Legislating discrimination protection for persons with disabilities in Australia and Sweden: a comparative analysis

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Comparative analysis is essential in order to evaluate the relative effectiveness of different legal approaches to protection against discrimination for persons with disabilities. In this article, the Australian (federal) and Swedish approaches to disability discrimination protection will be explored. Aspects of the Swedish approach may inspire Australia to review its own anti-discrimination measures, at both the federal and the state/territorial level. Section I offers a brief background on the international framework. Section II presents some general principles of Swedish law that provide a backdrop to its national anti-discrimination law and at the same time provide an explanatory framework to the Swedish approach to discrimination law. Section III describes the general development of the anti-discrimination legislation in Australia and Sweden. In this context, it should be noted that, in contrast to Australia, Sweden does not have a federal system: its legislation is unitary. Sections IV and V focus on a selection of substantial and formal provisions. Finally, Section VI evaluates the benefits of each national approach and discusses the means by which the limitations of these approaches might be remedied.

I. Introduction

Legal protection against discrimination for persons with disabilities has never been as prominent as now. As of April 2008, 127 United Nations member states, including Australia and Sweden, have signed the UN Convention on the Rights of Persons with Disabilities (CRPD). This Convention recognises that disability discrimination constitutes a violation of human rights. All signatory states are obliged to prohibit all discrimination on the basis of disability and to guarantee persons with disabilities equal and effective legal protection against discrimination (Art 5.2). Although the

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Convention will enter into force on 3 May 2008,[1] a large number of Western countries, including Australia and Sweden, have previously adopted legislative measures to combat disability discrimination. These national measures have, to different degrees, been inspired by the US legislation, which constitutes the oldest and most developed anti-discrimination legislation in the world (*Rehabilitation Act 1973*, s 504; *Americans with Disabilities Act 1990*). A general survey of the measures adopted in Australia and Sweden illustrates that they are founded on different conceptions of what constitutes disability, different forms of discrimination, different complaint mechanisms and, finally, different understandings of positive measures (Degener 2004, 87–106).

II. Some general principles of Swedish law

In order to understand how and why the Swedish anti-discrimination legislation is drafted, interpreted and applied as it is, it is necessary to outline some of the major features of the Swedish legal system. The Swedish legal system, unlike that of Australia, is not based on common law. Instead, the legal system lies somewhat between two major legal systems in Europe (common law and civil law). In contrast to the common law approach, a major difference in the Swedish legal system is that the doctrine of *stare decisis* does not apply. Hence, the lower courts are not legally bound to abide by judgments or precedents by the higher courts — although these lower courts do, in practice, follow higher judgments to avoid unnecessary appeals. Another significant difference in Sweden, in contrast to Australia, is that recourse to the judicial system is not an integral part of administrative law. A third difference is that the power of the judiciary is more limited in Sweden than in most common law countries. While judges in Sweden are not barred from being judicially active, they are expected to interpret statutory provisions in the light of the legislative history, the so-called 'restraint judicial interpretation'.[2] To facilitate their work, there is no

1 Twenty-four member states, excluding Australia and Sweden, have recently ratified the Convention: see <www.un.org/disabilities> (last visited 22 April 2008). The effect of ratification is currently examined by the Swedish and Australian governments: see the Australian Department of Families, Housing, Community Services and Indigenous Affairs at <www.facs.gov.au> and the Swedish Department Series on the CRPD at <www.regeringen.se> (last visited 22 April 2008). These consultative processes are required before the Australian and Swedish Parliaments can reach a decision on whether or not to ratify an international convention.

2 This is greatly influenced by the Scandinavian School of Legal Realism. The point of departure for this legal theory is to avoid all value judgments because they have a negative impact on the legal certainty. For a closer overview of legal philosophy, see, for example, <www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9337.2005.00282.x?cookieSet=1> (last visited 28 December 2007).

preamble in most Swedish statutes that permits a margin of discretion. Further, legislative history is generally accessible to the public and is pedagogically drafted, or drafted in simple terms, and is explanatory like in many civil law countries.

Some of these manifestations of legal realism have been undermined, to some extent, by Sweden's obligations under the European Convention on Human Rights (ECHR) issued by the Council of Europe.[3] This Convention requires that an individual has access to court in cases of alleged violation of his or her civil rights (Art 6 of the ECHR). If Sweden does not fulfil its obligations, any individual is entitled to file a complaint against Sweden before the European Court of Human Rights in Strasbourg (France). This court is authorised to order a violating member state to pay damages to the complainant. To avoid this outcome, the Swedish Parliament has amended its legislation in order to permit individuals to challenge administrative decisions before domestic courts, but the solution is not totally comprehensive. This shortage has, to a certain extent, imposed a negative impact on the discrimination protection for persons with disabilities. These persons often need government funds to be able to participate in society on a basis equal to that of others. Such funds are necessary to finance expenses for, in particular, personal service and technical aids. These measures aim at compensating the person's impairments, such as providing a sign language interpreter for the deaf and wheelchairs for the mobility disabled. The problem is that the Swedish Parliament and government are not totally ready to surrender their power to the court for democratic and economic reasons. They claim to have the responsibility of controlling state budgets, since they are directly elected by Swedish citizens, unlike judges.

In contrast to Australia, Sweden has incorporated discrimination protection into its Constitution and not merely in statute law. Sweden was greatly influenced by the former Nazi Germany, where the government violated many human rights during the period of the 1930s through to the 1940s. To prevent this recurrence, Sweden opted for strongly entrenched constitutional protection of discrimination law, which requires two parliamentary decisions with an intermediate election before any constitutional amendment can be made.

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3 Lag (1994:1219) om europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (Act of Parliament, which means that the Act has been published as number 1219 in the 1994 edition of *Svensk författningssamling, SFS,* the official bulletin for the publication of Acts of Parliament and Government Decrees) on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Constitutional protection against discrimination is found in one of Sweden's four Fundamental Laws — that is, the Instrument of Government. This Instrument includes a Bill of Rights that encompasses not only provisions on civil rights — such as the right to life and freedom of speech — but also two twin anti-discriminatory provisions. These twin provisions prescribe that no legislative body is allowed to discriminate against persons based on their gender or ethnic minority (Instrument of Government, Art 2 of Ch 1). The provisions further prescribe that such a body is entitled to introduce measures to promote substantial equality for these groups, so-called preferential treatment. It should be noted that these measures are not mandatory but voluntary. The question of whether an equivalent provision should be introduced for the benefit of persons with disabilities was discussed by a government commission of inquiry during the early 1990s (State Official Investigation SOU 1992:52, 537). However, the government dismissed this proposal due to drafting difficulties, such as how to define 'disability' and how to articulate justification defences to potential discrimination actions (such as that a blind person cannot drive a taxi).

There are, in any event, two additional provisions in the Instrument of Government that have a certain impact on disability discrimination. One provision prescribes that all administrative bodies are obliged to observe in their work the equality of all persons before the law and shall maintain objectivity and impartiality. This is called the 'principle of equality and objectivity' (Instrument of Government, Art 9 of Ch. 1). In the absence of any guideline from legislative history, it is not clear whether the principle is limited to formal equality or whether it extends to substantial equality. If the principle is limited to formal equality, then it would not benefit the majority of persons with disabilities. These persons inevitably require substantive equality measures to compensate their impairments and inaccessibility of society.

Another provision that was recently introduced in the Instrument of Government in 2003 is that all legislative and administrative bodies should counteract discrimination based on different grounds, including disability (Instrument of Government, Art 2 of Ch 1). This provision is unique among constitutional provisions in the sense that it is not legally binding but constitutes instead a political directive. Anyway, this legal feature should not be taken too seriously, since all provisions irrespective of their legal binding are relatively weak. The reason is that Sweden — in contrast to some countries — does not have a constitutional court with the mandate to invalidate statutes and regulations that are considered to violate any constitutional provision. Instead, there is a pre-review by a central council composed of the highest judges during the legislative procedure (Instrument of Government, Art 18 of Ch 8). Thus, judges who find that any statute or regulation is not compatible with constitutional provisions can only refuse to apply them in a concrete case,

provided that the violation is manifestly clear (Instrument of Government, Art 14 of Ch 11).

Last but not least, Sweden has been a member of the European Union since 1995. The EU should not be confused with the European Council, the primary objective of which is to safeguard the intention of the UN within the framework of human rights at the European level (Bartlett et al 2006).[4] The major difference between the two is that the objective of the EU is not only to promote human rights, but also to establish a common market without any national barriers. Specifically, persons, goods, services and capital can now move freely between European countries without being stopped by customs or police. This enables particularly small European countries to cooperate with each other so that they can compete with the superstates, such as the US, China and Japan, in the global market. Prior to joining the EU, Sweden had to make an exception from its dualistic approach to avoid violation of the EC law. Otherwise, there is a risk that the European Court of Justice in Luxembourg will order Sweden to pay damages if it violates EC law that takes precedence to national legislation (*Van Gend Loss*, 1963; *Costa v Enel*, 1964). This issue is relevant within disability discrimination since the EU has adopted a relevant directive that obliges the member states, including Sweden, to provide a minimum standard of discrimination protection for disfavoured groups, including persons with disabilities — that is, the Framework Employment Directive (Whittle 2002).

III. The development of anti-discrimination legislation in Sweden and Australia

Legal history shows that Australia and Sweden have, in part, experienced a similar development of anti-discrimination legislation. Until the 1990s, the legislation in both countries was limited to protection on the grounds of gender and ethnic origin. The explanation for the absence of disability in anti-discrimination legislation is that the national legislative bodies of both countries viewed the barriers that persons with disabilities faced in society as a result of their impairments, rather than any lack in society of providing facilities for the disabled. This approach, known as the 'medical model' view, saw the task as one for professionals to teach the disabled to adapt to

4 See <www.coe.int/> (last visited 28 December 2007). It can be noted that the Council of Europe, in contrast to the Organisation of American States, has not adopted any regional disability convention: see <www.oas.org> (the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, last visited 28 December 2007). Instead, persons with disabilities can rely on two general conventions on human rights, the ECHR (see note 3) and the European Social Charter.

societal demands. If the disabled could not, or did not, learn to adapt, they were consigned to an isolated life at hospitals and special institutions. The disability rights movement in both countries, however, began to be influenced by the UN's new view of disability, the 'social model' approach, which became prominent in the early 1970s and later. The social model view, in contrast to the medical model approach, saw the disabled not as passive 'recipients of care' *(object),* but rather as active citizens with equal rights and obligations as others *(subject).* More precisely, society should adapt to their needs and not vice versa (Blanck et al 2005, 3–5).

Accordingly, with pressure from the disability rights movement, both Sweden and Australia established in the 1990s a national government commission of inquiry with a mandate to review the legal situation of persons with disabilities.[5] Both commissions were concerned with the fact that the disabled were over-representative in unemployment and were allowance dependent. To promote integration of the disabled in society, the commissions were strongly inspired by the US announcement of a second introduction of anti-discrimination legislation (in particular, the *Americans with Disabilities Act of 1990*). The aim of this legislation was to make American society accessible to all Americans, irrespective of their level of functioning. The Australian Parliament adopted the Bill, which emerged from the Commission quickly so that the *Disability Discrimination Act 1992* (Cth) (DDA 92) could enter into force early in 1993. The Act applies to a range of areas, including employment, education, access to premises, provision of goods, services and facilities, accommodation, buying land, activities of clubs and associations, sport, and administration of Commonwealth Government laws and programs. In Sweden, however, the government disapproved of the commission's proposal, since it was not well analysed (Numhauser-Henning 1996; Svenaeus and Claesson-Wästberg 1997). The problem was that this proposal was not considered to provide equally effective discrimination protection for the disabled as for other disfavoured groups, particularly women. Indeed, the time was not right in Sweden for discrimination protection for the disabled until the late 1990s, when the UK and Ireland introduced the first anti-discrimination legislation in Europe — that is, the *Disability Discrimination Act 1995* (UK) and *Employment Equality Act 1998* (Ireland). In 1999, after the EU amended its EC Treaty so that the anti-discrimination provision would include disability as an explicit ground, the Swedish Parliament passed Sweden's first anti-discrimination legislation that included disability as a ground of discrimination (*Prohibition of Discrimination in Working Life of People with Disabilities Act 1999,* 132). This legislation has the same legal scope as older anti-discrimination legislation for men and women, ethnic minorities and homosexual persons.

5 See further for Australia <www.humanrights.gov.au/disability_rights/dont_judge.htm> (last visited 28 April 2008).

Later, the Swedish government found that university students needed discrimination protection equivalent to employees and enacted legislation in response. (The Government Bill, prop 2001/02:27, p 20ff). The Swedish Parliament adopted it immediately and the second anti-discrimination statute covering students entered into force in 2002 (*Equal Treatment of Students at Universities Act 2001,* 1286). This Act applies to several grounds of discrimination, including disability, and covers certain types of tertiary education. One year later, the Swedish Parliament adopted a third act that applies to several discrimination grounds, including disability and some employment-related areas such as employment agencies, unions, authorisation, goods, services and facilities (*Prohibition of Discrimination Act 2003,* 307). The last Act, adopted in 2006, applies to education from preschool to secondary school and covers several discrimination grounds, including disability (*Act on the Prohibition of Discrimination and Other Degrading Treatment of Children and Pupils 2006,* 67).

This legal approach has been sharply criticised in Sweden as patchwork. One problem is that the employment-related anti-discrimination legislation does not provide a similar level of protection against discrimination for different disadvantaged groups. Employers are obliged to take active measures that aim at promoting equal opportunities for employees belonging to certain protected classes — that is, gender and ethnicity — but not disability. Another problem is that the anti-discrimination legislation is supervised by a separate and discrete government agency (ombudsman) for each ground of discrimination, including disability. Persons who suffer from multiple intersections of discrimination (such as a disabled woman who is black and homosexual) are faced with choosing a forum which can deal only with one aspect of the discrimination they face. To avoid this problem, the Swedish government has recently submitted a single piece of anti-discrimination legislation that is intended to replace all existing acts (Government Bill, prop 2007/08:95). This Bill is expected to enter into force in January 2009. This is in direct contrast to the approach of the Australian Productivity Commission, which found that the federal anti-discrimination legislation for persons who are discriminated against based on their gender, ethnic origin, disability and age should not be merged into an omnibus legislation (Productivity Commission 2004). According to the Commission, special and targeted legislation is 'a powerful symbol of the government's commitment to persons with disabilities and that redrafting the acts would require considerable resources for perhaps little gain' (Productivity Commission 2004, 9).

The core components of the Australian and Swedish anti-discrimination legislation are generally similar. Although the Swedish legislation does not have any preamble, it is introduced by a provision that states the objective of the legislation — that is, to combat discrimination and, to a certain degree, promote equal rights. The Swedish

provision cannot be challenged by court but serves as a point of interpretation for other provisions aside legislative history, a so-called policy statement. The Australian equivalent provision is drafted in a more detailed and arguably more realistic way than the Swedish one. This provision uses a three-pronged purpose approach that states that the objects of the Act are to eliminate, as far as possible, discrimination against persons on the ground of disability; to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of community (DDA 92, s 3). Both approaches arguably have drawbacks. The risk of the Swedish approach is that the disabled may be given the false expectation that the anti-discrimination legislation will remove all discrimination. The Australian approach, tempered by the phrase 'as far as practicable', may appear more realistic, but may at the same time operate to reduce the ambition and goals of institutions and individuals to remove discrimination.

The national legislation of both countries contains definitions which aim to clarify key concepts such as 'disability', 'education provider' and 'employer' (DDA 92, s 4). The core of the Acts is the prohibition of discrimination and the promotion of equal rights, such as active measures (Sweden) and action plans (Australia). Finally, the Acts are supplemented by provisions that aim at rendering the prohibition of discrimination effective. Key provisions will be considered in depth in the following sections. In reference to the Swedish legislation, a more general analysis will be provided since anti-discrimination legislation is spread over multiple Acts. It will be up to the reader to locate specific provisions in each Act.

Last but not least, it should be noted that the anti-discrimination legislation in Sweden has received less attention and analysis than equivalent legislation in Australia. One problem is that there are few legal scholars who have chosen to specialise in disability law in Sweden, compared to Australia. Another problem is that no government agency has issued legally binding regulations in Sweden comparable to the Disability Standards in Australia. In addition, the Swedish anti-discrimination legislation is not as old as the Australian one, which is the reason why it has not been considered by the courts as much as that of Australia.

IV. Personal scope and discrimination prohibition

This section of the article compares a selection of substantial provisions arising from the Australian and Swedish anti-discrimination legislation. First, the definition of disability is asymmetric in contrast to other definitions of disfavoured groups, such as gender and race. It can be explained by the fact that all persons belong to a certain

gender and ethnical group but not a disability group, apart from intersexual persons. In other words, only those who at least have a disability can rely on the discrimination protection (Degener 2004, 10). Second is the discrimination prohibition, which is the core of the anti-discrimination legislation. This prohibition includes some forms of discrimination and aims at facilitating the identification of actions, including negligence, which can constitute discrimination. Third is reasonable accommodation (adjustments), which plays a central role for persons with disabilities. Accommodation aims at removing obstacles to promote the participation of the disabled in society on an equal basis as others. Fourth are active measures that serve as a complement to the discrimination prohibition. These issues will be discussed below in that order.

The definition of disability

It is complex to define the concept of disability, since it requires drawing a line somewhere along a spectrum of abilities from nothing to total. Where the border should be drawn has always been controversial. Australia has chosen a wide definition, with the aim of overcoming the problems of state definitions which had arisen in the courts prior to the Australian anti-discrimination legislation. The experience in New South Wales shows that the older state anti-discrimination legislation only applied to a person who had a physical impairment. In *Kitty v Tourism Commission,* 1987, a woman who applied for a job as a guide in the Blue Mountains had epilepsy (Basser and Jones 2002, 261). The state court interpreted the definition restrictively, so that epilepsy was considered to be not a physical impairment but a mental one. Thus, the woman could not rely on the anti-discrimination legislation. Therefore, the definition chosen for the federal legislation contains a list of types of disabilities without any reference to the degree or duration of the disability (DDA 92, s 4). Federal case law in Australia shows that the definition is broad enough to include persons with behaviour and narcotic problems, since there is no explicit list of exceptions (*Purvis v New South Wales,* 2003; *Marsden v Human Rights and Equal Opportunity Commission and Coffs Harbour and District Ex-Servicemen and Women Memorial Club Ltd,* 2000). Despite this wide definition, the Australian Productivity Commission has proposed that medically recognised symptoms where the underlying cause is unknown and there is a genetic predisposition should be included in the definition as a clarification. This proposal can be understood within the context that many employers and insurance companies use tests that can screen out persons with genes for diabetes, and so on, without showing any symptoms.

Such a definition can give rise to legitimacy problems if the result is that everybody can claim they are disabled. This would impose a big burden on supervisory bodies

and courts to consider minor and trivial issues and they would therefore have less time to focus on those who are truly disabled and experience much more discrimination than others with minor disabilities (*Sutton v United Airlines, Inc*, 1999; Locke 1997, 175–91). These potential problems do not seem to be manifest in Australia. However, Sweden has chosen a more restrictive definition that states the following:

> Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth arose thereafter or may be expected to arise. [See, for example, Art 2 of the *Employment Equality Act 1998*.]

The Swedish definition includes a criterion that limits the personal scope — that is, the person's impairment must be permanent. The Swedish legislative history explains that the intention is to exclude those who have broken arms or legs, have a cold or are recovering from rehabilitation (Government Bill 1997/98:179). However, in the absence of a specific guide, it is not clear what the minimum length of time is that is required for the definition.

Both Australia and Sweden recognise that a medical model of disability is not sufficient; a social model is also needed. This approach recognises that another person can experience disability discrimination, even though they themselves do not have any impairment. Thus, those who have an association with persons with disabilities — such as family members, friends or business associates — are covered. It should be noted that this relationship is not explicitly regulated in the Swedish anti-discrimination legislation, in contrast to that of Australia. Instead, the interpretation is based on the fact that the prohibition of discrimination is worded as protection against discrimination not *for* the disabled, but *on grounds of* disability. In other words, there is no requirement that the individual has a disability. In contrast to the Australian legislation, the Swedish statute does not include those who have had a disability in the past or who abuse alcohol or narcotics. The reason for this exclusion has not been discussed during the Swedish legislative procedure. As for future disability, according to the legislative history, a disease must be established. In other words, those who have a genetic predisposition are not included.

Forms of discrimination

Both Australia and Sweden include direct and indirect discrimination in their national anti-discrimination legislation. Direct discrimination in both jurisdictions is easy to identify and requires that four criteria are met (DDA 92, s 5.1). The first is that there must be a comparison between at least two persons. One must have a disability

or an association to the disabled (an aggrieved person) and the other person(s) must not have a disability or an association to the disabled (a reference person). The reference person can be actual or hypothetical. The purpose is to prevent a discriminator from circumventing the discrimination prohibition by arguing that there is no existing reference person. In other words, a court will assess how the discriminator would have treated a reference person. It can be the case where an employer has only one employee. The second criterion is that there must be a disadvantage for the aggrieved person that is not minor. Third, there must be a causal link between disability and disadvantage. It is not necessary that disability be the only cause; it can be one of several causes (DDA 92, s 10). Consequently, a discriminator cannot argue that the discrimination is based not on disability but, for example, bad clothes or poor judgments. Finally, both the aggrieved and the reference persons must be in a comparable situation, such as in relation to qualifications.

The case law from Australia indicates that Australia's High Court has interpreted the fourth criterion restrictively. In the *Purvis* case, a schoolboy with an intellectual disability was expelled from his high school due to violence. The court found that he should be compared to a pupil without a disability who had behaved in a similar way, leading inevitably to the result that expulsion would have also been the outcome. This judgment has been sharply criticised because the court did not take into account the question of whether the schoolboy's disability could be removed by proper medication or therapy that could guarantee he would not repeat his violent behaviour. (*Clark v Novacold,* 1999). More exactly, the schoolboy should be compared to a pupil without a disability who has shown no such violent behaviour. Should this reference person have been expelled or not? This issue is unclear in Sweden in the absence of case law.

Direct discrimination in both Australia and Sweden can be justified in some circumstances, such as the provision of reasonable accommodation (DDA 92, s 5.2). The main objective of direct discrimination is to combat stereotypes and prejudices. This can be illustrated by a decision of the Swedish Labour Court. The court held that an employer could not deny employment to a person with diabetes who was applying for night work at an oil refinery, based on its general health and safety policy. According to the court, the employer must make an individual assessment based on the applicant's medical documents, which showed that he could control his blood-sugar level at night.

Indirect discrimination arises when a discriminator applies a norm that appears to be neutral but which in practice disfavours persons with a disability when compared to persons who do not have such a disability (DDA 92, s 6). An example is when an

employer applies a driver's licence as a requirement for employment. Such a requirement disadvantages blind persons. However, both Australia and Sweden recognise that indirect discrimination is not absolute in some circumstances, provided that the actor can show that there are reasonable reasons for the measure and that it is appropriate and necessary in order to achieve the purpose. Thus, a requirement for a driver's licence is appropriate and necessary for an applicant who wishes to be a taxi driver.

If an aggrieved person is exposed to conduct that violates his or her integrity, both Australia and Sweden identify it as a form of discrimination — that is, *harassment* (DDA 92, ss 35–40). This can be physical or mental violence, such as kicking, spitting and bullying. There is, however, no prohibition of discriminatory questions in the Swedish legislation, in contrast to Australia (DDA 92, s 30). It can be argued that other forms of discrimination implicitly cover this. For example, Sweden identifies an additional form of discrimination called *instructions to discriminate*. This refers to an instruction which is given to someone who has a subordinate or dependent relationship to the person who gives the order. In Australia, this is explicitly covered by the prohibition of discrimination in employment ('a person acting or purporting to act on behalf of the employer'), but does not extend to other persons, such as education providers (DDA 92, s 15).

The prohibition of discrimination is not absolute but *relative* in both countries. The Australian anti-discrimination legislation contains a list of explicit exceptions, such as special measures, superannuation and insurance, infectious diseases, migration and combat duties (DDA 92, ss 45–55). Such a list does not exist in the Swedish legislation. Instead, such answers can partially be covered by a general rule of exception that states that the prohibition does not apply if the treatment is justified, taking into account a special interest that is manifestly more important than the interest of preventing discrimination. To facilitate this interpretation, there are additional explanations in the legislative history. In this context, one disadvantage of a list of explicit exceptions is that it can facilitate stereotypical interpretations which do not comply with the intent of the legislation, which instead intends individualised interpretation. To avoid this problem as far as possible, the Australian Productivity Commission has recommended that the list should contain clear and restrictive criteria and be supplemented by clearly defined and supported explanatory materials.

Failure to make reasonable accommodation

There is no legal definition of reasonable accommodation (adjustment) in either Australia or Sweden. The Swedish anti-discrimination legislation identifies failure to make reasonable accommodation as direct discrimination. This identification is based

on the EU case law within gender discrimination. The European Court of Justice declared that an employer's refusal to hire a pregnant applicant could only disfavour women because men cannot be pregnant (*Dekker,* 1990). Nevertheless, Waddington and Hendriks argue that failure to make reasonable accommodation should not be direct nor indirect discrimination, but rather be characterised as *sui-generis* discrimination (Waddington and Hendriks 2002, 426). According to them, direct and indirect discrimination are based on a group assessment, while failure to make reasonable accommodation is based on an individual assessment. It can be understood by the fact that this assessment must be adapted to each individual's unique needs, since it can vary among persons with similar disabilities. One example is that a deaf person who can lip read does not need an interpreting service to communicate with a hearing person without sign-language knowledge, while other deaf persons without such a gift do. This argument seems to have inspired the Swedish government commission of inquiry to remove this reference in the future anti-discrimination legislation. By contrast, there is no explicit provision on the failure to make reasonable adjustments in the Australian anti-discrimination legislation. However, the legislative history shows that the Australian government had such a duty in mind when the legislation was introduced (HREOC 2003). Moreover, a systematic interpretation of the legislation supports this approach as for the definition of discrimination and the reasonableness component of the definition of indirect discrimination. However, the High Court in the *Purvis* case has interpreted the provision of direct discrimination that reasonable adjustment is not mandatory but voluntary.

To clarify the education provider's obligation, the Disability Education Standard explicitly prescribes that failure to make such an adjustment constitutes discrimination.

To find out whether a certain measure is reasonable or not, both Australia and Sweden provide guidelines that state which factors should be considered in an individual's assessment. Such factors include, among others, the discriminator's ability to bear costs and the expected effects of the measure on the disabled person's ability to perform a certain task. These are not regulated in the anti-discrimination legislation itself but in the Australian Disability Standard and the Swedish legislative history. If a measure is considered reasonable, then a discriminator is entitled to rely on so-called unjustifiable hardship — that is, that that measure would cause excessive difficulties imposed on the discriminator (DDA 92, s 11). This two-stage process only applies in Australia, while Sweden considers it part of the concept of reasonableness — that is, a one-stage process.

Last but not least, it should be noted that the substantive scope is much more limited in Sweden than in Australia. In Sweden, only universities and employers are obliged

to make reasonable accommodations. There is an additional limitation for universities in the field of education, since the provision does not apply to measures to make premises accessible for the disabled. In other words, the disabled cannot rely on this provision to claim auxiliary aids and adapted education, in contrast to the situation in Australia. This can be illustrated by the fact that a deaf applicant in Sweden could not rely on the prohibition to claim sign a language interpreting service in order to attend a university course, in contrast to the situation in Australia.[6] According to the Board of Appeals for Higher Education, the legal scope of the anti-discrimination legislation could not be interpreted more broadly than what the literal interpretation allows. This limitation should not, however, be taken too seriously, since the Swedish anti-discrimination legislation is supplemented by other statutes and regulations. One is that the government requires that universities divide some percentage of government funding to accommodate the disabled person's special needs, including auxiliary aids and interpreting services. Another is that there are statutes and regulations that oblige Swedish agencies and enterprises to take measures so that public buildings, transport, services and information are accessible to the disabled. If these actors are unsure about what to do, they can provide information from the Swedish Agency for Disability Policy Coordination.[7] This agency has issued a guideline, *Break the Barriers,* which illustrates when certain actions or negligence should be treated as discrimination. In this context, it can be noted that the Swedish Commission of Inquiry has recommended that the legal scope of reasonable accommodation should be extended to include other living areas, such as goods, services and housing. This extension is relevant because most supplementary statutes and regulations outside the anti-discrimination legislation cannot be challenged before a court in Sweden.

Active measures

Active measures are not synonymous with discrimination; rather, they supplement the discrimination prohibition. One major difference is that active measures aim at eliminating future obstacles for persons with disabilities as a group, while discrimination prohibition focuses on actions that already have occurred for a particular individual with a disability. Both Australia and Sweden recognise this need. In Australia, active measures (action plans) are voluntary for the discriminator (for example, education providers and employers) (DDA 92, s 59). To encourage the discriminator to issue such plans, they are entitled to use the unjustifiable hardship

6 Decision of 14 February 2003, reg no 46-899-02: <www.onh.se> (last visited 28 April 2008).

7 See <www.handisam.se> (last visited 28 April 2008).

defence if a person with a disability files a complaint that he or she is not provided with any reasonable accommodation (DDA 92, s 11). This is valid, provided that the Human Rights and Equal Opportunity Commission (HREOC) has registered the plan. The Australian experience shows that the system is relatively ineffective, since too few organisations — particularly universities — have submitted actions plan to the HREOC for registration.[8]

Sweden has chosen to have a legal obligation only for universities to take active measures. These measures are not defined in the Swedish anti-discrimination legislation, as in Australia. However, the Swedish legislation states that a university shall conduct goal-oriented work to actively promote equal rights of students irrespective of disability. This work should make sure that no student is harassed. Moreover, a university is obliged to prepare an annual plan that shall contain a review of the measures that are required to promote the equal rights of students irrespective of disability and in order to prevent and preclude harassment. The plan shall also contain a report on which of these measures the university intends to commence or implement during the forthcoming year. Furthermore, a university that becomes cognisant of a student considering himself or herself to have been exposed to such harassment must investigate the circumstances surrounding the said harassment and, in appropriate cases, take such measures that may reasonably be required to preclude continued harassment. If the university requires assistance, it can request this from the Disability Ombudsman. This ombudsman has issued non-legally binding guidelines, such as *Prevent Discrimination*. The scope of this legal obligation is unclear, since the major objective is that the legal obligation should be flexible and adaptable to individual cases (Government Bill, prop 2001/02:27; Equal Treatment of Students at University, 33).

Finally, it should be noted that both the Australian and the Swedish anti-discrimination legislation are based on meritocratic values, which means that a person with a disability must be qualified for university education, professional employment and so on. It follows that the provisions of active measures do not require preferential treatment and quotas. This can be illustrated by a Swedish case in which an applicant with dyslexia was denied a veterinary education.[9] The education provider justified its denial with the argument that the complainant had worse grades than those who were accepted into the program. The complainant attempted to argue that he should be treated favourably because his earlier

8 See <www.hreoc.gov.au> (last visited 28 April 2008).

9 Decison of 16 September 2005, reg no 33-927-05: <www.onh.se> (last visited 28 April 2008).

education provider had not adapted its education to his special needs. The Board of Appeals for Higher Education rejected this argument and upheld the provider's denial.

V. Enforcement and remedies

In this section I will compare two types of formal provisions that enable a person to file a complaint if he or she experiences discrimination in the Australian and Swedish anti-discrimination legislation. These provisions will be considered along with the competence of the supervisory bodies and courts to deal with such complaints. The provisions play a central role in the effectiveness of the discrimination prohibition.

Supervision

The national anti-discrimination legislation is supervised by governmental agencies both in Australia and in Sweden. Australia has established a single agency, the Human Rights and Equal Opportunity Commission (HREOC) (DDA 92, s 67; <www.hreoc.gov.au>), while Sweden has a set of special agencies each allocated to a ground of discrimination — in this case, the Disability Ombudsman is the relevant agency.[10] In Sweden, it has been debated whether the ombudsman should be subject to the Swedish Parliament instead of the Swedish government. The problem is that the government has a power to affect the ombudsman's priority area by determining conditions for its subsidies. According to the ombudsman, this would not be compatible with the UN's Paris Principles, which emphasise the importance of an independent mandate.[11]

10 See <www.ho.se> (last visited 28 April 2008) and the *Disability Ombudsman Act 1994* (1994:749). The following deserves to be noted. The institute of ombudsman is deeply rooted in Swedish law, with its origin in the early 1900s. The older Instrument of Government (the Swedish Constitution) established a parliamentary ombudsman. The function was to consider individual complaints and to supervise that all governmental agencies follow the law. The main idea was to safeguard the rule of law by preventing any judge or clerk from abusing his or her power (see <www.jo.se>, last visited 28 April 2008). Later, since the 1970s, there has been an expansive growth of thematic ombudsmen with a limited function, such as gender, ethnic, disability, sexual orientation and children. This system has at least inspired the European Union to have its own ombudsman, the European Ombudsman. This ombudsman is authorised to consider individual complaints against maladministration by the EU institutions: see <http://ombudsman.europa.eu/home/en/default.htm> (last visited 28 April 2008).

11 National Institutions for the Promotion and Protection of Human Rights, A/RES/48/134.

The Swedish ombudsman has some functions similar to those of the HREOC. Any individual who experiences disability discrimination can file a complaint before the relevant agency. In Sweden, there is an explicit provision that entitles the individual who applies for education or employment to request an education provider or employer to provide written credentials (details of qualifications) from those who are offered tertiary education or employment. The purpose is to facilitate the task of the applicant in assessing whether there has been a discriminatory action or not. If the provider or employer refuses to cooperate with the applicant, the applicant can contact the ombudsman for assistance. Like the HREOC, the ombudsman is authorised to require that the respondent (such as an education provider or employer) provide the necessary documents and attend meetings. If they refuse, the ombudsman is, like the HREOC, authorised to impose a fine. The imposition can be challenged before a government board against discrimination. The goal of the meetings is to try to reach a confidential conciliation (similar to the mediation that courts often arrange prior to a hearing in both Australia and Sweden). If this does not eventuate, then the ombudsman will assess whether it is willing to assist the complainant before the court and tribunals. If so, then the complainant does not need to worry about legal costs. However, this opportunity is not available for complainants in Australia. This is because HREOC must be objective to be able to give opinions on whether the respondent has discriminated or not — the so-called 'termination of notice'. If a complainant needs legal advice, he or she can address it to any state or territorial anti-discrimination centre, such as the NSW Disability Discrimination Legal Centre in Sydney.

To reduce the risk of future complaints, HREOC has an authorisation to grant exemptions from the prohibition of discrimination and to initiate public investigations. This authorisation is an important preventive measure which the Disability Ombudsman does not have. Instead, the ombudsman can only issue non-legally binding recommendations to facilitate application of the discrimination prohibition and active measures.

Access to court

The Australian and Swedish anti-discrimination legislation regulates access to the courts. In Australia, the complainant cannot file an action in the courts unless he or she has received a notice of termination from HREOC. An application must be made within 28 days of the date of that notice, unless the complainant has a good reason for the delay. In this context, HREOC only considers complaints lodged within 12 months of the alleged discriminatory action. Such a notice is not necessary in Sweden. The Swedish legislation states that there is a limitation period of two years from the alleged discriminatory action, with some exceptions in the context of

employment. This period is not affected by the fact that an individual first contacts the ombudsman. The government has proposed that the period can be extended under certain circumstances if the ombudsman needs more time to investigate the complaint.

In Australia there are two federal courts where the complainant can lodge a claim: the Federal Magistrates Court[12] and the Federal Court of Australia.[13] The former deals with less complicated issues and is less costly than the latter. If the complainant is not satisfied with the judgment, he or she can appeal it to the High Court. In Sweden, the picture is more complicated. There is a set of courts and governmental agencies, depending on which type of discrimination is at issue. These include with regard to the school (the Board of Appeal for Education),[14] tertiary education (the Board of Appeals for Higher Education),[15] employment (the Labour Court)[16] and diverse questions including damage (General Court).[17] This system is the result of the view that issues of discrimination should be integrated with substantive issues in a particular area, so-called mainstreaming. However, this is problematic in the sense that there is no unified practice in relation to discrimination and judges do not gain particular experience if they are not focusing on this issue. Some countries have a particular tribunal within discrimination, such as Canada, Ireland and New Zealand (for example, the New Zealand Human Rights Review Tribunal).

The complainant bears the burden of proof in both countries. However, the standard of proof differs in each country. The Australian anti-discrimination legislation is based on the balance of probabilities. An applicant must convince a court or tribunal that it is more likely than not that discriminatory action has occurred. In Sweden, there is a relaxation of evidentiary standards. This means that if a person establishes facts from which it may be presumed that there has been discrimination, it shall be

12 See <www.fmc.gov.au> (last visited 28 April 2008).

13 See <www.fedcourt.gov.au> (last visited 28 April 2008).

14 See <www.overklagandenamnden.se> (last visited 28 April 2008).

15 See <www.onh.se> (last visited 28 April 2008). The European Court of Justice has found that this Board of Appeals is a court-like instance. A judge is a chair and other members are representatives from the academic world. However, the board does not apply general administrative procedural rules, but has its own procedure: see *Abrahamsson and Andersson v Fogelqvist*, 2000.

16 See <www.arbetsdomstolen.se> (last visited 28 April 2008).

17 See <www.dom.se> (last visited 28 April 2008).

for the respondent to prove that this is not the case. This provision is a result of the Swedish implementation of the EU's directives on equal treatment. Both Australian and Swedish courts and tribunals are authorised to consider certain discriminatory issues and to order various remedies, including an award of damages and invalidation (declaring discriminatory contracts void).

Finally, Australia and Sweden have different rules on legal costs. Under Australian law, the losing party usually pays the legal costs of the winning party or party-to-party costs. Swedish law provides that a court may order that the losing party not be required to pay the legal costs of the winning party, provided that he or she has reasons for the complaint. The objective is to facilitate persons to file a complaint where the issues are not clear. Irrespective of this difference, in both Australia and Sweden most disabled people are not ready to take the risk for fear of losing legal expenses. In this context, it can be stressed that at least one Australian state (New South Wales) provides access to an administrative tribunal free of charge.

VI. Some concluding remarks

As shown in the introductory section, disability discrimination protection is recognised as a human right that the UN safeguards. Although Australia and Sweden are both active member states of this organisation and are obligated to combat disability discrimination and to a certain degree promote equal opportunities for persons with disabilities, the survey of their legislative measures shows that they have somewhat different ambitions in dealing with disability discrimination issues. Australia has some benefits, such as a wide concept of disability; a broad substantial scope; a relatively simple court system; and disability standards regarding somewhat developed case law. Sweden has its own benefits, such as a constitutional Bill of Rights including discrimination prohibition; no list of exceptions from the discrimination prohibition; legally binding active measures; and more generous procedural provisions, such as limitation, burden of proof and ombudsman's representative in court proceedings.

However, if we relate these legislative measures to practice, the comparison shows that the effects of national anti-discrimination legislation are somewhat similar in spite of their differences. One is that the number of students with disabilities has increased in both Australia and Sweden. Another is that accessibility of new buildings and public transport has recently been improved in both these countries. However, the legislation has not had a positive effect on the employment of persons with disabilities in the two countries. This problem can to a certain degree be explained by the fact that the legislation does not oblige an

employer to appoint an applicant with a disability, but merely to pay damages if discrimination is proved. In the author's opinion, this is a serious problem, since access to employment is a precondition to give disabled people opportunities to advance in their work life. The problem can be illustrated by my personal experience. I have successfully obtained a law degree and am qualified to apply for a legal position. However, I am unable to find a job at any university, court or law firm because employers assess that my need for a reasonable accommodation would constitute significantly financial and administrative difficulties for them. Expenses for proofreading and sign language interpreting are very costly. Without a minimum of work experience, it is impossible for me to advance to higher employment positions, such as professor, judge and barrister/solicitor. It would be a waste of tax money if academically educated persons with disabilities were forced to be dependent on government funding, such as a disability pension, to be able to make their livings. Therefore, I argue that the anti-discrimination legislation should be revised so that it obliges an employer to hire an applicant with a disability, provided that he or she has sufficient qualifications for the desired position. It is not easy, since both Australian and Swedish policymakers are not ready to make additional measures to limit the employer's basic right to choose employees.

Another problem is that many existing buildings and some goods and services remain inaccessible. This problem is natural because it requires a long procedure until all areas of society will be accessible, due to different factors such as budget, technology and public awareness. However, if these countries do not prioritise this issue, there is a risk that they will violate the CRPD. This convention prescribes that the member states are required to take measures to the maximum of their available resources to promote full participation and equality for all persons, irrespective of disability (CRPD, Art 2.2). ●

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