognition and protection from potentially discriminatory practices

There are three steps involved in determining whether constructive discrimination has taken place in violation of the *OHRC*. First, there must be a neutral rule or practice that results in differential treatment and thus an unequal or discriminatory outcome.

33. *CHRA*, *supra* note 16 at ss. 17, 24.

34. *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 [*OHRC*].

35. See e.g. *Blind Person's Act*, R.S.O. 1990, c. B.7; *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sched. B.

36. *Ontarians with Disabilities Act*, S.O. 2001 c. 32 [*ODA*].

37. *Accessibility for Ontarians with Disabilities Act*, S.O. 2005 c. 11 [*AODA*].

38. *OHRC*, *supra* note 34 at ss. 1–6.

39. *Ibid.* at s. 10(1).

Second, the rule or practice may be justified if it is reasonable and genuine. Finally, if the rule or practice were genuine, it would only be allowed if accommodation could not take place without undue hardship to the respondent. Undue hardship can only result from costs, in light of potential sources of funding for the accommodation, health, or safety.⁴⁰

Ontarians with Disabilities Act and Accessibility for Ontarians with Disabilities Act

Ontario has two statutes that provide for the planned removal of barriers to persons with disabilities in Ontario. The *ODA* and the *AODA* reflect the disability movement's desire to proactively remove barriers for people with disabilities in all sectors of society, by placing responsibility on everyone to do so. The *ODA* serves as a proactive means for entities to design their buildings and businesses with the limitations and reasonable accommodations of the disability community in mind.

In 2001, the *ODA* came into force after years of consultation with disability groups, advocates, and government. The *ODA* required the provincial government and certain quasi-public entities, such as transportation organizations, educational bodies, and administrative tribunals, to create accessibility plans to identify and remove barriers to persons with disabilities.⁴¹ The *ODA* also requires government publications to be made available in alternative formats.

In June 2005, the *AODA* received royal assent and became law.⁴² The *AODA* establishes a process for the continuous development and enforcement of accessibility standards. Standard development committees, comprising government, persons with disabilities, and industry representatives, will each be responsible for drafting accessibility standards for a specific industry or sector. After public consultation, the minister will enact the standards as regulations under the *AODA*. If an organization fails to comply with a standard, a director may order compliance or payment of an administrative penalty. The minister must appoint inspector(s) to ensure compliance with the standards and tribunal(s) for hearing matters arising under the *Act*.

Both the *ODA* and the *AODA* use the *OHRC*'s definition of disability. Both statutes revolve around the removal of barriers for people with disabilities to effectively participate in society. Therefore, it is important to note the definition of the term *barrier*. It is defined as "anything that stops a person with a disability from fully taking part in society because of that disability", including physical, architectural, informational, attitudinal, technological, and policy-based barriers.⁴³

40. *OHRC*, *supra* note 34 at s. 11.

41. *ODA*, *supra* note 36 at ss. 14–16.

42. *AODA*, *supra* note 37.

43. *Ibid.* at s. 2; *ODA*, *supra* note 36 at s. 1.

THE UNITED STATES

Constitutional Rights

The *Constitution of the United States* (U.S. *Constitution*), in its original form, provided no equal-rights protections. The amendments to the U.S. *Constitution*, while offering some assistance in advancing the rights of persons with disabilities, provide relatively minimal protection and no explicit protections. In fact, such equality protections for persons with disabilities are nearly non-existent in the *Constitution*, partially as a result of drafting, but mostly a result of conservative judicial interpretations of the minimal protections that do exist.⁴⁴ The power to enforce the constitutional equality protections falls to the federal government. As a result of a broad interpretation of its powers over interstate commerce, the equality protections, and the doctrine of occupation of the field, the federal government's ability to prohibit private discrimination is now relatively uncontroversial and unchallenged.⁴⁵

The *Constitution* provides a general protection of equality to all citizens through the Equal Protection Clause (EPC).⁴⁶ It prohibits states from denying the equal protection of its laws to persons within its jurisdiction. To challenge such distinctions, it must be shown either that a classification violates the EPC "on its face", where the classification is written into the statute or regulation, or that a facially neutral statute, is purposefully administered in a discriminatory manner. In the application of the EPC, the courts utilize a similarly situated test. Rather than guaranteeing absolute equality or equality of opportunity, the courts attempt to ensure that similarly situated groups or people are treated similarly, and vice versa.⁴⁷

In their interpretation of this section, the courts developed three levels of scrutiny, similar to those often applied in judicial reviews of administrative decisions: the suspect, quasi-suspect, or non-suspect classes. The court determines which level of scrutiny to apply by considering the historical discrimination against that group. Generally, the courts do not reconsider the level of scrutiny applicable to a specific classification once it has been determined by an appellate court. Therefore, despite changes in social perceptions of age, sexuality, ability, or illegitimacy as personal characteristics, they continue to receive the same type of scrutiny they have previously.

The most common and least strict level of scrutiny is the rational basis or minimal standard. This is the standard applicable to statutory classifications based on ability.⁴⁸ The challenging party bears the burden of establishing that the law is not rationally

44. See e.g. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) [*Cleburne*]; *Frontiero v. Richardson*, 411 U.S. 677 (1973).

45. G. Quinn, M. McDonagh, & C. Kimber, *Disability Discrimination Law in the United States, Australia, and Canada* (Dublin: Oak Tree Press, 1993) at 47 [Quinn & McDonagh].

46. U.S. Const. amend. XIV, § 1.

47. See e.g. *Cleburne*, *supra* note 44 at 439.

48. *Ibid.*

related to, or designed to achieve, a legitimate government objective. Because the purpose of the EPC, according to the courts, is to protect individuals from intentional and arbitrary discrimination, “arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review”,⁴⁹ but unintentional or indirect discrimination is not prohibited by the EPC.

In *City of Cleburne*, the Supreme Court concluded that some factors, such as race, are so rarely relevant to any legitimate government purpose that distinctions made on those bases are deemed to reflect prejudice.⁵⁰ Distinctions based on ability receive minimal scrutiny, as the Supreme Court held that ability frequently bears a relation to an individual’s ability to perform or contribute to society.⁵¹ The Court, in making this determination, perpetuated and relied upon stereotypical views of persons with disabilities. For example, the Court held “that those who are mentally retarded have a reduced ability to cope with and function in the everyday world”.⁵² Because of the “fact” that persons with intellectual disabilities have difficulties in an ableist society, the Court concluded that distinctions on such bases warrant minimal scrutiny. This in turn perpetuates existing stereotypes and disadvantages experienced by persons with disabilities in the United States. This negatively affected the constitutional rights of persons with disabilities as the courts determined that a minimal standard of scrutiny should apply to persons with mental or physical disabilities because a disability may hinder an individual’s ability and can therefore provide a “rational” basis for different treatment.⁵³ While the need for differential treatment is undeniable, this does not mean that persons with disabilities are incapable of adverse and discriminatory legislative treatment.

The U.S. *Constitution* provides minimal protections to persons with disabilities. Only those laws that are not rationally related to or designed to achieve a legitimate government objective may be found invalid. This has left Americans with disabilities with minimal protections from legislative distinctions based on ability.

Federal

The most important piece of legislation guaranteeing disability rights is the *Americans with Disabilities Act (ADA)*. This statute is one of the first of its kind in the world and served as a precedent for legislative protections adopted elsewhere.⁵⁴ The purpose of

49. *Bankers Life & Gas. Co. v. Crenshaw*, 486 U.S. 71 at 83 (1988).

50. *Cleburne*, *supra* note 44 at 440.

51. *Frontiero*, *supra* note 44 at 686.

52. *Cleburne*, *supra* note 44 at 442.

53. See e.g. *Pontarelli Limousine Inc v. Chicago*, 929 F.2d 339 at 341 (7th Cir. 1991); *DeVargas v. Mason & Hangar-Silas Mason Co.*, 844 F.2d 714 at 725 (10th Cir. 1988); *California Association of Physically Handicapped Inc. v. FCC*, 721 F.2d 667 at 670 (9th Cir. 1983); *Brown v. Sibley*, 650 F.2d 760 at 766 (5th Cir. 1981); *Cleburne*, *supra* note 44 at 450.

54. L.A. Basser & M. Jones, “The *Disability Discrimination Act 1992* (Cth.): A Three-Dimensional

the ADA is to provide a comprehensive mandate and clear standards to eliminate discrimination against people with disabilities.⁵⁵

Congress stated that in adopting the ADA it recognized the historical and current discrimination, the stereotypic assumptions, and the barriers of accessibility experienced by Americans with disabilities and the lack of mechanisms to prevent or remedy such discrimination. Congress concluded that equality of opportunity, independence, and economic self-sufficiency were the proper goals for persons with disabilities. Continuing discrimination denies people with disabilities an opportunity to compete “and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”

It is somewhat conflicting for the aims of the legislation to include principles that are based on rights and on economics. Is reducing “unnecessary expenses” a valid goal for human rights legislation? Would this undermine the larger recognition of disability rights as rights innate to humanity rather than merely as good economic policy? Or is it simply an economic justification for an otherwise progressive piece of legislation?

The ADA prohibits discrimination on the basis of disability in several protected areas: employers of more than fifteen people, state and local governance, public accommodations, commercial facilities, transportation, telecommunications, and Congress. The ADA applies to state and local governments and requires them to give persons with disabilities—regardless of the size of the entity or whether they receive federal funding or not—“an equal opportunity to benefit from all of their programs, services, and activities.”⁵⁶ Additionally, state and local governments must follow strict standards of accessibility in the construction or alteration of buildings. The ADA addresses accessibility in public accommodations provided by businesses and non-profit organizations, including restaurants, and doctors’ offices. Other than specific requirements related to accessibility, such entities must comply only with basic non-discrimination requirements prohibiting exclusion, segregation, or differential treatment.

Definitions

The ADA definition of discrimination includes classifying persons with disabilities in a way that adversely affects their opportunities because of disability or the application of standardized criteria that has a discriminatory effect. The only exception is where the criterion “is shown to be job-related for the position in question and is consistent with business necessity.”⁵⁷ Further, it must be demonstrated that the purpose behind the standard cannot be accomplished by reasonable accommodation of the different needs of persons with disabilities. One such allowable requirement is that the individ-

Approach to Operationalising Human Rights” (2002) 26:1 Melbourne U.L. Rev. 254 [Basser].

55. 42 U.S.C. § 12101 *et seq.*

56. *Ibid.*

57. *Ibid.* § 12112(b).

ual with a disability not pose a direct threat to the health or safety of other individuals in the workplace.

Failure to make reasonable accommodations or refusal to hire someone in order to avoid reasonable accommodation may also constitute discrimination, unless such accommodation would impose undue hardship. Accommodations constitute undue hardship when they require actions that are significantly difficult or expensive. In making this determination, relevant factors to consider include the nature and cost of such accommodation, the financial resources of the enterprise, the number of individuals employed by it, the type of its facilities, and the type of the operations of the entity.⁵⁸

The *ADA* uses a medical model of disability and requires a claimant to have, be perceived as having, or have a history of a “physical or mental impairment that substantially limits one or more of [their] major life activities”.⁵⁹ The Supreme Court interpreted the definition of disability as requiring a consideration of whether the person is substantially limited in performing a major life activity when using a mitigating measure, such as an assistive device.⁶⁰ Rather than focusing on the social barriers someone may face, this definition focuses on the impairment itself and therefore becomes unjustly medicalized. Fortunately, the definition includes perceived disabilities. As the Supreme Court noted, “[A]n 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”.⁶¹

Procedure and Remedies

The enforcement of the *ADA* does not fall within the jurisdiction of one particular agency or government body. Instead, different government bodies have responsibility for different portions of its implementation. The U.S. Department of Justice bears the responsibility of receiving complaints and monitoring the actions of state and local governments and accessibility in accommodations.⁶² The Federal Transit Agency and the Federal Communications Commission are responsible for the accessibility of public transit and communication devices, respectively.

Enforcement for employment discrimination begins with a complaint to the Equal Employment Opportunity Commission (EEOC). The EEOC conducts an investigation into the discrimination alleged and may dismiss the complaint if it appears as though an in-depth investigation will not establish a violation of the law.⁶³ Throughout this

58. *Ibid.* § 12111(10).

59. *Ibid.* § 12102(2).

60. See *e.g. Sutton v. United Airlines, Inc.*, 527 U.S. (1999); *Murphy v. United Parcel Service*, 527 U.S. (1999).

61. *School Board of Nassau County v. Arline*, 480 U.S. 273 at 283 (1986).

62. 42 U.S.C. § 12133.

entire process the EEOC may encourage the parties to settle the dispute and may provide mediation to the parties. A 2003 study concluded that both complainants and respondents were highly satisfied with the mediation program.⁶⁴ If the parties are unable to reconcile the matter and the EEOC determines that a violation occurred, it may decide to bring the matter forward to federal court.⁶⁵ The EEOC has numerous remedies available to it, including making orders for back pay, hiring, promotion, reinstatement, front pay, systemic changes, reasonable accommodation, court costs, or attorney's fees, and "[p]unitive damages also may be available if an employer acted with malice or reckless indifference".⁶⁶

The EEOC, with its responsibility for implementing the *ADA*, implemented an outreach and education program on employment discrimination laws. The EEOC sponsors interactive workshops to inform small businesses of their responsibilities under the *ADA* and other similar legislation and educates community members on their rights. Recently, the EEOC began a project, Corporate Leadership Conferences, designed to encourage employers to hire people with disabilities.⁶⁷ The EEOC also developed State Best Practices, through which it promotes hiring of people with disabilities. The EEOC will review hiring, retention, and advancement practices and provide consultation and outreach to highlight the practices to be used as models for other states.⁶⁸

California

American states have also legislated to prohibit discrimination in specific areas. California, the most populous American state,⁶⁹ has relatively advanced disability

63. United States, Equal Employment Opportunity Commission, "EEOC's Charge Processing Procedures," online: Equal Employment Opportunity Commission <http://www.eeoc.gov/charge/overview_charge_processing.html> [Charge Processing].

64. E.P. McDermott, Ruth Obar, Anita Jose, et al., "An Evaluation of the Equal Employment Opportunity Commission Mediation Program" (2 October 2000), online: Equal Employment Opportunity Commission <<http://www.eeoc.gov/mediate/report/>>.

65. Charge Processing, *supra* note 63.

66. *Ibid.* States successfully challenged the constitutional power of the federal government to allow monetary damages against the states under the *ADA*. The Court reasoned that because disability is not a suspect class under the EPC of the Constitution, Congress does not have the remedial power to address it by ordering monetary compensation (*Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)).

67. United States, Equal Employment Opportunity Commission, "New Freedom Initiative" (4 February 2004), online: Equal Employment Opportunity Commission <<http://www.eeoc.gov/initiatives/nfi>>.

68. *Ibid.*

69. United States, Census Bureau, *Statistical Abstract of the United States: 2003* (Washington DC: Census Bureau, 2004), online: Census Bureau <<http://www.census.gov/prod/2004pubs/03stab/pop.pdf>> at 20.

protections. Because many of the protections at the state level resemble those federally, this review will be brief and focuses on the *Fair Employment and Housing Act (FEHA)*.

The *FEHA* protects the rights of persons seeking housing and employment (with an employer of more than five employees) without discrimination based on enumerated grounds, including disability. The *FEHA* states that “the practice of denying employment opportunity and discriminating in the terms of employment ... foments domestic strife and unrest”.⁷⁰ Additionally, the *FEHA* recognizes that seeking housing or employment without discrimination is a civil right. This recognition is a shift away from the charitable or medical model of disability rights and towards a human rights approach.

The *FEHA* protects individuals from discrimination in buying or renting accommodations. Landlords must allow tenants to make reasonable accommodations, but the owner has no obligation to assist in funding the accessibility.⁷¹ California provides protections from discrimination in business establishments that the public is invited into, such as accommodations, transportation, insurance, lodging, and recreation facilities.⁷²

Definitions

The *FEHA* protects persons with disabilities from both direct and adverse-effect discrimination. Employers may not use discriminatory testing criteria unless such criteria are job-related and there is no alternative. The employer bears the responsibility for ensuring that the test accurately reflects the skill or aptitude that it is meant to test, rather than simply being a reflection of the person’s disability.⁷³

Adverse-effect disability discrimination through inaccessibility of a business establishment, however, does not constitute discrimination. Businesses are forbidden from arbitrarily discriminating against persons with disabilities, but they are not required to make structural modifications to improve accessibility.⁷⁴ California law does require all publicly funded buildings and facilities and privately funded public facilities to be accessible to persons with disabilities.⁷⁵

The definition of disability under the *FEHA* is similar to that at the federal level and is equally dependent upon the medical model of disability. It includes both physical and mental impairments that affect one or more “body systems” and that limit a major life activity.⁷⁶ This definition differs from that under the *ADA* in that the use of

70. *Fair Employment and Housing Act*, CA Civ. Code § 12920 [FEHA].

71. CA Civ. Code § 54.1, subd. (b)(3)(A).

72. *California Access Law*, CA Civ. Code § 54.1.

73. Cal. Code Regs., tit. 2, § 7294.1.

74. *Unruh Civil Rights Act*, CA Civ. Code § 51.

75. CA Civ. Code, § 4450 et seq., and Health & Saf. Code, § 19955 et seq.

76. FEHA, *supra* note 70 at subd. (k), as quoted in California, Department of Justice, *Legal Rights of Persons with Disabilities* (Sacramento, CA: Public Inquiry Unit, 2003), (28 March 2004), online:

mitigating factors are not considered in determining disability. The definition of a mental disability consists of a list of types of disorders that qualify if they limit a major life activity. Specific disorders are excluded from the definition, such as sexual behaviour disorders, compulsive gambling, kleptomania, pyromania, or unlawful drug use.

Similar to the *ADA*, the *FEHA* provides a defence for employers by claiming that a person is unable to perform the essential functions of the job even with reasonable accommodation. If the employee is able to perform the essential functions of the job with reasonable accommodations, an employer has no defence to a charge of disability discrimination.⁷⁷

Enforcement

A complaint can be filed with the Department of Fair Employment and Housing (DFEH). The department may then try to resolve the complaint through conciliation between the complainant and the alleged discriminator. Alternatively or after conciliation fails, the DFEH may grant permission for the complainant to commence a private suit in court.

Individuals discriminated in accommodations because of disability may request that the local district attorney, city attorney, Department of Rehabilitation, or the Attorney General bring an action. The individual may also bring a private legal action or file a complaint with the DFEH.⁷⁸

AUSTRALIA

Constitutional Rights

The *Commonwealth of Australia Constitution Act* provides no human rights or equality protections.⁷⁹ Since the 1970s, there have been numerous unsuccessful attempts to introduce a bill of rights. Opponents to such a constitutional entrenchment fear that it would restrict parliament's sovereignty and transfer this power to the courts.⁸⁰ The courts are cognizant of the need to protect certain human rights and have done so by looking at international human rights documents for guidance in developing the common law and resolving statutory ambiguities.⁸¹ However, "[w]ere human rights

Office of the Attorney General <http://caag.state.ca.us/publications/legalrights/legal_rights.htm#page1> at 2.

77. *Ibid.*

78. CA Civ. Code, § 55 and 55.1; Gov. Code, § 12980 & 12989.1.

79. S. 51(xxiii).

80. Kirby, M., *A Bill of Rights for Australia: But Do We Need It?* (Brisbane: Young President's Association, 1997), (14 December 1997), online: Law and Justice Foundation of New South Wales <http://www.lawfoundation.net.au/resources/kirby/papers/19971214_austlaw.html>.

81. *Mabo v. Queensland* (1992) 175 C.L.R. 1 F.C. 92/014.

the fundamental governing principle of society, they would be embedded in the Constitution itself, or at the very least, in a bill of rights”.⁸²

Federal

As a result of these constitutional inadequacies, the government attempted to expand the legislative protections of rights. The government created a national Human Rights Commission and its successor, the Equal Opportunity Commission. There are also several pieces of legislation that provide supports and attempt to ensure accessibility for persons with disabilities. The primary source of federal disability rights is the *Disability Discrimination Act (DDA)*.⁸³

In contrast to the *ADA*, the *DDA* began life on the government’s own initiative.⁸⁴ The motivation of the government, in enacting the *DDA*, was a vision of a fairer Australia where difference is accepted, people with disabilities are viewed as equals, and communities, government, and individuals work in partnership to accommodate difference.⁸⁵ The objective of the *DDA*, as stated in the legislation, is to ensure that persons with disabilities experience equality before the law and to promote community acceptance of the fundamental rights of persons with disabilities.⁸⁶ To protect rights in this manner, the government adopted what is referred to as a “three-dimensional approach” to disability discrimination. The three-dimensional approach recognizes that individual complaints provide minimal assistance in achieving systemic change. Instead, the *DDA* spreads the responsibility for achieving equality among persons of different abilities across society.⁸⁷

Under the *DDA*, disability discrimination is prohibited in employment, education, and most other areas of public life.⁸⁸ These protections extend beyond those who identify as having a disability. Persons discriminated against based on a past, future, or perceived disability are also protected by the *DDA*.

Definitions

Disability discrimination occurs when a person treats, or proposes to treat, a person with a disability less favourably than he or she would treat someone without a disability because of his or her disability.⁸⁹ The test applied simply requires that “because of the

82. Basser, *supra* note 54 at 255.

83. *Disability Discrimination Act 1992 (Cth.)*, s. 3 [*DDA*].

84. B.P. Tucker, “Time for Action: The Disability Discrimination Act” (1995) 69:6 L. Inst. J. 538 at 540.

85. Austl., House of Representatives, *Parliamentary Debates* (26 May 1992) at 2755 (Brian Howe, Minister for Health, Housing and Community Services).

86. *DDA*, *supra* note 83.

87. Basser, *supra* note 54 at 261.

88. M.C. Tyler, “Law and Change: The Disability Discrimination Act 1992, Genesis, Drafting and Prospects” (1993) 19 Melbourne Univ. L. Rev. 211 at 221.

89. *DDA*, *supra* note 83 at ss. 5 & 7.

aggrieved person's disability, [he or she] received less favourable treatment".⁹⁰ Indirect discrimination, resulting from standardized criteria, therefore constitutes disability discrimination when a "substantially higher proportion of persons without the disability ... are able to comply [with the standard] ... which is not reasonable having regard to the circumstances of the case".⁹¹

As usual, with protections against disability discrimination, the *DDA* imports a defence of unjustifiable hardship. In determining whether an unjustifiable hardship exists, all the circumstances of the particular case should be considered, including the nature of the benefit or detriment to the persons involved, the effect of the disability on the person concerned, the financial circumstances of the entity complained of, and an action plan, if any, given to the Human Rights and Equal Opportunity Commission (HREOC).⁹² The defence of "inherent requirements of the job" exists in the employment context and recognizes that some job requirements are not discrimination, but rather inherent to the performance of the job itself.⁹³

Prior to the enactment of the *DDA*, many states had anti-discrimination laws. The courts strictly interpreted the definition of disability contained in state laws. The question at issue in any case became whether a specific medical impairment, such as epilepsy, constituted a disability rather than whether the person had been discriminated against.⁹⁴ In response to this strict interpretation, the federal government adopted a broad definition of disability. Under the *DDA*, a disability includes the total or partial loss of bodily or mental functions, or a part of the body; the presence of organisms that could cause illness; the malfunction, malformation, or disfigurement of a part of the body; a learning disorder; and a disorder affecting thought processes, emotions, or perceptions of reality.⁹⁵

While this definition is a broad one, it focuses on the medical aspects of disability rather than the social aspects that lead to discrimination and difficulties in accessibility. This definition requires factual focus on whether or not a person falls within one of these categories, and therefore focuses upon the medical impairment of an individual. However, individuals need not prove their "abnormalities" or "deficits" when asserting their rights to equality.

Enforcement, Process, and Remedies

The Australian approach to disability discrimination under the *DDA* has three dimensions. The first involves complaints, brought individually or collectively. Conciliation is the primary tool used by the HREOC, as it is unable to make binding determina-

90. *Garity v. Commonwealth Bank of Australia*, [1999] E.O.C. 92 at para. 129.

91. *DDA*, *supra* note 83 at s. 6.

92. *Ibid.* at s. 11.

93. *Ibid.* at s. 15(4)(a).

94. *Kitt v. Tourism Commission* [1987] E.O.C. at 92-196.

95. *DDA*, *supra* note 83 at s. 4.

tions.⁹⁶ If the parties fail to reach a resolution, the complaint is terminated by the HREOC and the choice rests with the complainant whether to file an application with the courts. Alternatively, where the complaint is one that raises issues of public importance, the HREOC can refer it to the courts directly.⁹⁷ Hearings before the court are conducted with a degree of formality, but the court is not bound by strict procedural rules. The court may make any order prohibiting or requiring a particular action by the respondent to prevent further discrimination, or ordering an act to redress any loss of the complainant. Because complaints pursued beyond the non-binding HREOC conciliation process take place in a court of law, costs and court fees apply.

While the initial complaint process is free at the HREOC, legal aid is very limited for bringing a complaint to the courts.⁹⁸ This provides a huge barrier to the achievement of the DDA's goals because the binding complaints mechanism is not accessible for persons of limited financial resources. Essentially the entire process is weighted toward the discriminator. Not reaching conciliation is a defeat for persons with disabilities because they may be unable to bear the cost of carrying the case forward to court. As one author noted, "If the forum is inaccessible in any way, albeit a result of cost, time or other barrier, or if the process is disempowering or undermining of people with disabilities in any way, significant intervention will be required to protect the rights of people with disabilities."⁹⁹

The second dimension involves the HREOC acting proactively to respond to systemic discrimination that cannot be adequately addressed through individual complaints. The HREOC is empowered to undertake public inquiries into problem areas of discrimination and to create Disability Standards. This process removes responsibility from the individual complainant and has greater potential to address systemic issues. The inquiries resolved thus far include the captioning of movies and interference with hearing aids related to mobile phones.¹⁰⁰

The intention was that Disability Standards would be mechanisms to educate and guide the public's attitude towards people with disabilities and rid society of the stigma and lack of understanding often faced by this group. Some critics find that "[i]nstead of specifying and simplifying non-discriminatory conduct ... Disability Standards have been hijacked by non-disabled stakeholders and directed towards justifying discriminatory conduct".¹⁰¹ At the same time, in transportation, the only area where

96. Australia, Government Solicitor, "Determination of Claims under Commonwealth Anti-Discrimination Laws" (2000) 57 Legal Briefing, online: Australian Government Solicitor <<http://www.ags.gov.au/publications/agspubs/legalpubs/legabriefings/br57.htm>>.

97. Basser, *supra* note 54 at 267.

98. *Ibid.* at 268.

99. *Ibid.*

100. *Ibid.* at 270.

101. *Ibid.* at 269.

Disability Standards are finalized, the content of the Standards has been accepted over time.

The third dimension involves a partnership between persons with disabilities and the larger community. It requires that the community take responsibility for the integration process through Action Plans. Service providers voluntarily develop an Action Plan, laying out the process by which the organization proposes to eliminate discriminatory practices. Rather than relying on individual complaints, this process allows service-providers to gain an understanding of the impact of discriminatory practices and to understand what steps to take to address inequality. Action Plans can be taken into consideration when evaluating what constitutes “unjustifiable hardship” for the organization.¹⁰² Action Plans also reduce the risk of having a complaint lodged against the organization and may improve the chances that the organization will receive government funding.

The third dimension also involves Voluntary Industry Codes of Conduct. These Codes, though not specifically included in the *DDA*, have developed in response to it. Industry Codes are plans of action to eliminate discriminatory practices at an industry level. They “allow the community to recognize the problems of inclusion, and allow ordinary citizens to work creatively to prevent exclusion”.¹⁰³ These three dimensions, when used together, provide a fairly effective means of protecting the rights of persons with disabilities and of promoting accessibility. Each individually, however, fails.

Victoria

The Victorian protections of disability rights resemble those at the federal level. This assessment will therefore focus on the differences rather than the similarities of the Victorian legislation and the *DDA*. One such dissimilarity is that the Victorian legislation is much older. Consequently, much of the jurisprudence on the *Equal Opportunity Act (EOA)* is relevant, and used, for the interpretation of the *DDA*.¹⁰⁴ The *EOA* is the most significant part of the Victorian disability-rights protections, though other protections exist.

The objectives of the *EOA*, as stated in the *Act*, are to promote the recognition and acceptance of the right to equality of opportunity, to eliminate discrimination, and to provide redress for discrimination.¹⁰⁵ The *EOA* and Victoria’s State Disability Plan are based on four guiding principles that better illuminate the vision underlying this legislation. The principle of equality acknowledges the right to respect and equal

102. *DDA*, *supra* note 83 at s. 64.

103. Bassar, *supra* note 54 at 273.

104. See e.g. *O’Neill v. Burton Cables Pty Ltd* (1986) E.O.C. 92–159; *Urie v. Cadbury Schweppes Pty Ltd.* (1986) E.O.C. 92–180; *O’Neill v. Brass & Anon* (1989) E.O.C. 92–266; *Byham v. Preston City Council* (1991) E.O.C. 92–377; *Waters & Ors. v. Public Transport Corporation* (1992) 173 C.L.R. 349.

105. *Victoria Equal Opportunity Act 1995*, s. 3 [*EOA*].

opportunities of social, economic, cultural, political, and spiritual participation for people with disabilities. The principle of dignity and self-determination relates to the recognition that persons with disabilities are full citizens, deserving respect for their knowledge, abilities, and experiences. Individual differences and contributions to society are recognized through the principle of diversity. Finally, the principle of non-discrimination requires that society be free from discrimination and acknowledges that all people have the right to live free from discrimination.¹⁰⁶

The majority of entities operating in Victoria are covered by the *EOA*, including education, employment, accommodation, and club memberships. The prohibition of discrimination in accommodations requires an owner to allow persons with a disability to make modifications at their expense, but the owner has no obligation to provide financial assistance. There are, however, exceptions to these general rules prohibiting discrimination. The prohibition of discrimination in employment does not apply to entities that employ fewer than five people.¹⁰⁷

Discrimination, under the *EOA*, includes direct and indirect discrimination, whether based on the actual existence of an enumerated ground, such as disability, or on the presumption that the individual has that attribute. The *EOA* expressly states that intention is irrelevant to all forms of discrimination. Indirect discrimination, also known as adverse-effect discrimination, is therefore prohibited as a form of discrimination and occurs upon the imposition of a standard that a person is unable to meet or is less likely to meet because of a disability unless the standard is reasonable. In the determination of whether or not it is a reasonable standard, regard should be given to the consequences of failure to comply with it, the cost of alternative standards, and the financial circumstances of the entity imposing the standard.¹⁰⁸

Procedures and Remedies

The enforcement procedures under the *EOA* are based on a human rights model and therefore are very similar to the other canvassed jurisdictions. Once filed, the Equal Opportunity Commission may refer the complaint to conciliation if it concludes that the complaint could be successfully resolved.¹⁰⁹ Should the complaint be inappropriate for conciliation, the Commission may refer the matter to the Victoria Civil and Administrative Tribunal, which will make a binding decision.¹¹⁰ The Tribunal, if deciding that the complaint is proven, may make an order prohibiting an action, compelling the discriminator to do something specific to redress the loss suffered by

106. Victoria, Australia, Department of Human Services, *Victorian State Disability Plan 2002–2012* (Victoria, Australia: Disability Services Division, 2002), online: Department of Human Services <<http://hnb.dhs.vic.gov.au/ds/disabilityimages.nsf/bd144b8a9dd88784ca256b2800041be3/3f18e8df6f1a6142ca256c250006e81d?OpenDocument>> at 9.

107. *EOA*, *supra* note 105 at ss. 13–60.

108. *Ibid.* at s. 9.

109. *Ibid.* at s. 112.

110. *Civil and Administrative Tribunal Act 1998* (Vic.).

the complainant, or requiring the discriminator to provide financial compensation for the loss of the complainant.¹¹¹

In July 2004, the Commission announced a “complaint specific approach” for complaint handling. Rather than employing its previous “one size fits all” approach, the Commission will now begin by “identifying the most appropriate process to deal with the issues of each individual complaint and help people reach a resolution”.¹¹² The Commission reports higher levels of satisfaction by complainants and respondents with the new approach to complaints.

COMPARATIVE ANALYSIS

The legal protections for persons with disabilities vary in degree among Canada, Australia, and the United States. Despite the differences in structure and breadth of the legislation, it is clear that formalized enforcement mechanisms are essential to society’s commitment to the human rights of people with disabilities. In the disability-rights protections of the three jurisdictions, four legal expressions of human rights are evident:

- Constitutional guarantees of equality
- Enforceable anti-discrimination legislation
- Specific entitlement programs
- Voluntary programs¹¹³

While they often overlap, all can incorporate human rights ideals into law. As one author states, “Disability advocates, for their part, have long insisted that the recognition of human rights for persons with disabilities is empty and meaningless, if not insulting, without explicit mechanisms for enforcing these values.”¹¹⁴ As such, the primary focus of this analysis will be concerned with the effectiveness of enforceable legal mechanisms available to persons with disabilities in their strive for human rights protections.

Constitutional Protections

The constitutional protections are the most disparate for persons with disabilities among the three jurisdictions. Although constitutional guarantees of equality are not

111. *EOA*, *supra* note 105 at s. 136.

112. Australia, Equal Opportunity Commission Victoria, *New Complaint Handling Process* (Victoria: Equal Opportunity Commission Victoria, July 2004), online: Equal Opportunity Commission <<http://www.standuptoracism.com.au/default.asp?nc=762&id=400> >.

113. J.E. Bickenbach, “Disability Human Rights, Law and Policy” in Gary L. Albrecht, Katherine D. Seelman, & Michael Bury, eds., *Handbook of Disability Studies* (Thousand Oaks, CA: Sage Publications, 2001) 565 [Bickenbach] at 208.

114. *Ibid.* at 210.

the most accessible means of protection from discriminatory acts, they do set a tone for the level of attention given to the rights of disadvantaged groups.

Historically, none of the three countries provided constitutional protection for persons with disabilities. Now, Canada is the only country with concrete constitutional protections. In Australia there are no equality provisions in the *Constitution*, though the courts now apply international documents in the interpretation of ambiguous legislation. In the United States practically no constitutional protection exists for persons with disabilities.

As stated earlier, a major concern raised by critics in Australia of an entrenched bill of rights is that of parliamentary sovereignty and the transfer of power from the legislature to the judiciary. However, without such guarantees the enormously bureaucratic and complex nature of government results in inadequate attention by elected representatives to issues concerning individual justice.¹¹⁵ This fact is especially true when dealing with historically and socially disadvantaged segments of the population. Judicial decisions affecting such issues accelerate the legislative process and are less dependent upon political whims.

The Supreme Court of Canada's decision in *Eldridge* demonstrates the value of constitutionally entrenched disability rights in effecting policy change. The case involved hearing-impaired individuals claiming that the denial of sign-language interpretation for medical services violated their equality rights because it impaired their communication with medical staff and increased the risk of misdiagnosis. The decision, in favour of *Eldridge*, recognized the history of marginalization experienced by persons with disabilities and pointed to a broad remedial purpose, rather than a formal and legalistic weighing of fine points.¹¹⁶ A person in such a situation in Australia would have no constitutional recourse. Although health care is not public in the United States, an analogous piece of legislation would be subject only to a minimal level of scrutiny under the EPC, as there is no explicit constitutional protection for people with disabilities.

The U.S. and Canadian courts have treated persons with disabilities in drastically different ways. The U.S. Supreme Court, in *City of Cleburne*, responded to the difficulties incurred by persons with disabilities by endorsing ableist legislative distinctions and providing maximum protection to discriminatory laws. In the United States, the Aristotelian notion of treating likes alike (the "similarly situated" test), is used in the application of the EPC. This approach to equality reinforces the medical model of disability, where the problem is situated within the person and not as a result of socially constructed barriers.

115. David Beattie, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995).

116. O. Endicott, *Key Trends in Case Law Pertaining to Supports for Persons with Disabilities* (2002) [unpublished, archived at the Association for Community Living] at 19.

In Canadian courts, on the other hand, equality claims involve the comparison of treatments and their results. In some situations, differential treatment may be necessary to achieve equality of outcome. In other situations, the differential treatment may be a reflection of stereotypical attitudes and therefore constitute discrimination. The question becomes “how we can structure relations of equality among people with many different concrete inequalities”.¹¹⁷

Although constitutional litigation is expensive, time-consuming, and complex, the merits of entrenching such protections address the much larger issue of systemic discrimination faced by persons with disabilities, especially if a person’s ability to self-advocate is limited. Aside from the complaint-driven aspect of a constitutional challenge, an entrenched bill of human rights proactively forces both new and existing legislation to adhere to its primacy.

In some countries this proactive approach serves as the primary mechanism to guarantee constitutional rights. The Finnish judiciary, for example, plays a minimal role in ensuring the constitutionality of proposed legislation. Instead, a parliamentary committee bears the responsibility of reviewing bills that might conflict with the constitution.¹¹⁸ While this system addresses legislation only and not government policy, like that in *Eldridge*, it is an alternative not often explored in the Commonwealth. Moreover, it may provide a solution to the Australian concern over parliamentary sovereignty while still providing some constitutional human rights protections.

Enforceable Anti-Discrimination Legislation

In Canada, Australia, and the United States, the rights of people with disabilities are protected in statutes within both federal and state or provincial jurisdictions. This method of enforcement is primarily complaint driven and addresses individualistic issues. Once a complaint is made, the debate generally revolves upon whether the complainant is a person with a disability, whether the discriminatory treatment is related to that disability, and whether the possible accommodations constitute undue hardship.¹¹⁹

It is important to appreciate the unique nature of disability as a protected ground under human rights legislation. Disability is a different kind of protected ground because not discriminating requires positive action, such as providing accommodations or making buildings accessible. Other protected grounds often require only a potential discriminator to abstain from certain actions. Therefore “[m]ere formal anti-discrimination legislation on the lines of anti-racist or anti-sexist legislation is neither appropriate nor enough”.¹²⁰

117. Jennifer Nedelsky, “Preconceiving Rights as Relationship” (1993) 1 *Rev. Const. Stud.* 1.

118. Finland, “Constitutional Law Committee,” online: Eduskunta, Parliament of Finland <<http://www.eduskunta.fi/triphome/bin/hx6200.scr?{tetunnus}=pe v01&{kieli}=en>>.

119. Bickenbach, *supra* note 113 at 211.

120. Quinn & McDonagh, *supra* note 45 at 4.

Disability also differs because of the stereotypes surrounding it. The U.S. courts are less willing to extend protections to persons with disabilities because disability, stereotypically, bears a relation to an individual's ability to perform or contribute to society.¹²¹ The inclusion of persons with disabilities in generalized human rights legislation may therefore lead to conservative interpretations of their right to equality. The "similarly situated" test creates problematic results for persons with disabilities because it is based on the notion that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalike-ness".¹²² For example, one could argue on the basis of this premise that instead of trying to include a child with autism in an integrated classroom, all children with this condition should be segregated into their own classroom environment because of their difference.

Cognizant of these differences, legislatures in our three countries either enacted separate anti-discrimination laws for persons with disabilities or incorporated specific provisions within their human rights legislation. The following analysis will illustrate each jurisdiction's success in maintaining this delicate balance.

Definitions

The choice of public policy approach radically influences the choice of how to define disability, and vice versa.¹²³ The definition of disability in human rights legislation differs among countries; however, it is fairly consistent among jurisdictions within each country.

Both on its face and in judicial interpretation, the *ADA* uses the most restrictive definition of the three countries. While all the laws being discussed rely heavily on the medical model of disability, the *ADA*'s definition is especially repressive to persons with disabilities. A major deficiency of the *ADA* definition is the "substantial limitation" clause. Even though a person may have an actual disability, if it does not substantially limit a major life activity, that person would not qualify for protection under the *ADA*. Although the U.S. Supreme Court addressed this issue in *Abbott* by extending protection to HIV/AIDS patients,¹²⁴ it did not indicate if protection also applied to other asymptomatic diseases such as cancer, carpal tunnel syndrome, or diabetes.¹²⁵ For example, in *Madjelessi*, the court dismissed the complaint because Madjelessi worked while experiencing side effects

121. *Frontiero*, *supra* note 44 at 686.

122. Aristotle, *Ethica Nichomacea*, trans. W. Ross, Book V2 at 1131a-6, cited by McIntye J., in *Law Society of BC v. Andrews*, [1989] 1 S.C.R. 143.

123. J. Lav, "Conceptualizations of Disability and the Constitutionality of Remedial Schemes under the Americans with Disabilities Act" (2002) 34:1 Columbia H.R.L. Rev. 197 at 206.

124. *Bragdon v. Abbott*, 18 S. Ct. 2196, 2196 (1998).

125. L.J. Harris, "The Americans with Disabilities Act & Australia's Disability Discrimination Act: Overcoming the Inadequacies" (1999) 22:1 Loyola of Los Angeles International & Comp. L.J. 51 [Harris].

(vomiting, weakness, and nausea) of cancer treatment and therefore did not satisfy the “substantial limitation” standard.¹²⁶

The “substantial limitation” clause affects persons with a controlled impairment. If an individual experiences a temporary impairment, occurring episodically, or one that is effectively masked by medication, then no life activity is impaired. Persons seeking the protection of human rights law and “asserting their ability and entitlement to participate equally may paradoxically find it necessary to argue that their ability to participate fully is in fact limited by their impairment in order to qualify for protection under the law”.¹²⁷

The courts, when applying the *ADA*, have been very reluctant to deem conditions of “moral fault”, “voluntary weakness”, or “motivational disability” as coming within the definition of disability for statutory purposes. The U.S. Supreme Court found, in *Argen*, that a student with a learning disability did not qualify for *ADA* protection “on the grounds that his functional need for more time and a quiet exam is compatible with the unworthy disability of lack of motivation or the inability to overcome stress and nervousness.”¹²⁸

The definition of disability under both the Australian and Canadian law is much broader and more liberal. The *CHRA* explicitly provides for alcohol and drug dependence as well as learning disabilities, mental disorders, and physical disfigurement.

The *DDA*’s drafters recognized the circular nature of the *ADA*’s “substantial limitation” language and accordingly rejected it.¹²⁹ The *DDA* therefore utilizes a very broad approach in defining disability, but it is still reliant upon a medical definition of disability, as the focus is on the individual rather than the social barriers he or she may face.

Likewise, Canadian human rights statutes, both federal and provincial, refrain from including any notion of a “substantially limiting” clause. The terms *any degree* and *any existing* mental or physical disability are used to indicate that a broad range of disabilities are protected under the laws. The Ontario legislation is especially comprehensive in listing numerous conditions that fall under its protection.

While the legislative and court interpreted definitions of disability in Canadian and Australian laws are more comprehensive than those of the United States, they are still based on the medical model of disability. They focus on the medical component of the disability located within the person instead of on the social barriers faced by persons with impairments. As a result, the paternalistic notion of caring for persons with

126. *Madjelessi v. Macy’s West Inc.*, 993 F.Supp. 736 (N.D. Cal. 1997).

127. Quinn & McDonagh, *supra* note 45.

128. *Ralph J. Argen v. New York State Board of Law Examiners*, 860 F.Supp. 84 (NY 1994).

129. Harris, *supra* note 125 at 67.

disabilities is perpetuated instead of improving the human rights of those faced with societal inequity.

Defences and Coverage

The anti-discrimination legislation in the three countries attempts to address discrimination against persons with disabilities with respect to goods, services, facilities, commercial establishments, housing, and employment. The coverage is broad and administers matters within both the public and private spheres. The legislative schemes also attempt to address systemic disability discrimination.

The concepts of reasonable accommodation and undue hardship differ among Canada, Australia, and the United States. Both the Canadian and U.S. laws suggest that the failure to make reasonable accommodations for persons with disabilities in the employment context could be considered a discriminatory act. Health, safety, and cost are considered in the determination of undue hardship in Canada. More descriptive measures of the discriminating entity are considered in the United States, including the nature of the discriminating entity, the financial resources of the enterprise, the number of individuals employed by it, and the type of its facilities.¹³⁰

In Australia, however, an adequate reasonable accommodation approach is often regarded as the most significant deficiency of the *DDA*. It remains unclear whether the “inherent requirements” test of the *DDA* “requires that a reasonable accommodation be made in deciding a person’s capacity to perform the requirements of an employment position”.¹³¹ Judicial interpretation of the *DDA* implies a duty by the employer to make reasonable adjustments to persons with disabilities. However, unlike the *ADA*, the *OHRA*, and the *CHRA*, the *DDA* imposes only a reasonable accommodation requirement on an employer when he or she is deciding whether to “refuse to hire or fire an employee”. Conversely, the *ADA* prohibits discrimination in all affairs related to employment.

Likewise, Canadian legislation protects persons with disabilities from potential discrimination at the recruitment and employment stages. Unless an employer can provide a bona fide occupational justification for differential treatment, the Tribunal will find that the employer discriminated. The inclusion of a similar statutory reference and judicial interpretation of a reasonable accommodation and undue hardship standard in the *DDA* would significantly strengthen the rights of persons with disabilities in the Australian employment arena.

Method of Advancement of Disability Rights

Anti-discrimination legislation, by its very nature, is primarily reactive and complaint-driven. Its individualistic approach places the onus on individuals to file complaints rather than on society to prevent the discriminatory practice. As a result, the process

130. 42 U.S. Const. § 12111(10).

131. Harris, *supra* note 125 at 15.

of complaint and adjudication is adversarial. One party must prove the discrimination, while the other party must disprove or justify it. One Australian critic writes, "When human rights legislation relies on individuals taking action to enforce their rights it is only too easy to see it as providing just another civil remedy for those who are sufficiently motivated to pursue it."¹³²

A complainant generally initiates the process by filing a complaint to either a federal or state agency responsible for administration. The primary objective of these bodies is to resolve the matter through conciliation. However, the three countries differ in their process if settlement is unsuccessful or inappropriate. Only in Canada and Victoria could the complaint be referred to a tribunal for a binding decision. Federally in Australia and throughout the United States, if a settlement is not reached, the complainant's case is terminated within the administrative system. In the United States, the EEOC must grant a "right to sue" letter to the complainant for the matter to be pursued in court. In Australia, the choice is left completely to the complainant to elevate the matter through the judicial system.

Although Canadian jurisdictions grant tribunals the power to administer binding decisions, only a very small number of complaints actually reach this level as the result of the "gatekeeper" role employed by the Ontario and Canadian commissions. A 1992 Ontario report found that approximately 96 per cent of human rights complaints never receive a hearing.¹³³ As a result, reports, advocates, and international bodies have recommended that complainants be granted direct access to the tribunals.¹³⁴

Alternatives to complaint-based legislation are instrumental in the success of disability rights, as much of the discrimination that persons with disabilities experience is systemic. As one author stated, "[T]he problem of exclusion is systematic in society and in the economy. It therefore requires systematic responses at a macro level."¹³⁵ The ADA, the DDA, the ODA, and the AODA employ preventive methods to address systemic discrimination. By requiring institutions to plan how to eliminate barriers and by setting clear standards of accessibility, organizations are able to strategically identify and remove barriers to accessibility.

132. B. Gaze, "The Costs of Equal Opportunity" (2000) 25:3 *Alternative Law Journal* 125 [Gaze] at 129-130.

133. Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Cornish Report) (Toronto, 1992) at 108.

134. See e.g. Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (La Forest Report) (Ottawa, 2000); Mark Hart and Geri Sanson, "Getting Rid of the 'Gatekeeper': A Practical Model for Human Rights Reform" (7 January 2005) online: Faculty of Law, University of Toronto <http://www.law.utoronto.ca/documents/conferences/admin05_hart.doc>; *Concluding Observations of the Human Rights Committee: Canada, 07/09/99*. CCPR/C/79/Add. 105 (7 April 1999).

135. Quinn & McDonagh, *supra* note 45 at 224.

Specific Entitlement Programs

Australia, Canada, and the United States all have legislation in place that create programs of special entitlements for persons with disabilities. While a comprehensive analysis of these laws is beyond the scope of this paper, it is worth noting that they provide additional support to the disability community beyond the anti-discrimination statutes discussed thus far. As entitlements, the benefits derived from these programs are enforceable, and an individual can call on a court, tribunal, or other adjudicating body to enforce his or her claim to those benefits. The most significant difference of this approach to disability “is that here the focus is on positive provision of resources and other facilitators to full participation rather than on the removal of physical barriers”.¹³⁶

Given that persons with disabilities often experience economic marginalization and disenfranchisement, the most prevalent form of specific entitlement initiatives are programs that provide income support and maintenance. In Canada, CPP-D is a modified version of the country’s public pension program that incorporates relaxed workforce participation requirements for persons with disabilities. At the provincial level, the Ontario Disability Support Program (ODSP), a part of the social assistance system, provides income and employment support for individuals with disabilities. In Australia, the *Social Security Act* provides a disability pension for those who are unable to work for more than two years. In the United States, a similar program is provided in Social Security Disability Insurance.

To a greater extent than anti-discrimination legislation, these income support programs rely heavily on a medical interpretation of disability in order to qualify for assistance. The ODSP requires that a person have a “substantial physical or mental impairment”.¹³⁷ Social Security in the United States is based on the inability to work due to a medical condition.¹³⁸ Australia’s social security legislation is similar; it evaluates “which body systems have a functional impairment”.¹³⁹ The reality of restricting income support program eligibility to strict medical interpretation is that persons with disabilities overwhelmingly live in less than satisfactory conditions.

Income support mechanisms are also disproportionately designed for people with physical and late onset disabilities. Pension support systems can be used only by individuals who have contributed to them, and income tax credits are beneficial only to individuals with taxable income.

136. Bickenbach, *supra* note 113 at 213.

137. *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sched. B.

138. *Social Security Act*, 42 U.S. Const. § 401.

139. *Social Security Act* (Cth.) 1991.

Voluntary Human Rights Manifestos

The final form of legal expression is based upon unenforceable policy-oriented initiatives, which build upon social commitment. Voluntary schemes may provide political techniques for raising public awareness, pre-emptively defusing protest or limiting public expenditures on disability-related initiatives.¹⁴⁰ While all three jurisdictions employ some form of voluntary action, Australia has been the most proactive in using this form of legal expression.

The third dimension of Australia's *DDA* involves voluntary steps being taken by the community to perpetuate integration. This approach is not novel. The *CHRA* and the *ADA* also include provisions that allow providers to voluntarily submit proposals that adapt environments for persons with disabilities.

Voluntary developments in disability human rights are prevalent at the international level.¹⁴¹ These documents serve primarily as moral authority on the human rights of persons with disabilities. They act as a tool for countries to assess their laws, policies, and practices. Paradoxically, "voluntary manifestos, either nationally or internationally, are by far the most explicit affirmations of human rights for persons with disabilities".¹⁴² They are difficult to implement, because the needs of persons with disabilities are left to legally enforceable solutions, which are often abstract, expensive, and lengthy in practice.

POLICY V. PRACTICE

Varying in legal expression, enforceable and voluntary initiatives apply at all levels of government, but how effective have the governments been in improving the human rights of persons with disabilities?

The evolution of disability rights legislation differs among the three countries. The *ADA*, inspired by the civil rights movement in the United States, was born as a result of grassroots lobbying.¹⁴³ The *Charter* was a product of the government's agenda, but the introduction of specific protections for persons with disabilities was heavily influenced by disability rights groups. The disability movement was widely publicized in both Canada and the United States, resulting in significant community support. Disability advocacy groups played a significant role in the creation and negotiation of the legislation throughout all stages of the process. Conversely, Australia passed "the

140. Bickenbach, *supra* note 113 at 215.

141. See e.g. *Declaration on the Rights of Mentally Retarded Persons*; *Declaration on the Rights of Disabled Persons*; United Nations, General Assembly, *World Programme of Action Concerning Disabled Persons*; Report of the Secretary-General: Addendum, at 21, U.N. Doc. A/37/351/Add.1 (1982); See *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, Annex at 202–11 (1994).

142. Bickenbach, *supra* note 113 at 215.

143. Harris, *supra* note 125 at 285.

DDA with little or no public attention, fanfare, or participation by disability advocates. Hence, the Australian public was, and still is, generally unaware of this law.”¹⁴⁴

The different approaches to enactment led to disparities in attitude toward disability human rights in the three countries. Although Canada and United States have problems, Australia’s “attitudinal obstacles and implementation difficulties continue to severely hinder the *DDA*’s progress”.¹⁴⁵ For example, Australia’s disability legislation employs a “comparability requirement” in its discrimination framework. As a result, the notion of reasonable accommodation is rarely addressed, as people with disabilities are required to comply with requirements in the same way as able-bodied individuals. This method is inconsistent with the Canadian Supreme Court’s interpretation of disability in the *Eaton* case and the U.S. process of keeping disability legislation “separate from the body of ordinary anti-discrimination law”.¹⁴⁶ The able-bodied person continues to be the standard by which individuals with disabilities are measured.

There are common criticisms of the three countries when evaluating the reality of accessibility and enforcement. The most significant impediment in the process is one of cost. In Canada, one study suggests that

only a select sample of people with disabilities are the subject of human rights decisions. Adjudicated decisions do not include cases of the people most significantly marginalized. Decision-makers adjudicate cases for those who have had the means to make the initial complaint as well as the patience, resources and motivation to see the process through ... Despite its objectives concerning accessibility, the human rights process appears to be a privileged system with few appearances by individuals with disabilities who are caught in more oppressive systems.¹⁴⁷

As this author notes, the complaint process can be time-consuming and difficult. Additionally, the complainant who successfully navigates the process may be unsuccessful at conciliation and be unable to obtain a binding determination in Australia or the United States.

In Australia, beyond the complaint-based system, the *DDA* does not prohibit entities from administering additional fees for “special” accommodating services. Consequently, many Australians with disabilities still experience inaccessibility to buildings and services, despite compliance measures outlined in the *DDA*.¹⁴⁸ Inaccessibility to the system has resulted in the continued marginalization of the most vulnerable

144. *Ibid.* at 5.

145. *Ibid.* at 7.

146. Gerard Quinn, “Legislation on Disabled Should Be Kept Separate from Anti-Discrimination Law” *Irish Times [Dublin]* (19 May 1997) 6.

147. I. Grant & J. Mosoff, “Disability and Performance Standards under the Ontario Human Rights Code” (Fall 2002) 1 *J.L. & Equality* 205 at 299 [Mosoff].

148. Harris, *supra* note 125 at 8.

segments of the disability community. The largest proportion of new complaints received by the Canadian Human Rights Commission are disability claims, representing over 30 per cent of all grievances.¹⁴⁹ Strikingly, “individuals with severe disabilities were rarely the subject of decisions. The human rights system under-represented the most disadvantaged individuals with disabilities.”¹⁵⁰ This is equally true in the United States, where most disability complaints are from individuals with lower back pain. Complaints and redress for persons with psychiatric disabilities are painfully absent.¹⁵¹ Is this because they are not experiencing discrimination or, perhaps more realistically, as a result of the disadvantage they experience?

The process, designed to protect individuals with disabilities, is stacked against them. Only 54 per cent of Americans with disabilities have heard of the *ADA*. Employers prevailed in 93 per cent of the trial court level cases between 1992 and 1998, and 84 per cent on appeal.¹⁵² A study suggests that the *ADA* has failed to remove barriers. People with disabilities remain just as disproportionately underemployed as before the *ADA*. Their incomes remain below those of persons without disabilities. Physical, process, and attitudinal barriers remain. Additionally, a second study suggests that the *ADA* did not have the desired impact on the employment of persons with disabilities. Instead, it “had a negative effect on the employment of disabled men of all working ages and disabled women under age 40 ... the adverse employment consequences of the *ADA* have been limited to the protected group.”¹⁵³

The statistics are likely even less encouraging in Australia. Lack of public education on the *DDA* thwarts the achievement of its goals. Low enforcement levels in Australia are a direct result of “meager, deficient and often non-existent guidelines for *DDA* compliance and enforcement”.¹⁵⁴ Regulations that inform the Australian public about the *DDA* or outline methods of compliance are minimal. Conversely, U.S. legislation employs clear and effective compliance regulations and guidelines. Similar regulation-based guidelines are included in the *ODA*; however, as a result of its relatively recent enactment, comprehensive compliance measures are not yet available.

At the Canadian federal level, critics argue that the CHRC underutilizes special standards and accessibility programs for addressing systemic discrimination.¹⁵⁵ The

149. Lana Kerzner & David Baker, “A Canadians with Disabilities Act?” (14 May 1999) online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/law-reform/analysis/cda.htm>> [Kerzner].

150. Mosoff, *supra* note 147.

151. Bickenbach, *supra* note 113 at 217.

152. Lord, *supra* note 6.

153. D. Acemoglu & J. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act* (Cambridge, MA: National Bureau of Economic Research, 1998) at 1–2.

154. *Ibid.* at 7.

155. Kerzner, *supra* note 149.

government has never issued accessibility standard regulations or implemented a Special Program.

CONCLUSION

The legislation enacted in all three jurisdictions, while far from perfect, placed disability rights on the agenda, acknowledged that such rights exist, and provided a mechanism to enforce those rights. They successfully addressed some forms of disability discrimination and accessibility, but unfortunately many others still remain.

Much progress has been made, but there is still much change needed before persons with disabilities experience full citizenship. Despite the governments' claims that they recognize the importance of disability issues, it still is not a legislative or policy priority. If it were a priority, and equally recognized humanity was the organizing principle of society, there would be strong protections in all national constitutions instead of just in the Canadian one.¹⁵⁶ How can we expect the community at large to take ownership of accessibility when the government itself is free to discriminate in legislation without substantial review?

As long as individual complainants remain the primary method of enforcing accessibility and prohibitions on discrimination, societal change is impossible. Again, if disability rights truly were a governmental or social priority, there would be adequate tools to address this pervasive type of disability discrimination, which is systemic.

Despite the lack of attention to systemic barriers, perhaps the largest are attitudinal, as exemplified by the U.S. Supreme Court perpetuating and condoning ableist stereotypes.¹⁵⁷ Rather than being viewed as an issue of public interest, the human rights scheme resembles another individual remedy that is of no concern to society at large.¹⁵⁸ The community must accept ownership of disability issues. Barriers of access for persons with disabilities must become as repugnant as a similar barrier to persons of colour or women would be.

Courts and governments must also recognize the difference between disability and other protected grounds before change can occur. Disability is not the same as race or gender, and new mechanisms of enforcement must be developed and used to end discrimination and ensure access. Australian Access Plans, Canadian Special Programs, and U.S. regulations are examples of the initiatives necessary to address this form of discrimination. To create an environment where disability discrimination is recognized as fundamentally different, the disability movement must continue to develop its own rhetoric and analytical approaches.

156. Bassler, *supra* note 54 at 255.

157. See, e.g. *Frontiero*, *supra* note 44; *Cleburne*, *supra* note 44.

158. Gaze, *supra* note 132 at 129–30.

Rather than allowing the process to stagnate, we must now ensure that further progress is made toward full inclusion and respect for equal humanity. While this analysis is very critical of the individual-complaint model, we recognize its value as one tool to end discrimination. As the Australian dimensions demonstrate, however, progress must involve ownership by individuals with disabilities, government, and society at large. Ableism fundamentally affects the organization of society on every level. To create a society equally accessible to all individuals, regardless of ability, measures must be adopted at both a macro and micro level. Accessibility for all individuals must be a fundamental principle upon which society is built. Constitutional protections ensure that society is accessible and egalitarian from a macro perspective, and accessibility standards and prohibitions on discrimination attempt to do the same on a micro level. Either principle alone would fail to achieve equality, as all dimensions of inaccessibility would not be adequately addressed.

ACKNOWLEDGEMENT

This paper was prepared for Disability Rights Promotion International, as part of an international project developing mechanisms to monitor the enforcement of rights of persons with disabilities.