HUMAN RIGHTS COMMISSION

Discussion Paper No. 11

Affirmative action for people with disabilities

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Foreword

From its early days the Commission has been concerned with the human rights issues, both practical and theoretical, associated with programs designed to assist disadvantaged groups - often described, in short-hand form, as affirmative action programs. Groups of particular concern are Aborigines, women and people with disabilities. This discussion paper focuses on the problems of people with disabilities, whose circumstances present specific issues for an affirmative action study.

A basic theme of the paper is that, at least in the area of employment, anti-discrimination legislation is of itself unlikely to provide a satisfactory remedy for people with disabilities.

The Declaration on the Rights of Disabled Persons, which is appended as Schedule 4 to the Human Rights Commission Act, recognises the need to go further than simply the avoidance of discrimination on grounds of disability. Its whole tenor is that active and positive programs are needed to ensure decent living standards for people with disabilities, that their special needs are taken into account in planning, that they are entitled to measures to help them become as self-reliant as possible and that they are to be protected against discriminatory treatment. Paragraphs 5, 7, 8 and 10 of the Declaration specify that:

> Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible. (Paragraph 5)
>
> Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions. (Paragraph 7)

> Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.
> (Paragraph 8)
>
> Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.
> (Paragraph 10)

An important theme emerging from the Declaration is the need for people with disabilities to have a major role in shaping policy and determining practice in the area of anti-discrimination, equal opportunity and affirmative action programs for people with disabilities. The Commission supports this core theme.

Definitions - of discrimination, of affirmative action itself, of 'hard' and 'soft' affirmative action - are still a matter of public debate. So, inevitably, are broad affirmative action issues as well as specific practical initiatives. It is the intention of this paper to stimulate discussion of these issues in the context of people with physical disabilities in the hope that positive action will result.

In the preparation of this paper the Commission has received much assistance from Dr Helen Ware and, more recently, from Ms Rosemary Meale. It expresses its thanks to both of them.

P.H. Bailey
Deputy Chairman

2 October 1986

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1. Introduction

> Affirmative action is the active and positive process by which an organisation seeks to achieve its goal or equal employment, by not only passively removing barriers to employment but also to actively seeking both applicants and employees from under-represented groups.'

Definitions of affirmative action vary considerably, but the above description is a useful starting point as it stresses that a whole process is involved. Affirmative action for women and members of minority ethnic groups is commonly said to be justified because of past discrimination, the effects of which can only be removed by positive action now. In the case of persons with disabilities there is a second argument which is often raised to the effect that, even in the absence of past discrimination, disabled people need affirmative action to give them equal opportunities. This is claimed to be because, other things being equal, a rational employer will always employ the non-disabled person first on the assumption of his or her greater all-round utility and the allegedly lesser risk of medical complications. This assumption can readily be disputed; disabled employees may be more highly motivated to maximise their performance in order to keep their jobs and/or less likely to put themselves at risk of accidents. Following this line of reasoning it might be argued that the rational employer will always give preference to males in employment because they stand no risk of becoming pregnant, or to whites because they allegedly have lower crime rates.

Paragraph 7 of the Declaration on the Rights of Disabled Persons makes it plain that 'they have the right, subject to their capabilities, to secure and retain employment or to engage in a useful productive and remunerative occupation.' The first step towards protecting that right is to outlaw discrimination on the ground of disability. However, it is only since 1980 that legislation has existed in Australia to prohibit or discourage discrimination on the ground of physical impairment. At present, New South Wales, Victoria and South Australia have in operation anti-discrimination legislation to cover physical impairment and the New South Wales statute covers discrimination on the ground of intellectual handicap. Now the

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R. Calvert, Affirmative Action: a comprehensive recruitment manual: Garrett Park Press, Maryland, 1979.

question arises if, notwithstanding the existence of legislation, there may not be a need for further action, whether by Government payments to offset the costs of employing persons with disabilities, by affirmative action or by the introduction of a quota system.

The New York City Commission has identified three layers of discrimination against disabled people:

1. Overt Discrimination: e.g. refusal of access to facilities or employment on the ground of handicap.

2. A Network of Barriers: e.g. physical obstructions and rules and regulations which are not intended to be discriminatory but which have that effect; for instance problems in the field of workers' compensation.

3. Indifference: e.g. lack of awareness of understanding of the need to cater for special needs.

Anti-discrimination legislation can deal with only the first layer and this will have little impact, even if there is a multiplicity of resolved complaints, if the next two layers are not also dealt with. Education must play a large part first in arousing public interest in the problems and then in solving them.

2. The Relationship Between Complaint Statistics and the Level of Discrimination

Statistics of complaints of discrimination on a particular ground offer a very poor indication of the level of discrimination against a particular group. A good case study in this context is provided by the impact of the International Year of Disabled Persons (IYDP). Complaints on the ground of disability rose sharply not because discrimination increased (indeed the converse was probably true) but because willingness to make a public complaint grew.

Any procedure which requires the disadvantaged person to take action against an institution or person in an advantageous position will be followed up only by people who are aware of their rights and of possible avenues of redress and who have considerable self-confidence and confidence in the justice of their case.

Many people with disabilities have been conditioned to believe that they nave limited capacities and rights. Often their education is poorer and less is demanded of them. They have little experience in even simple aecision making. For example, disabled people are often not given the opportunity to handle money. Disabled people are also taught to have little raitn in their ability to nanale committee work, conflict situations and authority. They need to be made aware that they have the same rights as otner people in the community. Until recently it has been commonplace even for voluntary organisations in the disability field to Show a striking reluctance to employ persons with disabilities on equal terms within their own organisations.

Affirmative action is necessary for job evaluation and modification to ensure the opening up of a greater range of jobs to disabled people. Thus anti-discrimination legislation is intLinsicaily unlikely to prove a satisfactory remedy for disadvantages sutfered by persons with disabilities.

Occupation

Discriminations on the ground of disability or medical record are not amongst the seven grounas specified by the International Labour Office (ILO) Convention No.111, under which the National and State Committees on Discrimination in Employment and Occupation operate. However, the Convention provided that other grounds of discrimination may be identified by parties to the Convention. Disability and medical record have been so identified in Australia. Unlike the State equal opportunity bodies, the Committees distinguish between physical aisaniiity and medical record as grounds of complaint.

Numbers of complaints on tnese grounds since the committees were established are recorded in Table 1 below. The gender of complainants has been recorded from 1981-82 onwards when there was a noticeable increase in numbers of complaints, probably due to the impact of the International Year or Disabled Persons.

(a) Ground - Physical Disability

Discrimination in employment and occupation may occur when a person is aenied equality of opportunity or treatment in employment and occupation primarily because of his/her physical disability, and that person's aisability does not detract tram nis/her capacity to perform the duties of the job.

Area **(1)** Advertisements:

Advertisements must not specify that persons with physical disabilities are ineligible for employment.

Area (2) Recruitment Conditions:

Examples of discrimination on the ground of physical disability are:

(1) refusing employment to a person in a wheelchair although that person requires no special facilities to pertorm tne duties of the job campetently;
(2) refusing to employ a mat person in a job, such as computing, where auaitory abilities are not essential;

(3) refusing to employ a blind person who had developed sufficient alternative skills, such as reading braille, to perform the duties of the job competently;

(4) refusing to employ an aurally or orally impaired person in a position where communication by speech is not essential.

Area (3) Employment Benefits:

An example of discrimination on the ground of physical disability is:

(I) giving no staff benefits, or reduced benefits, to a person primarily because of that person's physical disability;

(2) a person being denied access to training facilities or being refused acceptance into job-related courses of study, apprenticesnips or on-the-job training primarily because of that person's physical disability.

(b) Ground - Medical Record:

Discrimination in employment and occupation may occur when a person is denied equality of opportunity or treatment in employment and occupation primarily because or nis/her medical record and that person's medical record does not detract from his/her capacity to perform the duties or tne job.

The Committees note that a major problem with adverse medical records is that the employers tend to take the 'safest' approach and not to appoint someone whose condition might subsequently raise problems. An example of a condition reported under medical record which might not be thought of as a disability in the customary usage of the term, is being overweight.

Area (1) Advertisement:

Advertisements must not specify that people with particular medical records or current medical conditions are not eligible tor employment unless the advertised job could not be adequately performed by a person with the specified medical record or condition, or the job would aggravate the medical condition.

Area (2) Recruitment Conditions:

An example of discrimination on the ground of medical record is:

(1) refusing to employ a person who has a history of, or current condition of eczema, epilepsy, a weight problem, etc., despite medical reports stating that the medical history or condition should not detract from the person's ability to perform the job.

Area (3) Employment Benefits:

An example of discrimination on the ground or medical record is:

(1) a person being excluded from superannuation cover despite medical reports that a past medical condition is highly unlikely to recur.

Area (4) Vocational Training:

An example of discrimination on the ground of medical record is:

(1) a person being denied access to training facilities or being refused acceptance into job-related courses of study, apprenticeship or on-the--job training despite medical reports that that person's medical record would not detract from his/her ability to benefit from the training.

Source:

National Committee on Discrimination in Employment and Occupation, Annual report 1981-82, AGPS, Canberra, 1981.

Table 1

Year	/3-/4	/4-/5	/5-/6	/6-/7	/7-/8	/8-/9	/9-80	80-81	81-82		82-83		83-84		84-85		Total
Ground									M	F	M	F	M	F	M	F	
Physical Disability	25	17	11	12	11	15	27	20	31	6	22	6	33	7	10	10	263
									37		28		40		20		
Medical Record	8	11	7	19	16	18	23	13	19	9	14	8	27	17	15	8	232
									28		22		44		23		

Source: National Committees on Discrimination in Employment and Occupation, Annual Reports 1983-84 and 1984-85, A.G.P.S., Canberra, 1985-86.

4. New South Wales Experience of Complaint of Discrimination on the Grounds of Physical and Intellectual Impairment

In April 1981, New South Wales became the first State in Australia to bring into operation anti-discrimination legislation which rendered it unlawful to discriminate on the ground of physical impairment when amendments made to the Anti-Discrimination Act 1977 came into effect.

Prior to the introduction of this legislation the Anti-Discrimination Board issued a lengthy research report . Many of the issues raised in that report have not subsequently been raised in complaints. Indeed, the general impression has been that complaints from people with Physical disabilities have been slow in coming in. It would appear that people with disabilities are unaccustomed to raising public complaints and are often in situations where it would be impossible to prove discrimination. The high proportion of employment complaints with non-visible disabilities also suggests another possibility: it may be that people with obvious impairments rarely reach the point where discrimination becomes evident. Thus, many of the complainants were already in employment when the discrimination occurred and the employer clearly stated that the reason for the discrimination was the physical impairment. Visibly disabled people may never get beyond the interview stage. In an over-stocked labour market it may be difficult to show that failure to hire one disabled applicant amongst many is discriminatory.

In December 1982, amendments bringing intellectual impairment within the scope of the anti-discrimination legislation came into force. Complaints to the N.S.W. Anti-Discrimination Board on each ground are shown in the tables below.

Table 2

Complaints received by the N.S.W. Anti-Discrimination Board

Ground	Year - 1981-82	1982-83	198a-84	1984-85
physical impairment	91	47	92	140
intellectual * impairment		2	7	12
total complaints on all grounds	837	562	639	808

* Became a ground for complaint in December 1982.

Table 3

	Employment Area					
	Physical Impairment			Intellectual Impairment		
1981-82	22	50	72			
1982-83	11	23	34			
1983-84	11	54	65		2	2
1984-85	20	71	91	2	3	

One of the first issues to be raised by complaint was not covered by the anti-discrimination legislation since it involved a voluntary institution which provided services only to physically impaired children. Thus the question of discrimination against them on the ground of disability could not arise. Several of the complaints related to people who were refused

employment or services because of a concern with problems of workers' compensation or insurance against negligence. Thus a shipping company refused to hire a slightly deaf person on the grounds of potential liability if the condition should become aggravated. One complaint relating to accommodation resulted in a full public hearing before the Anti-Discrimination Board. A striking feature of this case was the ignorance Of the nature of epilepsy demonstrated by the institution involved.

In 1981, a notable feature of the employment complaints was the high proportion which included impairments not traditionally thought of as constituting disability, for example Short-sightedness, diabetes and asthma. The three complaints involving transport, however, did concern blindness and quadriplegia. A publican's refusal of service to a blind woman and her paraplegic friend on the grounds that persons with disabilities Should not drink alcohol, presented an example of the extreme paternalism sometimes faced by persons with visible disabilities.

A majority of the employment complaints from males in 1981-82 related to the N.S.W. Public Service practice of granting temporary rather than permanent status to employees unable to satisfy the stringent standards applied to entry to the State superannuation fund. This practice denied the possibility of promotion to those whose health was not of a standard to meet superannuation fund requirements. In November 1981, the N.S.W. Public Service Board changed its policy to allow such persons to attain permanent status. This is a good example of how anti-discrimination legislation which requires complaints from individuals is of most immediate benefit to those who understand the workings of the system. One interesting example of a complainant who gained permanency under the new public service ruling was a former alcoholic who had been refused permanency on the ground of her past medical record. Once again, many complaints came from people with invisible disabilities including dyslexia, a history of back injury and arthritis. Amongst the complaints of refusal of goods or services, several involved refusals of entry to blind persons accompanied by guide dogs. There were also a number of complaints where the refusal was held to be incidental to the disability of the complainant.

In 1984-85 the Board accepted the first complaints from people who are anti-body positive and from people who have Acquired Immune Deficiency Syndrome (AIDS), and who allege discrimination on the ground of their illness (and not on the ground of actual or perceived homosexuality). Because of its infectious character, AIDS is not analogous to other conditions for which precedents exist in case law in disability discrimination. It will consequently be the task of the Equal Opportunity Tribunal and the Courts to determine, in the final analysis, whether antibody positive status and AIDS are disabilities within the meaning of the Act.

To date, very little use has been made of the provisions relating to intellectual impairment. Only two complaints were lodged with the Board by July 1983. Seven complaints were lodged in the following year in the areas of employment, goods and services, and education, with a further twelve complaints in these areas in 1984-85. One cause of the small number of complaints received is the exceptions which restrict access to the complaint process. In other cases, people may not be aware of their rights under the Act. The Anti-Discrimination Board has also recommended that a concerned person should be able to make a complaint on behalf of a disabled person who is unable to communicate.

5. Equal Opportunity in Public Employment in New South 'dales

The Anti-Discrimination Amendment Act 1980 (Part IX) established a Director of Equal Opportunity in Public Employment and required all government authorities (public service departments, statutory authorities, the teaching service and the police force) to prepare Equal Employment Opportunity (EEO) management plans. The amendments were intended to prevent discrimination in public employment on the ground of race, sex, or marital status.

On 16 December 1983, universities and colleges of advanced education in New South Wales were scheduled under Part IXA of the Anti-Discrimination Act and required to prepare EEO management plans to be lodged with the Director of Equal Opportunity in Public Employment by 1 June 1985.

In May 1985, Part IXA of the Anti-Discrimination Act was amended to include people with a physical disability. A set of draft guidelines for employing disabled people was distributed to EEO Co-ordinators in July 1984 to assist scheduled authorities to incorporate disability into their management plans.

6. Experience in the Other States and Territories

There is no anti-discrimination legislation in the Australian Capital Territory, Queensland or Western Australia. Western Australia's Equal Opportunity Act 1984 does not cover discrimination against people with disabilities, although a Task Force has recommended that the Act be amended to include the ground of impairment.[2] In 1979, Tasmania introduced into Parliament an Anti-Discrimination Bill which made it unlawful to commit an act of unjustifiable discrimination on the ground of a person characteristic including personal handicap. 'Personal handicap' was defined as meaning any degree of infirmity, malformation, or disfigurement suffered by any person, whether this occurred at birth or from a subsequent illness or injury. The term included any degree of paralysis or lack of physical co-ordination; any loss of any part of the body by amputation or otherwise; any loss or impairment of any faculties of sight, hearing or speech; any impairment of intellectual faculties; any physical reliance on a guide dog, wheelchair, or any remedial appliance or device; or any epilepsy. The Bill was not passed and many of its opponents argued that there was no clear cut evidence of undesirable discrimination in Tasmanian society.

A Northern Territory Bill outlawing discrimination on the ground of physical handicap has apparently passed into oblivion. At least one speaker in the House argued that such discrimination was a feature of sound management practice.

In South Australia the Handicapped Persons Equal Opportunity Act was proclaimed in July 1982. In the first year of operation there were twenty-five complaints lodged under the Act. In 1984 the Act was repealed and discrimination on the ground of physical impairment was included within the prohibition provisions of the Equal Opportunity Act 1984.

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2. Working Party on Equal Opportunity Legislation for People with Disabilities, A fair go for people with disabilitiep, (Discussion Paper), Dept of the Premier & Cabinet, Perth W.A. August 1986.

In Victoria the Equal Opportunity (Discrimination Against Disabled Persons) Act came into force in May 1983. In the two months after the Act was proclaimed, ten complaints were received. However, prior to that date the Anti-Discrimination Bureau, a non-statutory body, had dealt with complaints on the basis of disability. In the five years prior to IYDP the Bureau received only thirty-five such complaints. However, during the International Year, a further nineteen complaints were submitted. *As* in Ni South Wales, discrimination against people with invisible disabilities was a common feature of employment complaints. Restrictions related to workers' compensation legislation were also raised in both States. Service complaints were dominated by complaints concerning transport, but access to restaurants and clubs by persons in wheelchairs was also an issue. Seventy complaints were received in 1983-84 by the Equal Opportunity Board, and a total of 116 were lodged in 1984-85 (the Act was repealed and replaced by the Victorian Equal Employment Opportunity Act 1984).

The Victorian legislation refers to discrimination which results from non-compliance with a requirement or condition which is not reasonable, having regard to the circumstances of the case. The problem lies in defining what can reasonably be required of prospective employees or employers or educational institutions in making special provisions to enable people with particular disabilities to function in those areas.

7, The Canadian Experience

The Canadian Human Rights Act offers protection to physically disabled persons in the area of employment in Federal institutions only. Of the twelve States and Territories, five have legislation preventing discrimination in employment on the ground of physical disability and three also cover other areas of life such as housing and access to services.

Overall, the legislation does not appear to have been very effective if a lack of actual complaints involving disabled persons is an appropriate criterion for measurement: in Manitoba less than 2% of all complaints involve discrimination on the ground of disability. In general, such complaints take a long time to resolve and are difficult to substantiate. The difficulty lies in proving that discrimination has actually occurred on the basis of

physical disability, particularly in relation to employment; it is a simple matter to claim lack of accessible facilities, lack of qualifications for the 'physical demands' of the job or simple lack of personal qualifications, and thereby deny that discrimination has taken place. Where the person with a disability has clearly superior qualifications it may be claimed that he or she is over-qualified for the position.

The Canadian Human Rights Commission has listed four problems which are associated with discrimination in employment:

(1) Administrative technicalities usually related to superannuation provisions which have requirements that are not related to job performance;

(2) Physical limitations of the workplace;

(3) The employment system which allows very little flexibility in areas such as job-Sharing;

(4) Irrational fears of employers and workers which often stem from folklore, e.g., the belief that epilepsy is infectious or that intellectually handicapped persons are highly prone to violence.

Clearly, there are many parallels between the Canadian and Australian experiences. However, the Canadians have had further difficulties in that the Courts have held that discrimination by an employer on the ground that his/her customers or employees would object to his/her hiring a disabled person is not covered by the anti-discrimination legislation, because the intent of the employer is to placate customers and not directly to discriminate. Fortunately this problem has not arisen in Australian courts.

The New Ontario Human Rights Code which came into force in June 1982 prohibits discrimination on the ground of handicap, which is defined to cover physical disability, infirmity, malformation or disfigurement, and mental disorder, retardation and impairment. Indirect indiscrimination is covered. However, it is also provided that 'a right of a person under this Act is not infringed for the reason that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap' (Statutes of Ontario 1981, C.53 s.16(1) (b)). The onus is placed upon the prospective employer to Show that the disabled person is incapable of performing the duties of the job.

Another approach which has been adopted in Canada has been to restrict the topics upon which the prospective employer can request information prior to appointing an individual to a position.

The principal barrier to the full use of potential guarantees under the anti-discrimination laws is the lack of awareness of the existence of the law On the part of the general public and those primarily affected, namely, landlords, employers, government officials, and especially on the part of the disabled people themselves. One answer is an intensive publicity campaign to publicise the law's provisions, focusing in particular on those groups most directly involved. Suggestions include posting the legislation in places of work and in all public facilities, using the mass media, and developing a series of conferences or special symposia for employers, landlords and other affected groups. Who should sponsor and develop this publicity - admittedly a sizeable task - is difficult to determine. The problem of disseminating information is magnified when so many disabled people are conceded to be virtual shut-ins, isolated frdm contact with other people with disabilities, and unrepresented by the range of special service agencies.

To some, the type of publicity likely to have the greatest impact would be exposure of the law in relation to violation and enforcement. They would like to see all complaints publicised, irrespective of outcome, and some even urge publicising complaints before they are investigated. Equal to or perhaps more effective than general publicity, some suggest, is vigorous enforcement.

The difficulties of enforcement are two-fold. Firstly there are problems inherent in relying on individual complaints from those unaccustomed to asserting their rights and who, because of physical immobility or financial insecurity, find it difficult to initiate the complaint and, even more difficult, to proceed to its conclusion. Secondly, there are difficulties involved in determining what constitutes discrimination against disabled people, in the absence of well-defined guidelines understood both by people with disabilities and by those on whom they depend. To help individuals assert claims, some have recommended that complaint forms be distributed to all agencies serving disabled people, and that personnel be designated in

these agencies and trained to encourage and assist with filing complaints. Agencies could train disabled members to serve as ombudsmen, helping complainants to identify and pursue claims.

The second problem, the problem of guidelines for landlords, employers and managers of public facilities, is obviously an area for continuous and long-term study. It is important for public agencies to set an example, to both the public and private sectors, in the employment of disabled people in appropriate and responsible roles.

8. The ,American ,Bar_Association° model_Anti-,Discrimination_,Statute

The American Bar Association's model anti-discrimination statute is a general statute covering discrimination on the grounds of race, colour, religion, national origin, disability, age, marital status, sex or use of adaptive devices with the optional additional categories of status with regard to public assistance, liability for service in the armed forces, alcoholism, drug addiction and sexual preference. Disability and use of adaptive devices are included in a general anti-discrimination statute, despite the fact that the Bar Association's committee originally set out to write a statute specifically to Protect people with mental disabilities. The change in scope came about because it was felt that this would assist in raising public consciousness of the minority group status of disabled people and that a proliferation of anti-discrimination statutes for each minority group was impracticable.

n the draft statute:

> 'Discriminate' or 'discrimination' means to segregate or unreasonably differentiate in treatment, whether intended or unintended, or to act in a manner fair in form but discriminatory in operation based upon race, colour, religion, national origin, disability, age, marital status, sex or use of adaptive devices.
>
> 'Disabled person' means any person who:
>
> (a) has a physical or mental impairment which substantially limits one or more major life activities;
>
> (D) has a history of, or has been misclassified as having an impairment which substantially limits one or more major life activities;

(c) has a physical or mental impairment that does not substantially limit major life activities but that is treated by others as constituting such a limitation;

(d) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment;

(i) 'Physical or mental impairment' means:

(a) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(b) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) 'Major life activities' means functions such as, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

'Use of adaptive device means the utilising of any item to compensate for a physical or mental impairment, including, but not limited to, braces or other supports, wheelchair, talking boards, hearing aids, corrective lenses, or seeing-eye dogs.

In this particular context 'affirmative action program' means any bona fide effort to advertise, seek out, recruit, attract, or otherwise indicate that persons who are disabled, over forty (40) years of age, non-white or female are welcome or desirable with respect to employment, real estate transactions, public accommodations, public services, educational institutions, credit transactions, insurance transactions or other actions covered by this act, whether voluntary or required by statute or rule or by a consent, administrative or court order. The term includes the making or keeping of records on race, colour, ,disability, age or sex so long as they are not made, kept or used for reasons contrary to the provisions or purposes of this Act.

Employment discrimination is prohibited whether practised by employers (with the possible exclusion of those with less than four employees), employment agencies or labour organisations such as trade unions.

(d) 'Qualified individual' means an individual who can perform the essential functions of the job in question. *As* applied to a disabled individual, 'qualified individual' means an individual who, with reasonable accommodation, can perform the essential functions of the job in question. Receipt or alleged receipt of treatment for a disability, whether physical or mental, Shall not constitute evidence of a person's inability to perform the essential functions of a particular job or

> position. In addition, uninsurability or increased cost of insurance under a group or employee insurance plan does not render a disabled person unqualified.

It should be noted that Wisconsin State law already forbids an employer 'to contribute a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employee because of a handicap' [Wis. Stat. Ann. Section 111.32 (5)(f)(2)(West Supp. 1978-1979)]. This amendment followed a case in which the court affirmed a finding of discrimination in a case of refusal to hire a person with leukemia because of 'the risk of future absenteeism and higher insurance costs' but said that some discrimination in insurance cover, once hired, was permitted (Chrysler Outboard Corp. v. Dept of Industry, Labor and Human Relations 14 Fair Emp. Prac. Cas. 345 (1976)).

For employers, it is provided that:

> It Shall be unlawful discriminatory practice for an employer because of race, colour, religion, national origin, disability, age, marital status, sex or use of adaptive devices to:
>
> (a) fail or refuse to hire, recruit, or promote a qualified individual;
>
> (b) discharge or otherwise discriminate against qualified individuals with respect to compensation, fringe benefits or the terms, conditions, or privileges of employment;
>
> (c) limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive a qualified individual of employment opportunities or otherwise adversely affects the status of an employee;
>
> (d) fail or refuse to hire, recruit, or promote a qualified individual on the basis of physical, mental or other examinations that are not directly related to the requirements of the specific job;
>
> (e) discharge or take other discriminatory action against a qualified individual on the basis of physical, mental or other examinations that are not directly related to the essential functions of the job;
>
> (f) fail or refuse to hire, recruit, or promote a qualified individual when accommodation or adaptive devices or aids may be utilised, thereby enabling that individual to perform the essential functions of the job, except as noted in subsection 7 of this section; or
>
> (g) discharge or take other discriminatory action against a qualified individual when accommodation or adaptive devices or aids may be utilised thereby enabling that individual to perform the essential functions of the job.

Further provisions cover discrimination by employment agencies and labour organisations. Discrimination in job advertisements, apprenticeships and other training programs and in occupational licensing and certification is also prohibited. Except in the case of specific affirmative action programs, prospective employers may not make pre-employment inquiries as to information on characteristics which are prohibited grounds of discrimination. This does not prohibit enquiries about the applicant's ability to perform job-related tasks. Thus an employer can ask whether the applicant for a cleaner's position can use a vacuum cleaner and a mop and pail, but not whether a person uses a wheelchair. Where information on disabilities is required for bona fide affirmative action programs necessary to correct the effects of past discrimination, there must be an accompanying statement explaining why the information is needed, making plain that its provision is voluntary and that it will be kept confidential, and also describing the working of the program.

It provides that:

> An employer shall make accommodation to the known disability of an otherwise qualified employee or applicant for employment unless the employer demonstrates that the accommodation would impose an undue hardship in the conduct of business. A labour organisation shall co-operate in making such accommodation to the extent they influence or control job structure and other employment conditions.

Other provisions protect the restriction of some jobs to disabled people, but only where they would not be able to get employment compatible with their ability on the open market. This means that Sheltered workshops can only employ disabled workers who cannot reasonably be expected to get work elsewhere. The statute provides for the public posting of the provisions of the Act by every employer of six or more persons, every trade union and every employment agency. It also specifically provides that where there is a complaint the person hearing the complaint 'shall take into account all evidence, statistical or otherwise, which may tend to prove the existence of a predetermined pattern of discriminatory employment'. Following from this, larger employers may be obliged to keep statistics on the characteristics of employees, with individual information confidential, but statistics being available to the public.

In determining discriminatory practice it is provided that:

> (a) the hearing examiner shall make findings and conclusions of law, and if the hearing examiner finds that the respondent has engaged in an unfair or discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from such practice, to take such affirmative action as will effectuate the purposes of this Act, and to periodically report on the manner of compliance. Such order shall be a final decision of the Office. In all cases, the examiner may order the respondent to pay compensatory damages, including but not limited to back pay or other loss, to an aggrieved party who has suffered discrimination, and punitive damages in an amount not less than $500 nor more than $5,000, in addition to any other relief the examiner deems just and equitable.

This model statute has been discussed at length because it represents the culmination of three years of intensive work backed up by examination of the legislation and practice of fifty American States.

In the Australian context it is common to find the argument that affirmative action constitutes an unacceptable constraint upon free enterprise. Yet in the bastion of free enterprise, many of the provisions of the model statute have already been enacted in individual States. In the commentary on the preamble to the statute, the Bar Association Committee explain that 'our political system is based upon the belief in freedom to pursue one's own happiness and equality of opportunity to do so... Discriminatory practices threaten these rights of freedom and equality, deny the fullest participation of all persons and ultimately injure society by interfering with the full utilisation of productive capacities and by contributing to our social problems'.[3]

9. Employment

(a) Open Employment for Disabled People

In Australia employment has an importance far beyond the income which it produces. Employment stands as the symbol for worth in the society. It also

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3. B. Sales et al. Disabled persons and the law, New York, 1982 p.169 - the full model statute follows after this text.

allows interaction with the wider world. To be an adult without a job is to be in a marginal position.

Quarterly employment figures from September 1984 to March 1986 (see Table 4 below) demonstrate the disproportionately high percentage of disabled people registered at the Commonwealth Employment Service (CES) who are unsuccessful in finding work. On average over this period, disabled people registering constituted 7.98% of all people registering per quarter. However, they constituted a mere 2.58% of those successful in gaining employment.

Many members of the community are aware that from the pool of employable disabled people, only a small percentage obtain employment. Fewer perhaps realise that of those disabled people in employment, many are familiar with long-term unemployment and under-employment. Largely invisible to the community is the extent of the personal, professional and financial resources expended by disabled people and their advocates to obtain work which does not fully employ their skills, and offers little opportunity for job mobility.

(b) Commonwealth Public Service

The Public Service Reform Act 1984 was passed by Parliament on 13 June and proclaimed on 1 October 1984. It brought in new equal employment opportunity provisions (s.22B), which are designed to ensure that all departments and statutory authorities employing staff under the Public Service Act take appropriate action to eliminate discrimination in relation to employment and that measures are taken to promote equal employment opportunities, for example, in promotions or in transfers within departments or authorities.

The EEO provisions place responsibility on these bodies to develop, implement and report on EEO programs for women, Aboriginals, migrants (defined in the Act as people born outside Australia, whose first language is not English and their children) and people with disabilities. They were required to send a written statement to the Public Service Board within twelve months of the date of proclamation.

Some departments and authorities employing staff under the Public Service Act also employ other staff under different legislation. These organisations decided to develop EEO programs for staff in all employment categories. In

Table 4

Quarterly Employment Figures - Australia

	Sept '84	Dec '84	March '85	June '85	Sept '85	Dec '85	March '86
Disabled persons seeking work	61515	62455	63063	63907	61128	63512	66090
All persons seeking work	752900	820412	836892	766939	711121	818798	841150
Disabled persons placed	5196	4017	4487	4603	5080	4419	5041
All persons placed	168833	162586	193101	168321	184279	191354	208941
Disabled persons as a percent of all persons seeking work	8.17	7.61	7.53	8.33	8.60	7.76	7.86
Disabled persons placed as a percent of all persons placed	3.08.	2.47	2.32	2.73	2.76	2.31	2.40

Source: Department of Employment and Industrial Relations statistics.

June 1986 s.22B was extended by regulation to Naval Defence Act and Supply and Development Act staff in the Department of Defence; A.C.T. Health Services Ordinance staff in the A.C.T. Health Authority and Commonwealth Teaching Service Act staff in the A.C.T. Schools Authority and the Department of Education, thus legally requiring the inclusion of these staff in EEO programs.

The Government also decided in June 1986 that all Commonwealth statutory authorities with more than forty staff should be required to implement EEO programs and consequently regulations were gazetted to extend the provisions of s.22B to a further twenty-four authorities which are not staffed under the Public Service Act, but for which the Public Service Board (PSB) has same statutory responsibility in relation to staffing matters. EEO programs in these authorities will be monitored by the Board. Authorities with more than 100 staff are required to submit their first EEO programs to the Board by February 1988. In addition, the Australian Broadcasting Corporation (over which the PSB has no jurisdiction) has been required to prepare an EEO program. Its program will be monitored by the Minister for Communications.

The Act prohibits discrimination against people in any of the specially designated groups in employment on the grounds of political affiliation, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age, physical or mental disability and includes discrimination outlawed by the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984.

Departments and authorities are required to set objectives, collect relevant information, including statistics, and review the program's effectiveness against specified goals and objectives. The provisions also require the allocation of staff and other resources.

The Public Service Board has issued guidelines, reviewed EEO programs and will report to the Parliament. Departments and statutory authorities employing staff under the Public Service Act were required to report to the PSB by 1 October 1985 outlining their proposed programs. The PSB may recommend changes to improve their effectiveness.

Quotas are not specified in the legislation. Targets represent objectives or goals which may or may not be achieved. Targets or other non-quantitative indicators are to be used to assess the effectiveness of the program. Hence, the EEO provisions do not override the merit principle.

The EEO programs are expected to have an impact on aspects of the governmental organisation and lead to fundamental changes in employment and personnel practices.

(c) Private Sector Employment

In the private sector the employment of people with disabilities is left to the good will of individual employers. C.S.R. has a company policy on the employment of disabled people and a few other companies have followed suit. However, equal employment opportunities for disabled people in Australian private industry are the exception rather than the rule/[4]

10.,Affirmative Action Initiatives

In the United States, 'Projects with Industry' (NI) are federally funded to promote rehabilitation programs that include the participation of employers. 'Projects with Industry' may involve job placements; work adjustment which allows a short period of transitional employment in permanent positions set aside for Short-term occupancy; and skills training and linkage to enable disabled people to meet known demands within industry. In some NI projects 'Job Coaches' work alongside trainees to help them with their problems. In a similar scheme in Wales, foremen receive a special bonus for supervising new intellectually handicapped recruits. It has been Shown that even when the bonus has been stopped the recruits stand a much better chance of staying in

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if'. In the 1981 Social.Welfare.Information Bulletin Barbara Thyer has given a clear picture of barriers to the employment of disabled persons as experienced by individuals grappling with a two-tier society, negative attitudes by carers and employers and 'that dread of finding oneself 84% incapacitated' and therefore ineligible for an invalid pension fallowing an attempt to take up employment.

employment than those who start work without it. During IYDP Australia established State Employment Promotion Committees to encourage employers to employ disabled people. These committees terminated at the end of IYDP.

In Australia, problems arise from the fact that both the employment service and the rehabilitation service are federally administered. This makes it difficult for State governments to establish programs involving actual job placements. Yet both industry and self-help groups are more likely to be effectively involved at the local level.

(b) Financial Incentives

Many people who are opposed to affirmative action are not opposed to financial payments[5] to counter-balance the financial disincentives associated with the employment of disabled persons. These disincentives are associated with two main factors:

(1) the costs of altering the workplace or providing special work equipment for disabled employees. Some government aid is available in this area, but Australia has not followed the American precedent of making such expenditure tax deductible for employers; and

(2) the costs of increased job orientation time resulting from having to take up a new occupation following disablement or prolonged unemployment associated with disability. The various government employment schemes provide wage subsidies to the employer to offset the effects of long-term unemployment and work inexperience; problems which are certainly not specific to disabled people.

(c) Slow Worker Permits

In all the Australian States there are statutory provisions to allow the employment of aged, infirm or slow workers at special rates. Slow worker permits are very rarely issued (most States would average less than 100 individual permits a year) and have been the focus of considerable

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5% There is an extensive discussion of financial incentives, including direct cash bonuses to those who employ workers with disabilities in the paper published by the IYDP National
Committee of MOs in March 1982.

controversy. Such permits are said to allow for the exploitation of disabled people as cheap labour. It is also argued that they single out disabled people as a group and may imply that all disabled workers are slow workers. Employers as a group could object if particular companies sought to reduce costs by widespread use of slow worker permit labour employed at reduced rates. There are also problems for the individual slow worker who is at risk of losing income overall if the payment from employment is not greater than the loss of pension and pensioner benefits.

(d) Labour,Market,Programs and Policies Relating to People with Disabilities

(i) Public Service Board

In her December 1983 paper, Reforming.the Australian Public Service, Gail Radford made the following points with respect to equal opportunity and the Australian Public Service (APS):

> 4.3.1. ...the Government is committed to policies that will lead to greater employment of groups traditionally under-represented in the Australian Public Service - women, Aboriginals, migrants and the disabled. This policy is seen as strengthening the merit principle, as it is aimed at removing those barriers which disadvantage some groups in merit competition.
>
> 4.3.2. In addition to its determination to eliminate discrimination, the Government intends to legislate to place a positive obligation on departments to develop and implement equal opportunity management programs for disadvantaged groups.
>
> 4.3.4. Each equal opportunity management program would include:
>
> - review of personnel practices within the agency (including recruitment techniques, selection criteria, training and staff development programs, promotion and transfer policies and patterns, and conditions of service), with a view to identifying and correcting any discriminatory provisions or practices;
>
> - development of action-oriented plans designed to meet equal opportunity objectives, including:
>
>   - elimination of identified sources of discrimination,
>
>   - implementation of special measures designed by the Public Service Board to reduce inequalities, for example, special skill training, language training for migrants and aids for the disabled, and
>
>   - setting numerical targets, where this can reasonably be done, against which the success of the program can be measured.

- consultation with staff organisations on the development and implementation of these plans;
- communication of the plans to staff; and
- collection and recording of relevant information, and development of means of evaluating the results of the program.

Pre-employment and pre-promotion equal opportunity activities have been pursued by the Public Service Board in preference to any positive action with respect to employment and promotion themselves.

These pre-employment and pre-promotion activities are outlined in Appendix I.

(ii) Commonwealth Employment Service

It has been the experience of the Commonwealth Employment Service that people with 'major disabilities' prefer to go through their awn associations or through community rehabilitation centres rather than use the CES. The clients who use the centres are people with 'basic disabilities' such as bad backs. There may be an assumption shared by CES officers and people with disabilities that associations for the disabled have a better 'network', i.e., are in contact with those employers likely to hire people with disabilities.

Quarterly employment figures from September 1984 to March 1986 (see Table 5) demonstrate the disproportionately high percentage of disabled people registered at the CES who are unsuccessful in finding work. On average over this period, disabled people registering constituted 7.98% of all people registering per quarter. However, they constituted a mere 2.58% of those successful in gaining employment.

The CES employs regional Disabled Persons Officers who travel to rehabilitation centres and CES offices in the region and liaise with community groups and disabled organisations with a view to serving the needs of disabled clients. It runs a community based labour program called 'Jobstart' which replaced various programs for disadvantaged groups. These programs were: the Special Youth Training Program (SYETP); the Adult Wage Subsidy Scheme (AWSS); the Special Needs Clients Program and the Disabled On-the-job Program. The latter program replaced the Work Preparation Program for People with Disabilities, begun in 1981 as a response to the International Year of Disabled Persons.

To be eligible for Jobstart you must register with the CES and either have been unemployed for at least six of the past nine months or have special disadvantages in keeping or getting a job. Specially disadvantaged job-seekers include mentally or physically disabled people; people born overseas with poor English, or little or no work experience in Australia; Aborigines; sole supporting parents; and other special needs jobseekers such as those with a poor education, State wards, ex-offenders, etc.

Under the 'Jobstart' scheme, individual CES centres use subsidies for incentives for employers. The rate of the subsidy varies according to age and the length of the period of unemployment as follows:

Table 5

Age group (years)	Jobstart Basic* ($ weekly)	Jobstart Special** ($ weekly)
15-17	50	75
18-20	75	110
21-44	100	150
	225	

* unemployed six months in last nine months

** unemployed over twelve months in last fifteen months, or especially disadvantaged

Jobseekers are issued with self-canvassing cards outlining the subsidies available to potential employers. The centres can allocate wage subsidies for a training period of up to six months and can make available up to $2,000 for modifications to the workplace (negotiated subsidies in excess of $2,000 have also been granted). Although placements are increasing nationally, the Service finds that employers are not generally responsive to these schemes.

(iii) Community Youth Support Scheme CYSS

CYSS operates through grants made to and administered by local community bodies. These local bodies are normally elected and operate relatively independently, though they do have guidelines from the Department of

Employment and Industrial Relations. Because they are community based and relatively autonomous, they cannot, or at least do not, keep statistical records.

CYSS premises are normally arranged through local Councils and are usually the cheapest available. At present inadequate access and staffing prevent many disabled persons from participating in CYSS centres. In order to make them accessible to people with disabilities, local, State and Federal governments responsible for funding need to issue guidelines for renovations and grants to pay for them. In addition, some CYSS officers require training in order to sensitise than to problems and strategies appropriate to people with disabilities, and staff numbers need to be increased. CYSS officers have a strong association, if no union, and would object to increasing their workload without increasing their numbers.

(iv) Department of Comnunity Services Programs

A review of Social Security Programs for the people with disabilities, the Handicapped Programs Review, was begun in 1983 and the report of the Review, New directions, was tabled in Parliament on 30 May 1985. Since December 1984 programs for people with disabilities have been the responsibility of the new Department of Community Services.

New directions criticised the poor co-ordination of related Federal and State government programs, the lack of specific objectives for clients and a lack of consumer involvement in planning and review. It also criticised the restrictive nature of the Handicapped Persons Assistance Act 1974, which has served to channel funds into large organisations with a philosophy of developing institutionalised care.

As a result of the report, new legislation is planned for the autumn sittings of Parliament this year, and a new program for people with disabilities, the Disability Services Program is expected to be introduced (a successful pilot program is already in place) to replace the Handicapped Persons Welfare Program. The new program will focus on providing housing, paid employment, independent living, community participation, security and choice of lifestyle for people with disabilities.

Other recommendations made in New directions concerned the need to provide personal and social support services. These needs will be addressed not only in the Disability Services Program which will be closely linked to the Commonwealth Rehabilitation Service, but also in the Home and Community Care Program which has always been intended to cater for younger disabled persons as well as for elderly people.

Handicapped Persons Welfare Program

This program, with an expenditure of approximately $93 million in 1984-85, provides capital and recurrent subsidies to voluntary, non-profit organisations or local government bodies for prescribed services to assist people with disabilities. These services include training, activity therapy, Sheltered employment and associated residential care.

The CRS aims to provide high quality accessible rehabilitation programs to assist those disabled persons of working age to make substantial progress towards employment, personal independence and the capacity to undertake household duties. In recent years emphasis has been placed on community' based networks. At June 30, 1985, the scheme involved thirty-three regional units and seven mobile teams which provided programs for over half of the CRS clientele.

Sheltered workshops have come in for a great deal of criticism in recent times. Comments received by the Committee of Inquiry into Labour Market Programs, which published its report in January 1985, included criticisms of wages and conditions in sheltered workshops. Rates of pay, work environments, workers' compensation arrangements, award conditions relating to sick leave, holiday pay, etc., were all mentioned as needing revision.

Accreditation standards for Sheltered workshops have been developed by the Australian Council for Rehabilitation of Disabled (ACROD) and a report on a pilot accreditation project conducted in 1983-85 and monitored by Macquarie University's Unit for Rehabilitation Studies was published in 1986. The project was funded by the Department of Community Services and involved evaluating a representative sample of fourteen sheltered employment

facilities in New South Wales. The report noted an improvement in standards of some of the facilities during the accreditation process, thus at least partly fulfilling one of the aims of accreditation. The accreditation process involved a pre-accreditation evaluation conducted independently by the Unit for Rehabilitation Studies at Macquarie University and a self-study phase of at least six months' duration before an on-site survey and evaluation took place by surveyors with expertise in the field. It was hoped to have at least some disabled surveyors involved and suitable people were contacted but were unable to participate. The report recommended a longer self-study period for any accreditation program to be introduced in the future, as is the case in the United States where the period is twelve to eighteen months. It was also felt that better education of staff at the facilities would ensure greater improvement prior to accreditation. The areas covered by the standards were:

1. Objectives and purpose
2. Corporate organisation
3. Management and administration
4. Business practice
5. Financial control
6. Records and systems
7. Personnel practices
8. Volunteers
9. Public Relations
10. Autonomy and rights of employees
11. Services
12. Physical facilities
13. Occupational health and safety
14. Evaluation

Only one of the fourteen facilities gained the maximum three year accreditation showing substantial fulfillment of the standards, thus obviating the need for an accreditation process to place emphasis on the achievement of standards. Nine facilities gained one year accreditation, having significant deficiencies but showing evidence of capability, commitment and progress in their correction and being, on balance, beneficial to employees and not threatening their health, welfare CT safety. A twelve month hold on accreditation was given to one facility falling between the one

year and no accreditation status. Three facilities were given no accreditation, having major differences in several areas of standards and serious questions as to the benefits to employees.

Following the pilot project, the Accreditation Steering Committee recommended that a national accreditation program should be implemented covering all services for people with disabilities. It recommended that standards should be primarily developed by the voluntary sector in consultation with the Commonwealth Government who should provide funds to establish an Australian Council for the Accreditation of Services for People with Disabilities. Such funding would emphasise its independence from any one vested interest group. The report recommended the body should eventually become self-financing through fees charged for on-site surveys.

(e) Adaptation of Jobs

A 1984 report by the International Labour Office entitled Adaptation of jobs and the employment of the disabled explains the importance of thorough job analyses, work system analyses and disabled worker evaluations for the successful placement of disabled employees and for the redesign of jobs and/or workplaces to enable more disabled persons to be employed.

Appendix II, Adaptation of Jobs and the Employment of the Disabled, which is divided into a number of sections (Job Analyses; Work Systems Analyses; Evaluating the Abilities, Skills, Training Potential and Aspirations of the Disabled Employee; Matching Job Demands and Workers' Capacities), is based on recommendations made in the report. They represent very significant practical measures employers can take to implement affirmative action for people with disabilities.

(f) Quota Systems (i)

Historical Development

Quotas first became popular following World War I when enormous numbers of young men returned from the war with severe impairments and were reduced to busking in the streets. At first, governments reacted by making jobs available in government services, reserving jobs for disabled ex-servicemen and by relaxing recruitment rules, but these jobs were soon filled.

Germany was the first country to impose the mandatory employment of the war disabled in 1919. Federal and State public offices and private employers were obliged to reserve 2% of their posts for ex-servicemen with disabilities. In 1923 the legislation was amended to include all disabled Germans and to provide for fines for employers who did not comply. Mandatory quotas followed in Austria, Italy, Poland and France between 1920 and 1923, and in the Netherlands and the United Kingdom following World War II. By the end of the 1940s, the quota system had been introduced in almost all European countries and in Japan.

Outside Europe, Australia, Canada, New Zealand and the U.S.A. relied upon intensive vocational rehabilitation, vocational training, promotion of the employment of disabled people through persuasion of employers and by providing sheltered employment as an alternative to open employment. After a lengthy and lively debate, the ILO recommended a quota system in 1955. Since then the number of countries with mandatory quota systems has gradually increased, but the debate as to their efficacy continues.

(ii) The_quota System in_the_Federal_Republic_of_Germany

Firms employing more than sixteen persons are required to meet a quota varying from 4% to 15%, depending upon industries and regions. **For** public employment the quota may be as high as 12%. To be eligible under this system, a person must be severely handicapped by a physical and/or mental impairment which reduces his or her ability to earn a living by 50%.

Quotas can be met by gaining points for employing disabled workers (double points for severely disabled people); for sub-contracting work to disabled persons' workshops; and for providing homes or other welfare benefits to disabled persons. Where quotas are not met, the employer must pay an 'equalisation levy' which is given as a bonus to those who do fulfil their quotas. **A** subsidy of $9,000 per year is available for each additional severely disabled worker employed above the quota.

(iii) Great Britain

Britain has no anti-discrimination legislation covering disability. It has had, however, a controversial quota system ever since the enactment of the

Disabled Persons (Employment) Act in 1944. This legislation has recently been the subject of review by the Manpower Services Commission which has recommended its replacement with equal opportunity legislation. As yet no such action has been taken.

(A) Reg.istration

At present, a voluntary register of persons likely to remain disabled for a minimum of twelve months who are actively seeking, and have some prospect of obtaining, employment is kept by the Manpower Services Commission. A separate section of the register lists severely disabled people unlikely to obtain employment on their merits. Registered persons are issued with an identification card.

(B) Quota

(1) Employers with twenty or more employees are obliged to employ at least 3% of their staff from registered disabled people. Where an employer is below the quota, he or she is obliged to take on a suitable registered disabled person for any vacancy unless covered by a permit to engage someone else.

(2) Under the Companies Act 1980, companies employing more than 250 people are required to spell out in their annual reports their policies on the recruitment, training and career development of workers with disabilities.

Both the N.S.W. Anti-Discrimination Board and the S.A. Committee on the Rights of Persons with Handicaps have argued against the introduction of quota systems, instead supporting affirmative action plans along the United States model.

In the 1970s, handicapped persons, their families and their advocates, building on the gains made by blacks, women and other minorities in the previous decade, convinced Congress to pass legislation providing disabled persons with equal opportunity to education, public facilities, employment, transportation, housing and social services. Two key laws were the Civil Rights of Institutionalized Persons Act enacted in 1980, and 5.504 of the Rehabilitation Act, passed in 1973. The Institutionalized Persons Act

gave the Federal Government authority to sue State institutions that tolerated harmful conditions. Section 504 of the Rehabilitation Act, sometimes referred to as the Disabled Persons Civil Rights Act, prohibits discrimination against handicapped persons by individuals or institutions that receive federal funds. The Attorney-General has responsibility for suing alleged violators of both these laws.

The Reagan administration has yet to bring a single suit under the Institutionalized Persons Act. As to s.504 of the Rehabilitation Act, the Justice Department has filed suit to obtain records in two cases but it is yet to file suit to redress discrimination, despite requests for it to do so by other government agencies.

(iv) Affirmative Action.Plans: The U.S. Experience

Section 503 of the Rehabilitation Act requires employers with contracts or sub-contracts to take affirmative action to employ disabled people. *As* almost one third of all businesses in the United States have some business with the Federal Government, this law has considerable impact on the employment market as a whole. An affirmative action clause is included in each contract over $2500. This clause has three parts:

Part A requires the contractor to treat disabled people without discrimination in all employment practices and to deal with complaints of discrimination.

Part B requires the contractor to have a published affirmative action program, which is reviewed annually.

Part C requires that a copy of the program be submitted to the government and an annual report of action be provided.

Part A applies to contracts under ninety days. Parts **A** and B relate to contracts under $500,000 which take more than ninety days to complete, and Parts A_q B and C apply to contracts which are for over ninety days and valued at more than $500 000.

These requirements are administered by the Department of Labour, and failure to comply can result in payment due to the contractor being withheld until the violation is corrected, or in cancellation of contracts and a debarring from receiving future contracts. Legislation in this form has the advantage of offering a carrot rather than a stick to employers in a competitive market for government contracts. In the United States some unions also provide a special advocacy service for members with disabilities.

11. Disadvantages of Affirmative Action and Quota Programs

Opponents of affirmative action and quota programs for disabled people argue that they have four main disadvantages:

(a) the target group has to be identified and labelled with all the evils associated with labelling;

(b) such programs cater for disabled persons as a group - they tend to ignore individual differences and needs and, possibly, to discriminate against disabled persons who do not have an obvious employment handicap;

(c) to many people the singling out of disabled persons will tend to imply that there are real disadvantages to employing disabled persons which can only be outweighed by governmental coercion; and

(d) it is commonly argued that employment quotas for disabled persons simply do not work. This is not the same as saying that they are in themselves undesirable. The United Kingdom case is most often cited as proving that quotas are 'unworkable'. Yet both Federal Germany and Japan appear to have working quota systems. The difference seems to result from a difference in governmental willingness to make a system work and the fact that the German and Japanese schemes use both quotas and levies upon non-compliant employers. Even in the United Kingdom, after reviewing the many defects of the quota system, Peter Townsend argues that the quota was the most effective means of assuring employment and also the means preferred by people with disabilities. This latter finding is especially significant since it was drawn from a survey which interviewed all people with disabilities within a number of local government areas and not from any particular interest group. The conclusion of a comparative study by the Michigan State University's

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6. Peter Townsend, The social minority, 1973, p.121-2.

Centre for International Rehabilitation was that 'the quota-levy system, if developed with the consent of consumers, professional workers, administrators and legislators; administered with flexibility; and enforced with firmness, is most likely to succeed in promoting the employment of handicapped persons' .[7]

Much of the debate over quotas, affirmative action plans and anti-discrimination actions fails to recognise the basic similarities between the three approaches. All aim at ensuring that persons with disabilities are not underrepresented in open employment. Quota legislation essentially takes a fixed level of underrepresentation as conclusive evidence of discrimination which the employer is required to redress, thus removing from people already disadvantaged by disability the burden of experiencing and then having to prove discrimination against themselves as individuals. However, without data from comprehensive job and work system analyses, and individual disabled worker evaluation tests, it is unrealistic and insensitive to impose quotas on particular companies or industries. On the other hand, occupational segregation of people with disabilities along the lines of the British system by reserving some positions such as carpark attendants and lift drivers is undesirable. Clearly job and work systems analyses and impartial disabled worker evaluation tests are crucial to opening up employment for people with disabilities and must be undertaken prior to quotas being imposed if the quota system is to operate fairly and effectively.

Much of the opposition to affirmative hiring programs for minority groups is based upon the implicit assumption that jobs currently are awarded exclusively on the basis of the intrinsic merit of the candidates as measured by an objective standard. Yet job applicants rarely have to sit an examination or provide an actual demonstration of their job skills. If there were an apparently objective test for all applicants and those with the highest score were appointed, then members of minority groups would at least know that direct discrimination was not being practised. Obviously there are other ways of achieving an impartial selection; for example, determining those who have the basic qualifications and then selecting on a first came, first served or lottery basis. Once selection is on a more subjective basis,

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7. Michigan State University, Centre for International Rehabilitation, **2=1 systems** Dexter, M. I., 1982, p.66.

there is always the risk of discrimination: disabled applicants are not selected because 'the other employees wouldn't accept them': 'they wouldn't fit in with our style of management': or just 'we've never had one of those before!'

(a) Australian Bill of Rights Bill

On 2 December 1985, the Australian Bill of Rights Bill 1985 was introduced into the Senate. The Australian Bill of Rights will provide legislative recognition and protection and judicial enforcement of human rights.

Following an amendment made to Article 1 in the Senate, the Bill now specifically guarantees equality before the law and entitlement to the human rights and fundamental freedoms expressed in the Bill to every person irrespective of disability, rather than leaving the ground of disability implicit in the 'other status' cited at the end of the Article. This amendment is important, as the Bill will be used as an educational charter and should therefore list all common grounds of unlawful discrimination.

The Bill contains several rights of major importance to disabled people including the right of every Australian citizen to have access on general terms of equality to public employment, and the right to freedom of movement and choice of residence.

The Bill will override existing inconsistent Commonwealth legislation five years after its enactment and will render future inconsistent Commonwealth laws inoperative unless an explicit intention to the contrary is expressed. It will not override inconsistent State or Territory laws, although the proposed Human Rights and Equal Opportunity Commission will be empowered to examine and report on both Commonwealth and State legislation which conflicts with the Bill. It will also investigate Commonwealth, State and local government acts and practices which may conflict with the Bill of Rights. There is, therefore, a need for the States to introduce their own Bills of

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8. Since this paper was written, the Government has indicated its intention to withdraw the Australian Bill of Rights Bill and the associated Human Rights and Equal Opportunity Commission Bill.

Rights to override State legislation inconsistent with human rights.

Further legislation is needed, moreover, to ensure that disabled persons enjoy the rights set out in the Declaration on the Rights of Disabled Persons as the Bill of Rights will only operate in respect of governmental acts, practices and legislation and will not affect the rights of individuals in relation to each other. Anti-discrimination legislation is needed to protect disabled persons in areas such as employment, education, access to and the provision of goods and services.

(b) Affirmative Action Equal Employment Opportunity for Women) Bill 1986

This Bill, currently before the Senate, requires all private sector employers with 100 staff or more and all higher education institutions to develop and implement an affirmative action program for women. Commencement dates vary as follows: higher institutions by 1 August 1986; companies with more than 1000 employees by 1 February 1987; companies with over 500 and less than 1000 employees by 1 February 1988; and companies with over 100 and less than 500 employees by 1 February 1989. Expenses incurred by employers in implementing affirmative action programs will be tax deductible.

Eight prescribed steps are set out in the legislation and are, briefly, as follows: issuing a statement by senior management informing employees that the program is to be developed; appointment of staff to work on the program; consultation with trade unions; consultation with employees; collection of statistics; review of policies and practices to identify discrimination; setting objectives and making of forward estimates; and monitoring and evaluation. The sanction to be imposed for non-compliance will be the naming of the employer in a report by the Director of Affirmative Action in an annual report or other report to be presented to Parliament.

13. Inequality and Affirmative Action : Where Next?

The most intransigent problems of inequality are unlikely to be resolved satisfactorily simply by providing equality of opportunity, unless equality of opportunity is defined broadly enough to include some intervention to secure an overall balance of burden and benefits. Measures designed to

achieve equality of opportunity goals will tend to stress treating people the same. Yet, the achievement of equality for disadvantaged groups will often require treatment which is different to achieve actual equality. Treating the individual with disabilities the same as those without disabilities is in many instances unlikely to achieve equal results, genuine fair play or equal opportunity. Somewhere between the theoretical extremes of the state as the neutral arbitrator of a fair play game and as the assurance of absolutely equal shares, there is an understanding of equality which accepts that the achievement of an overall balance of burdens and benefits requires a recognition of different needs within a broad framework of equal rights.

In the context of disability and employment, there are at least four groups with different needs:

(a) those who only need protection against discrimination, e.g., the receptionist with a facial disfigurement or the clerk with epilepsy;

(b) those who need protection against discrimination plus special aids and/or the removal of barriers, e.g., the white collar worker in a wheelchair, or the deaf factory machinist who requires visual rather than auditory warnings of malfunctions;

(c) those who, because of their disabilities, are inescapably less efficient than the able-bodied; and

(d) both (b) and (c) above (e.g., prelingually deaf people who, due to lingual retardation, would need additional initial training and supervision).

The differences between these groups relate to the extent to which physical or mental impairment is an impediment to the performance of the job. In the case of the first group, the handicap is created by the attitude of potential employers; in the case of the second there is a real disability, but it is one which can be overcome by effort CT ingenuity. It is only in the case of the third and fourth groups that full affirmative action or quotas should generally be necessary. Obviously, there will be some disagreement as to who fits into which category. Will courts accept that a hunch-backed man who can pass all the physical tests to be a fireman in fact falls into category (a), for example? The British Columbia case of Andruchiw v. Corporation of the District of Burnalpy (1982) 3 CHRR 663 suggests not.

Possible moves towards increasing the employment levels of disabled persons are as follows:

(a) open employment, where all candidates are considered for employment on an equitable basis but no attempt is made to compensate for past discriminatory practices;

(b) job and work systems analyses leading to job redesign and an increase in positions available suited to disabled workers;

(c) limited affirmative action, where attempts are made to increase the number of disabled applicants but employment and promotions go solely to applicants with the best qualifications;

(d) preferential hiring, where a positive recruitment program (searching out disabled candidates) is coupled with giving than priority consideration in hiring; and

(e) a quota system, where specific numbers of percentages of all new hirings CT total employees must came fram specific minority groups. In most cases, quotas are expressed in terms of annual objectives.

Same commentators distinguish between 'soft' and 'hard' affirmative action with 'hard' affirmative action involving positive discrimination. Thus option (a) simply involves the elimination of current discrimination; (b) and (c) are 'soft' affirmative action; and only (d) and (e) constitute 'hard' affirmative action.

Disabled people should have a major role in Shaping policy and determining the choice between options. For disabled people who are unable to move or be moved, isolated, and financially and physically dependent, the problems of explicit denial of an apartment or job are hypothetical, and the difficulties in entering a theatre or parking a car are remote concerns when fundamental problems involved in day-to-day living perenially confront them.

Discrimination is often not characterised by hostility to disabled people, but is rather a 'cosmetic problem' - one which exists because few of the able-bodied have any direct contact or involvement with disabled persons. These groups may have developed from initial segregation in schools, the separation continuing as disabled people become increasingly unable to participate in social and vocational activities.

The isolation compounds itself. People with disabilities are doubly disabled in their attempts to move out into the mainstream, firstly by physical difference, and secondly by their self-perception and the way they are

perceived and treated by others. The 'they don't apply for positions' rationale is perhaps even more accurate for physically disabled people than it has been for all other minorities.

Haw to break this self-perpetuating cycle is a problem, for society at large is unlikely to respond unless disabled people make their needs felt. Unless disabled people are better able to negotiate the system they will continue to be ineffectual in voicing their needs. Major commitments of public and private resources will be required to build more than the pitifully few individual housing units now available; to develop appropriate and reasonably priced systems of transportation; to re-focus education and integrate disabled children into the school system; to supply comprehensive social and health services with sufficient reach; to train and develop disabled people for responsible job opportunities and to expand those opportunities through job analyses and redesign. Unless these primary objectives are attained, the likelihood is that the majority of people with disabilities will continue to be neglected.

What is needed is a massive educational program directed not only towards those who are the providers of basic human services, but also towards disabled people themselves to assist them to develop as a political constituency. Key figures - doctors, teachers, architects, personnel officers and other professionals - should, as an integral part of vocational preparation, be exposed to the problems facing people with disabilities and given at least a basic understanding of how professional attitudes condition or even control the lives of those who are in any way physically limited.

An important adjunct to this practice is that disabled people themselves be actively recruited to be developed as professionals in basic field services. People with disabilities need to develop their self-confidence through communication skills and assertiveness training before they even attempt to enter the workforce, in order to counteract the effect of years of socialisation into passive roles of 'acceptance' and 'gratitude'. In addition, once recruited they will often need to counteract limited experience in decision making and organising due to years of 'protection' from such activities by having access to training in executive and operational skills.

At this point the next step might appear to be Federal anti-discrimination legislation for disabled people along the lines of the Sex Discrimination Act 1984. The chief objective of the legislation would be to help people accept that discriminating against disabled people is wrong.

As Martin Luther King argued: 'Morality cannot be legislated but behaviour can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless.'

There are a number of barriers to the employment of persons with disabilities which need to be attacked independently of any action on employment quotas or discrimination. These include:

(a) superannuation questions;

(b) workers' compensation issues, especially those relating to the aggravation of pre-existing conditions and the possibility of establishing a second injury fund;

(c) the lack of tax-deductibility for unavoidable employment expenses for people with disabilities; and

(d) the lack of tax-deductibility for employers for modifications of workplaces or machinery to facilitate the employment of people with disabilities.

As to the future of registers of persons with disabilities, employment targets and quotas, more needs to be known of the desires of the people who are most directly involved. In the meantime, governments are themselves major employers and could very profitably examine the proportion of people with disabilities employed within their own ranks as a means of paying more than lipservice to the concept of equality of opportunity of access to permanent public sector employment for this group.

The success of the EEO provisions and initiatives in Australian Public Service employment will be judged on how the present representation of disabled people in the workforce changes.

APPENDIX ,I

Resume of Steps Taken by the Public Service Board in Recent Years to Promote EEO for Disabled Persons

1971

An officer in each of the Board's Regional Offices was designated as a Special Placement Officer (SR)), to assist in the testing and placement of disabled people and to act as a point of contact for disabled people seeking employment in the Australian Public Service (APS).

1972

The Board's medical guidelines to Commonwealth Medical Officers (CMOs) were revised, reducing the minimum period of time APS applicants had to satisfy the CMO that they were capable of performing duties of the position-, from seven to three years. This revision has allowed greater numbers of disabled applicants to satisfy the medical prerequisite for an offer of permanent employment in the Service to be made.

1975

An Equal Employment Opportunity Section (now Bureau) was set up in the Central Office of the Public Service Board to develop and implement programs and policies for disabled people, women, Aboriginals and migrants.

The Board began ongoing modifications to its selection tests to facilitate equal opportunity of entry to the Service for persons with physical disabilities. These included braille and large print tests for the visually impaired, an interpreter for deaf applicants, and extended time limits for some mobility-restricted applicants.

1976

The Superannuation Act was overhauled. Disabled people are now able to contribute to the fund along the same lines as non-disabled contributors.

New guidelines on medical standards were given to Commonwealth Medical Officers which assisted in the assessment of disabled people.

1977

The EEO Bureau began to pay attention to the personnel development needs of disabled APS staff. Aequa, the Equal Employment Opportunity Newsletter, was produced on cassette; the induction booklet, Your career service, was translated into braille.

The EEO Bureau commenced a series of recall sessions in the A.C.T. for deaf APS staff, their supervisors and co-workers.

A pilot work experience program was run in the APS in Canberra for ten intellectually impaired school children. Two were subsequently employed in the APS.

1978

An Inter-departmental Steering Group (IDSG) on the Employment and Training of the Disabled in the APS was established; chaired by the Board and having representatives from the Department of Social Security and Employment and Youth Affairs.

1979

The ISDG:

– conducted a survey of the reading assistance needs of blind and visually impaired clerical workers in Sydney and Melbourne, to determine the amount and type of such assistance required by blind and visually Impaired APS employees.

– held seminars for departments on the employment and training of disabled people in Sydney, Melbourne, Adelaide and Brisbane.

The Board:

– extended the Department of Social Security's Work Therapy Scheme throughout the Australian Public Service.

– extended the Linguistic Availability/Performance Allowance (LAM to include interpreters for the deaf.

– issued guidelines for interviewing disabled MS staff.

1980

The IDSIG:

– held seminars for departments on the employment and training of disabled people in Hobart, Perth and Darwin.

– set up a working group to examine the rehabilitation and retention of injured APS employees following expressions of concern by the Commonwealth Rehabilitation Service. The working group comprises representatives fram the Board, Department of Health, Commonwealth Rehabilitation Service, the Commissioner for Superannuation and the Commissioner for Compensation.

The Board's Selection Techniques Section validated an alternative individual selection test, the Weschler Adult Intelligence Scale (CUS) as a predictor in relation to the Board's standard selection tests. This test is now being used to assess certain ANS applicants having hearing or visual impairments.

The EEO Bureau commenced a series of 'Communication Workshops' for deaf APS staff, their supervisors and co-workers. During 1980, the workshop was held in Canberra, Sydney and Melbourne.

The Board's Regional Office in Sydney ran mini-recruitment campaigns for special disability groups. These included the deaf and hearing-impaired, the blind and those with low vision, and those with physical disabilities, other than deafness or blindness (resulting in a doubling of the 1979 disabled placement rate for that State).

The Board's Regional Offices in Melbourne and Adelaide completed task and access analyses of basegrade positions to facilitate the placement of successful disabled applicants.

1981-82

A series of seminars was conducted for Central and Regional Office staff as part of the Board's IYDP program. Two major guidelines were issued in conjunction with these seminars: 'Facts about Disabled Workers in the APS', which provides definitions of disability, attitudes relating to disabled staff, and advice on assisting disabled co-workers, and 'Steps for Incorporating Disabled People into the Career Service', which outlines methods to assist disabled staff towards equality of developmental experience in matters such as induction, orientation, personal development, promotion and training.

1982-83

The sound/slide sequence, 'Learning About Disabled Co-Workers', was launched.

The DWG on the Employment and Training of the Handicapped in the Australian Public Service completed a report on the Rehabilitation and Reinstatement of Injured Australian Public Service Staff.

1983

Introduction of the Aids for Disabled Commonwealth Employees Program (110,7 known as the TEDCEP - Technical Equipment for Disabled Commonwealth Employees Program).

1984

'Mainstreaming' in Department of Education and Youth Affairs; and

Public Service Reform Act.

APPENDIN_II

Adaptation of __Jobs .and.the_Employment, of the . Disabled

(a) Job Analyses

Comprehensive job analyses are essential for the appropriate placement of disabled employees. They are important for determining the extent to which a job may be redesigned and for comparing training schemes in rehabilitation centres with job demands so that schemes can be made relevant and effective.

A job analysis procedure should:

(1) be applicable to both disabled and non-disabled employees to promote integration;

(2) consider different categories of impairment to determine the type and extent of disability which could restrict performance;

(3) consider the possibilities of matching job demands and working capacities of people with disabilities;

(4) consider universality of application to a wide range of jobs in industry, public services and sheltered workshops;

(5) consider applicability for the prevention of occupational diseases; and

(6) have reliable results. The degree of similarity of results can be compared if one job is analysed using the same procedure independently by different experts.

(b) Work Systems_Analyses

Work systems analysis is required before job redesign and employee adaptability can be considered. Such an analysis should:

(1) evaluate work tasks, conditions for carrying out these tasks and demands upon the worker resulting therefrom;

(2) cover type and properties of work objects (weight, size, form, danger involved in, and sensitivity of handling);

(3) document equipment used;

(4) evaluate the work environment in terms of physical, organisational and social characteristics.

(i) Physical characteristics - these include noise, lighting, climate, mechanical vibration, dust and toxic substances.

(ii) Organisational and social characteristics - including working hours, paced/unpaced work, group or individual work, seniority, remuneration, shift work and rest pauses.

(5) describe tasks involving nom-manual work (e.g., planning, decision making, analysing, combining information);

(6) include demands of information perception, decision/response action;

(7) include demands to reach the working area and facilities (washrooms, canteens, etc.); and

(8) include demands in emergency situations (e.g., applying great force, escaping quickly from a dangerous zone, aiding colleagues in danger).

(c) Evaluating the Abilities, Skills. Training, Potential an&,Aspiratjns of the Disabled Worker

Once workloads, working environments and organisational and social conditions have been assessed, the abilities, skills and potential of the person with disabilities need to be evaluated and consideration given to the individual's aspirations in order to define the range of jobs he or she can cope with.

The International Labour Office's report recommends assessment by psychological tests meeting the following specifications. Assessment procedures should:

(1) be objective, reliable and valid excluding subjective influences on results by the tested person and the assessing specialist;

(2) not harm the tested subject and be accepted by him/her. (Subjects should not be exposed to workloads exceeding their capacity. When this capacity is not yet known, pre-tests with a lower workload may be performed; the workload may be gradually increased under medical supervision; or capacity may be estimated from submaxinal tests.

Acceptance of a test depends inter alia on its purpose, on the race, sex, age and social status of the subject and on the persons administering and supervising the assessment.);

(3) not discriminate against disabled persons. Tests Should be adapted to the residual functions and skills of the disabled. Disadvantages are incurred by people with disabilities when test norms such as strength and practical intelligence derived from non-disabled subjects are used to assess them;

(4) enable trainability of functions to be assessed along with actual working capacity. This would be important, for example, when assessing physical functions after a period of inactivity or bed rest or when evaluating trainability of cognitive functions of young disabled persons whose cognitive development is still evolving; and

(5) take into consideration situational variables (e.g., the labour market situation in order to fix test norms for aptitude prognosis).

Ability to be assessed should include:

(a) verbal comprehension
(b) verbal expression
(c) memorisation
(d) mathematical reasoning
(e) number facility
(f) deductive and inductive reasoning
(g) spatial orientation
(h) visualisation
(i) speed and flexibility of closure
(j) selective attention
(k) time Sharing
(1) perceptual speed

Skills are commonly assessed by work samples developed by vocational assessment personnel and completed by the subjects under their supervision. Examples of skills needed for different kinds of jobs are as follows:

Verbal (message taking, giving information); numerical (payroll computation, giving change); clerical perception (mail sorting, filing, zip coding, record checking); sensorial-motor (bottle capping and packing, lamp assembly, electronic connector assembly).

(d) Matching Job Demands and Worker Capacities

Difficulties in this area include:

(1) changeability over time of both job demands and workers' capacities;
(2) the inter-relationship between job demands and workers' capacities, especially where there is a high degree of choice in relation to working speed, decision making and work lay-out; and
(3) the lack of knowledge as to how a disabled person's impaired functions may be compensated, substituted or supplemented and whether this would be possible in the specific work environment.

Questions needing to be asked in relation to, for example, visual impairments are:

(1) what are the functional consequences of visual impairments?
(2) which job characteristics are related to visual perception and compensatory mechanisms?

It will also be necessary to identify other occupations with law or no visual requirements and to take into consideration other individual characteristics such as skills and aspirations.

Following this process, jobs with no visual requirements must be sought along with jobs requiring visual functions, but where other Channels of information perception could be utilised if modifications were made to the workplace or aids made available to the worker. Reallocation of functions should also be considered.