(2016) 18 *Flinders Law Journal*

ADDRESSING ABLEISM IN WORKPLACE POLICIES AND PRACTICES: THE CASE FOR DISABILITY STANDARDS IN EMPLOYMENT

PENELOPE S SCOTT[†]

I INTRODUCTION

In Australia, the issue of disability in the workplace is on the policy agenda. The National Disability Strategy (2010-2020) sets out a broad policy framework for improving the lives of persons with disabilities in a range of areas including employment.[1] A priority of the strategy is to increase access to jobs to ensure economic security for persons with disabilities.[2] Anti-discrimination laws were previously introduced to ensure people with disabilities fair access to jobs,[3] but these laws have been criticised for failing to address systemic discrimination entrenched in workplace policies and practices.[4] Official statistics indicate there is a significant and concerning difference in labour force participation rates between people with

† BA, LLB (Hons), GDLP, candidate in the Masters of Employment Law, Melbourne Law School. The author would like to thank Professor Beth Gaze and Dr Susannah Sage-Jacobson for their comments on earlier drafts. Correspondence should be directed towards p.scott@student.unimelb.edu.au.

1 Council of Australian Governments, *National Disability Strategy* (2010-2020) 22.

2 Ibid 42.

3 The *Disability Discrimination Act 1992* (Cth) was introduced to 'eliminate the discrimination which prevents fair access for people with disabilities to jobs …': Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) [8].

4 See, eg, Dominique Allen, 'Remedying Discrimination: the Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83.

disabilities and those without disabilities.[5] Part of the difficulty is that the *Disability Discrimination Act 1992* (Cth) (DDA) enshrines the high level principle of non-discrimination without providing specific guidance as to the obligations of employers. A more standardised approach could help address ableism in workplace policies and practices by ensuring people know their legal rights and responsibilities.

The development of minimum standards pursuant to s 31 of the DDA is one possible measure to address the labour market disadvantage suffered by people with disabilities. The power to develop disability employment standards has been present in the Act since 1992 but has never been exercised. The Australian Human Rights Commission (AHRC) prepared draft employment standards after consulting with industry, people with disabilities and governments from 1994 to 1998. The cited reason for the standards not proceeding towards authorisation was that 'consensus for adoption of regulatory standards in this area is lacking'.[6] In 2016 the issue is heating up again as the AHRC recommended in a recent report that the Australian Government consult with individuals, employers and peak bodies on the merits of developing disability employment standards.[7] International comparisons highlight the argument that a stronger standards-based approach is needed to address ableism[8] in workplace policies and practices. The United Kingdom is more advanced on the path of disability employment standards than Australia as it has established a more detailed and comprehensive legal compliance regime. Unlike Australia, the United Kingdom has been actively

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5 Australian Bureau of Statistics, *Australian Social Trends: Disability and Work* (2012) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40March+Quarter+2012#lfp>.

6 Australian Human Rights Commission, *Disability Standards and Guidelines* <https://www.humanrights.gov.au/our-work/disability-rights/disability-standards-and-guidelines>.

7 Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with a Disability* (Australian Human Rights Commission, 2016) 340.

8 Paul Harpur, Sexism and Racism. Why not ableism? Calling for a cultural shift in the approach to disability discrimination' (2009) 34(3) *Alternative Law Journal* 163.

working towards measures to improve the employment prospects of persons with disabilities.[9]

This paper is divided into three parts. Part II of this paper begins by defining the concept of 'standards' pursuant to legal theory to contextualise discussion about legal norms in the context of anti-discrimination law. Part III discusses the poor employment prospects of people with disabilities in the labour market in the context of ableism and the pervasive myths about people with disabilities. The legal framework governing disability discrimination in employment at the federal level is then described, including the power to issue disability employment standards, in the context of the human rights of people with disabilities. Part IV then examines the increasingly standards-based approach taken by the United Kingdom to disability discrimination regulation providing an overview of the *Equality Act 2010* (UK) and the *UK Employment Statutory Code of Practice*. The examples of two possible disability employment standards, the prohibition on pre-work health questions and an entitlement to paid or unpaid disability leave, are then analysed as examples of where the UK has lessons for Australia in practical measures to improve the position of workers with a disability. The term 'persons with disabilities' is used with preference to 'disabled persons' in this paper due to the rise of people-first language[10] noting there is currently a divide in the academic community.[11] Social model scholars argue 'disabled people' should publicly embrace their identity,[12] while rights

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9 Australia is significantly behind the United Kingdom, which was ranked number 7 out of the 35 Organisation for Economic Cooperation and Development countries: Organisation for Economic Cooperation and Development, *Sickness, Disability and Work: Breaking the Barriers — A synthesis of findings across OECD countries* (Organisation for Economic Cooperation and Development, 2010) 51.

10 People with Disability, *A Guide to Reporting on disability* (no date).

11 See generally Irving Kenneth Zola, 'Self, identity and the naming question: Reflections on the language of disability' (1993) 36(2) *Social Science & Medicine* 167; Romel W Mackelprang, 'Disability Controversies: Past, Present, and Future' (2010) 9 (2-3) *Journal of Social Work in Disability & Rehabilitation* 87.

12 Nick Watson, 'Well, I Know this is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and disability' (2002) 17(5) *Disability & Society* 509, 524-5.

scholars argue the humanity of persons with a disability should be emphasised.[13]

II STANDARDS-BASED APPROACH TO THE REGULATION OF DISABILITY DISCRIMINATION

Before launching into a discussion of the regulation of disability discrimination, the legal concept of a standard should be defined. This is best done with reference to the concepts of rules and principles in Australian law. In the context of regulation in Australia, principles are drafted at a high level of generality, apply to a diverse range of circumstances, and express the reason or purpose behind the rule.[14] Principles express standards of behaviour (eg 'skill, care and diligence') and contain qualitative or evaluative terms (eg 'fairness').[15] In contrast, rules are prescriptive about the actions of a subject in a factual scenario.[16] Rules are a legal construct 'attaching a definite legal consequence to a definite detailed state of fact'.[17] Rules can be negative or positive in nature depending on whether conduct is required or prohibited (ie do X when Y happens). Standards, on the other hand, allow for some form of discretion in relation to conduct and context. They command the achievement of a value, goal, or outcome without specifying the required action undertaken to achieve it.[18]

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13 Gabi Mkhize, 'Problematising rhetorical representations of individuals with disability — disabled or living with disability?' (2015) 29(2) *Agenda* 133, 138.

14 Julia Black, Martyn Hopper and Christa Band, 'Making a success of principles-based regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 192.

15 Ibid.

16 John Braithwaite and Valerie Braithwaite, 'The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation' (1995) 4(3) *Social Legal Studies* 307, 308.

17 Julia Black, '"Which Arrow?" Rule type and regulatory policy' (1995) *Public Law* 95, 96.

18 Colin Scott, 'Standard-setting in Regulatory Regimes' (Working Paper No 7, University College, 2009) 2.

The line between rules and standards can blur depending on the type of regulatory standard. Specification standards, for example, focus on prevention by controlling the processes that give rise to a factual situation or outcome.[19] Standards specifying the actions required to achieve a goal may take on the character of a rule. In recent times, technical standards such as this have become important sub-sets of larger groups of outcome-based standards.[20] Accordingly in this broad sense, standards can be the norms, goals and rules around which a regulatory regime is organised either as primary or delegated legislation.[21]

In this paper, taking a standards-based approach means the provision of guidance to persons subject to legislation, by being prescriptive as to the actions that should be taken to uphold the value, goal or outcome. The primary focus of this paper is demonstrating that the general principles under anti-discrimination legislation need to be supported by detailed guidance as to the practical measures that need to be taken in relation to workers with a disability.

III DISABILITY DISCRIMINATION AND THE WORKPLACE IN AUSTRALIA

The employment prospects of people with disabilities in the Australian labour market are demonstrably poor, and are linked to stereotypes and assumptions about their ability as workers.

A *The Reality of Disability Employment in Australia*

By any objective measure, people with disabilities are significantly disadvantaged in the labour market compared to people without disabilities. Statistics from the Australian Bureau of Statistics (ABS)

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[19] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2011) 297.

[20] Scott, above n 18, 2.

[21] Ibid 1.

and other official sources provide evidence that the situation of people with disabilities in relation to employment is not improving. The labour force participation rate for people with disabilities in Australia was 54 percent in 2009 compared to 83 percent of the rest of the population.[22] The rate has remained relatively steady for about 20 years in Australia, although the participation of persons without a disability increased from 77 percent to 83 percent in the same time period.[23] The participation rate is lower when disability is combined with other indicators of disadvantage, such as age, sex, or race.[24] Employment of people with disabilities in the public sector is particularly poor, despite strategies aimed at making government workers reflect the community they serve.[25] Rates of employment in the Australian Public Service have steadily declined from 5 percent in 1999 to 2.9 percent in 2013.[26] This is not reflective of broader society considering 2.2 million Australians, almost 20 percent of the

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22 Australian Bureau of Statistics, above n 5.

23 Ibid.

24 Persons aged 55-64 years are less likely to participate than other age groups (40 percent), as are women with disabilities (49 percent) compared to their male counterparts (60 percent): Australian Bureau of Statistics, *Australian Social Trends: Disability and Work* (2012) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40March+Quarter+2012#lfp>. The employment rate for Indigenous persons with disabilities (13 percent) is significantly lower for Indigenous persons than those without disabilities (51 percent): Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander people with disability: Wellbeing, participation and support* (Australian Institute of Health and Welfare, 2011) 4.

25 See, eg, New South Wales Government, *NSW Public Sector Workforce Strategy 2008-2012* (New South Wales Government, 2008) 11.

26 Australian Public Service Commission, *State of the Service Report, State of the Service Series 2011-12* (Australian Public Service Commission, 2012) 137. Similar figures are seen at the state and territory level — Vic: 4 percent, NSW: 3.8 percent, Qld: 3.8 percent, WA: 2.6 percent. Victorian Public Service Commission, *Profile of the Victorian Public Sector Workforce at June 2013* (2013) <http://www.ssa.vic.gov.au/images/stories/product_files/FactSheet05.pdf>; NSW Public Service Commission, *How it is. State of the NSW Public Sector Report 2012* (NSW Public Service Commission, 2012) 32; Qld Public Service Commission, *Quick Facts* (2014) <http://www.psc.qld.gov.au/publications/workforce-statistics/assets/Quick-facts-edition-8-Mar-2014.pdf>; Public Sector Commission (Western Australia), *State of the Sector Report 2013* (Public Sector Commission (Western Australia), 2013) 84.

population, have a disability.[27] The key point to note is that labour force participation rates have not improved over time despite a range of policy and legislative initiatives. Despite being in force for over 20 years, the DDA has had a limited impact on disability discrimination in the workplace because negative and enduring social attitudes remain prevalent.

The employment prospects of people with disabilities across the western world and in Australia are linked to pervasive myths, assumptions, and stereotypes about them. Exclusion is systematic because these negative social attitudes are so powerful and entrenched.[28] There appears to be a common belief that people with disabilities cannot make a valuable contribution to the workforce.[29] Such widespread misconceptions have contributed to employer concerns about the possibility of increased conflict in the workplace between employees.[30] But evidence suggests hiring people with disabilities may result in improved staff morale, customer relations, and corporate image.[31] A related concern is that people with disabilities are more likely to be absent from work,[32] research has shown however that attendance of workers with a disability is better if not the same as their counterparts.[33] There is also a perception that the quality of work performance of people with disabilities is inferior,[34]

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27 Australian Bureau of Statistics, *Disability, Australia: Disability Prevalence* (2009) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4446.0main+features42009>.

28 National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia – National Disability Strategy Consultation Report* (Australian Government, 2009) 11-12.

29 Ibid.

30 Human Rights and Equal Opportunity Commission, *People with disability in the open workplace: Interim report of the national inquiry into employment and disability* (2005) <https://www.humanrights.gov.au/publications/national-inquiry-employment-and-disability-interim-report-chapter-2#_Toc111979297>.

31 Joseph Graffam et al, 'Employer benefits and costs of employing a person with a disability' (2002) 17(4) *Journal of Vocational Rehabilitation* 251, 257.

32 Human Rights and Equal Opportunity Commission, above n 30.

33 Joseph Graffam et al, above n 31, 256; Stephen M Crow, 'Excessive Absenteeism and the Disabilities Act' (1993) 48(1) *Arbitration Journal* 56, 66.

34 National People with Disabilities and Carer Council, above n 28, 11.

which is inconsistent with evidence they meet or exceed standards in terms of accuracy and quality of work.[35]

Employers also express concerns about the added expense of hiring people with disabilities. There is a perception that people with disabilities require costly workplace adjustments.[36] According to the ABS however, less than half of people with disabilities with moderate activity limitations require minor adjustments (45 percent),[37] while only a fifth with core activity limitations require significant supports (22 percent).[38] Numerous studies have found that accommodations, such as aids and devices, are usually reasonably priced and not prohibitive.[39] Other than the cost of reasonable adjustments, employers are concerned about the risk of workers' compensation claims and higher insurance premiums from workers with a disability.[40] There is no evidence however that people with disabilities are more likely to sustain injuries or lodge claims.[41] On the contrary, the research indicates there is no significant difference between people with disabilities and those without.[42] With such a gap between perception and reality in relation to employees with a disability, the attitudes and practices of employers need to change. The law has a role to play to effect this change.

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35 Joseph Graffam et al, above n 31, 254; Brigida Hernandez and Katherine McDonald, Exploring the Costs and Benefits of Workers with Disabilities' (2010) 76(3) *Journal of Rehabilitation* 15, 21.

36 Human Rights and Equal Opportunity Commission, above n 30.

37 Australian Bureau of Statistics, *Disability, Ageing and Carers; Summary of Findings* (1998) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimary mainfeatures/FC0848D8195F79F0CA256F0F007B1094?opendocument>.

38 Ibid.

39 Joseph Graffam et al, above n 31, 256; Helen A Schartz, D J Hendricks and Peter Blanck, 'Workplace accommodations: Evidence based outcomes' (2006) *Work* 345; Darlene D Unger, 'Workplace Supports: A View From Employers Who Have Hired Supported Employees' (1999) 14(3) *Focus on Autism and other Developmental Disabilities* 179.

40 Human Rights and Equal Opportunity Commission, above n 30.

41 Ibid.

42 Joseph Graffam et al, above n 31, 254.

B *Legislative Prohibition on Disability Discrimination in the Workplace*

The DDA makes it unlawful for employers to discriminate against people with disabilities. When the DDA was introduced in 1992, it was recognised that people with disabilities faced a number of barriers, including employer and co-worker attitudes, which prevented fair access to jobs.[43] The aim of the reform was to help people with disabilities overcome social and economic disadvantage.[44] The stated objects of the Act are to eliminate discrimination against people with disabilities 'as far as possible' and to ensure that they have the same rights to equality 'as far as practicable'.[45] The DDA prohibits disability discrimination in various areas of public life, including employment.[46] It is unlawful for employers to discriminate against employees in recruitment arrangements, offers of employment and terms of employment.[47] It is also unlawful for employers to dismiss employees or withhold opportunities such as for example promotions, transfers, and training on the basis of disability,[48] to limit access to benefits or to impose other kinds of detriment.[49]

Indirect discrimination is defined under s 6(1) of the DDA as disadvantage incurred by a person with a disability due to their inability to comply with a 'requirement or condition'.[50] As is relevant here, it is aimed at addressing systemic discrimination found in workplace policies and practices that unfairly disadvantage people with a disability.[51] The failure to make reasonable adjustments under s 6(2) constitutes discrimination if considered to be 'unreasonable' in the 'circumstances of the case'.[52] The court balances the reasons for

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43 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750 (Brian Howe).
44 Ibid 2751 (Brian Howe).
45 *Disability Discrimination Act 1992* (Cth) ss 3(a)-(b).
46 Ibid pt 2, div 1.
47 Ibid ss 15(1)(a)-(c).
48 Ibid ss 15(2)(b)-(c).
49 Ibid ss 15(2)(b), (d).
50 Ibid ss 6(1)(a)-(c).
51 Neil Rees, Katherine Lindsay and Simon Rice, *Australian anti-discrimination law: Text, Cases and Materials* (The Federation Press, 2008) [1.2.5].
52 *Disability Discrimination Act 1992* (Cth) ss 6(2)(a)-(e), (3).

the condition or requirement against the nature and extent of the discriminatory effect on people with disabilities.[53] Employers do not have to comply with the duty if they would suffer from an 'unjustifiable hardship' depending on various factors including the nature of the detriment, effect of the disability, relevant action plans, estimated amount of expenditure, and availability of financial assistance.[54] A complaint can be lodged with the AHRC alleging unlawful discrimination.[55] The AHRC can inquire into the complaint and attempt to undertake conciliation with the parties to resolve the complaint.[56] If conciliation fails,[57] the complainant can then make an application to the Federal Court.[58] The regulatory approach to discrimination in Australia has been criticised because employers are not required to take preventative or positive measures.[59]

The DDA was designed to facilitate equal opportunities for people, but this aim has not been realised.[60] Most recently, the AHRC found disability discrimination to be 'ongoing and systemic'.[61] The DDA relies heavily on amorphous principles like equality and non-discrimination but it is far from clear what these concepts require in set circumstances. Even the concept of 'reasonable adjustments' leaves doubt as to which measures should be considered reasonable in practice. These legal principles are stated at a very high level of generality. The advantage is that they are sufficiently flexible to cover a broad range of factual scenarios.[62] But this has resulted in a lack of clarity for all stakeholders including employers and people with disabilities. Standards are needed to support the operation of the high-

53 *Catholic Education Office v Clarke* (2004) 138 FCR 121, [115].
54 *Disability Discrimination Act 1992* (Cth) s 4 ("reasonable adjustment"), s 11.
55 *Australian Human Rights Commission Act 1986* (Cth) ss 46P (1), (2).
56 Ibid s 46PF(1).
57 Ibid ss 46PH(1)(a)-(i).
58 Ibid s 46PO(1).
59 Belinda Smith, 'It's about time — For a new regulatory approach to equality' [2008] 36(2) *Federal Law Review* 117, 119.
60 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Productivity Commission, 2004) 374.
61 Australian Human Rights Commission, above n 7, 12.
62 Glenda Beecher, 'Disability Standards: The Challenge of Achieving Compliance With the Disability Discrimination Act' (2005) 11(1) *Australian Journal of Human Rights* 5.

level principles of non-discrimination in order to set the processes employers need to follow. This could help ensure that discrimination does not occur in the first place. If minimum standards were set, the burden would then fall on employers to rectify potentially discriminatory practices vitiating the need to make complaints.[63]

Under the DDA, disability employment standards can be promulgated as regulations. Pursuant to s 31 of the DDA, the Minister has the discretion to formulate standards by legislative instrument known as 'disability standards'. The aim of this measure was to establish minimum standards to overcome systemic discrimination. Regulations can be developed in relation to any area under the DDA in which it is unlawful for a person to discriminate against another on the basis of disability[64] including education,[65] access to premises,[66] and employment.[67] There are disability standards in relation to the areas of education, transport and physical access but there are no disability employment standards.[68] Disability standards can deal with reasonable adjustments, unjustifiable hardship, exemptions, and strategies to prevent harassment or victimisation of people with disabilities.[69] It is against the law for employers to contravene disability standards.[70] If employers comply with disability standards, they cannot be found liable for discrimination.[71]

Employers are unsure of their obligations to employees with a disability under the DDA because the DDA does not prescribe the kind of actions they should undertake to ensure non-discrimination in the

63 Communities and Local Government (UK), *Discrimination Law Review, A framework for fairness: Proposals for a Single Equality Bill in Britain* (Department for Communities and Local Government, 2007) 122.
64 *Disability Discrimination Act 1992* (Cth) s 31(1).
65 Ibid s 22.
66 Ibid s 23.
67 Ibid pt 2.
68 *Disability Standards for Education 2005* (Cth); *Disability (Access to Premises-Buildings) Standards 2010* (Cth); *Disability Standards for Accessible Public Transport 2002* (Cth).
69 *Disability Discrimination Act 1992* (Cth) ss 31(1)-(2)(a)(i)-(iv).
70 Ibid s 32.
71 Ibid s 34.

workplace.[72] Arguably therefore, the open-ended nature of the DDA has limited its effectiveness in protecting people with disabilities.[73] If there were prescribed standards to follow, it is possible that employers would understand their legal obligations and responsibilities better. Rules-based standards may also minimise the incidence of employers avoiding the issue, as the burden would fall on employers to proactively comply with standards instead of relying on people with disabilities to raise complaints.

Australian law and practice should be consistent with the principles and provisions of the *Convention of the Rights of Persons with Disabilities*.[74] Australia has been a signatory to the treaty since 2012 the aim of which is to ensure the full participation of people with disabilities in society.[75] Under art 4(b), States are required to modify or abolish laws and practices that constitute discrimination against people with disabilities.[76] Conversely, people with disabilities have a positive right to work on an equal basis with others in an environment that is inclusive and accessible under art 27.[77] Consistent with the premise of universal design, workplace norms and business practices should accommodate the needs and aspirations of workers with disabilities.[78] The difficulty is that there is a significant discrepancy between the rights set out in the convention and 'lived experience of many people with disabilities' in Australia.[79] Given the implementation gap, efforts to bring disability discrimination regulation into full conformity with the convention should be strengthened. If disability employment standards are more effective in securing compliance with the principle of non-discrimination, they could help narrow the gap between current poor practice and

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72 Productivity Commission, above n 60, 405.

73 Australian Human Rights Commission, *Issues paper on disability standards* (Australian Human Rights Commission, 1993). See Executive Summary.

74 *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

75 Ibid art 1.

76 Ibid art 4(b).

77 Ibid art 27(1).

78 See generally Jesse S Zolna et al, 'Review of accommodation strategies in the workplace for persons with mobility and dexterity impairments: Application to criteria for universal design' (2007) 19(4) *Technology and Disability* 189.

79 National People with Disabilities and Carer Council, above n 28, 14.

international expectations. It is true that the convention does not specifically require benchmarks setting minimum standards, but they could be the means or vehicle through which the rights of people with disabilities are better secured.

C *The Perceived Risks of Disability Employment Standards in Australia*

Employers have argued that it is impossible to develop disability employment standards because of the broad range of disabilities and differences between individuals with disability in the community.[80] It is true that the degree and type of disability (including physical, intellectual, sensory, and psychiatric) varies with individual circumstances[81] however this does not mean that it is impossible to articulate disability employment standards. One particular disability employment standard does not have to meet the needs of all people with disabilities.[82] Standards can be designed to meet the needs of sub-groups within the disability community in the same way that they may be designed to be adapted for different workplaces. With enough research and community consultation, disability employment standards can be readily developed to apply to most Australian workplaces.

Employers believe that the costs of implementing disability employment standards would be too high for their business to sustain. It is true employers may incur additional costs if required to undertake an activity or provide an entitlement for a worker with a disability. It is possible that employers may experience higher costs overall if they are more likely to comply with the requirement of non-discrimination with clearly defined standards in place.[83] As Beecher points out, many employers assume the risk of a disability discrimination complaint

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80 Productivity Commission, above n 60, 418 quoting submissions by the Australian Industry Group.

81 Ibid 30.

82 National Coalition for the Development of Disability Standards, *WOE or GO! A Discussion Paper on the Disability Discrimination Standards* (National Coalition for the Development of Disability Standards, 1994) 15.

83 Glenda Beecher, above n 62.

because they are uncertain as to the nature of their obligations.[84] If calculable, the costs of clearly defined standards may actually be more predictable and therefore sustainable to business. Any increased costs sustained by employers may be offset by this greater certainty in addition to reduced litigation and associated transaction costs.[85]

Due to the perception of greater costs to business, a real risk associated with the development and introduction of disability standards in employment is that the process would be unduly politicised by interest groups. There is a possibility employers would contest the development of effective standards to 'ensure they have to spend the least possible money'.[86] The National Coalition for the Development of Disability Standards has observed 'it would be foolish to believe the Standards will not bring these vested interests to the fore'.[87] For this reason that one commentator predicted ten years ago that it was unlikely they would 'ever see the light of day'.[88] Due to conflicting interests, a significant number of people with a disability would need to be involved to determine the 'minimum level acceptable to the community'[89] for each disability employment standard introduced pending the use of appropriate drafting techniques.

There is also a risk that the consultation process involved in developing disability employment standards in Australia would result in undue delay and again lose momentum, like it did in the 1990s. The AHRC has adopted a consensus approach requiring agreement on the terms of disability standards from all interested parties. When the DDA was introduced, there was a perception disability standards required careful and lengthy consideration because of their uniqueness and potential impact.[90] Beecher has cogently critiqued the reliance on consensus by the AHRC when the delays in developing disability

84 Ibid.
85 Productivity Commission, above n 60, 141.
86 National Coalition for the Development of Disability Standards, above n 82, 15.
87 Ibid.
88 Dougie Herd, 'We'll do it ourselves' (2004) 6(1) *Access* 3, 3.
89 National Coalition for the Development of Disability Standards, above n 82, 12.
90 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 229 (Gary Thomas Johns).

employment standards have been so substantial.[91] The consensus approach is probably an inappropriate basis for such measures given the inevitability of the conflict between capital and labour.[92] The Productivity Commission has commented, in criticism of the AHRC consultation process in relation to the DDA that consultation is 'not an end in itself'.[93] The Commonwealth Government may therefore need to resolve the deadlock by taking decisive leadership action as has been the case with the introduction of disability education standards.[94]

In addition to this concern, people with disabilities have expressed concerns about the possibility that disability employment standards in the workplace may prove meaningless and unhelpful unless they are set out in practical terms.[95] This view is based on the fact that the draft disability employment standards of the 1990s focused on the broad principles outlined in the DDA without providing specific and detailed instruction as to the actual practical measures and explanations as to the obligations of employers.[96] This risk would need to be managed by releasing additional guidance material additional under s 67 of the DDA. The AHRC could prepare and publish 'guidelines' for the avoidance of discrimination on the basis of disability.[97] Guidelines are not legally binding but judicial bodies can then consider them in legal proceedings under the DDA. The AHRC has not thus far released any guidelines on the employment of people with disabilities.

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91 Glenda Beecher, above n 62.

92 Paul Davies and Mark Freeland, *Kahn-Freund's Labour and the Law* (Stevens and Son Ltd, 3rd ed, 1983) 28.

93 Productivity Commission, above n 60, 422.

94 Elizabeth Dickson, 'Disability standards for education and reasonable adjustment in the tertiary education sector' (2006) 12(2) *Australia and New Zealand Journal of Law and Education* 25.

95 National Coalition for the Development of Disability Standards, above n 82, 12.

96 Australian Human Rights Commission, *Initial Draft: Disability Standards* (1995) <https://www.humanrights.gov.au/publications/initial-draft-disability-standards-employment>; Australian Human Rights Commission, *Revised draft DDA Disability Standards: Employment* <https://www.humanrights.gov.au/revised-draft-dda-disability-standards-employment>.

97 *Disability Discrimination Act 1992* (Cth) s 67(1)(k).

IV A COMPARISON BETWEEN AUSTRALIA AND THE UK THROUGH THE USE OF DISABILITY EMPLOYMENT STANDARDS

This paper will now compare the differences between Australia and the United Kingdom in relation to disability discrimination in employment by using the two specific examples of existing disability employment standards in the UK; those relating to pre-work health questions and the availability of disability leave. In order to better address systemic discrimination against people with a disability in the workplace, the United Kingdom has adopted a stronger standards-based approach to disability discrimination regulation. This approach has been underpinned by the *Equality Act 2010* (UK) and the *UK Employment Statutory Code of Practice***.**

A *United Kingdom: Standards-Based Approach to Disability Discrimination*

Both Australia and the United Kingdom have overarching legislation making disability discrimination unlawful and allow for the use of subordinate legislative instruments. The United Kingdom goes further than Australia however to regulate workplace disability discrimination under its *Equality Act 2010* (UK) and *UK Employment Statutory Code of Practice*. Like the DDA, the *Equality Act 2010* (UK) applies to the area of work as a sphere of public life[98] prohibiting discrimination in relation to offers of employment, terms of employment, opportunities for promotion, transfer and training, dismissal, and any other benefit or detriment.[99] In the United Kingdom however there is a specific test for disability discrimination and employers are specifically required to make reasonable adjustments for people with disabilities.[100] An employer can discriminate if they treat a person with a disability unfavourably because of something arising in consequence of their disability in a way that is not a proportionate means of achieving a

[98] *Equality Act* 2010 (UK) c 15, s 39(5).
[99] Ibid ss 39(1)-(2).
[100] Ibid s 39(5).

legitimate aim.[101] This proportionality test is recognises that people with disabilities sometimes need to be treated differently in order to be equal and applies a positive conception of equality. An equality duty is imposed on public authorities to eliminate discrimination and also to advance equality of opportunity.[102] The *Employment Statutory Code of Practice*,[103] introduced in 2010, contains important industrial relations protections for people with disabilities. In addition, specific statutory codes of practice are enacted pursuant to the *Equality Act 2010* (UK)[104] which are approved by the Secretary of State and laid before Parliament.[105] Unlike in Australia, codes of practice do not impose legal obligations but may be taken into account and considered in legal proceedings.[106]

Prior to the introduction of the *Equality Act* in 2010, the 2007 *Fairness and Freedom Review* (the Fairness Review) by the UK Equality and Human Rights Commission highlighted the fact that indirect disability discrimination in the community took a 'far subtler form' than other forms of discrimination in the workplace. The Fairness Review reported that it was not 'overt bias' against certain individuals but barriers more likely to affect a *kind* of person which was 'far harder to spot and much more difficult to prevent'.[107] The Fairness Review also noted concern about the role of organisational work and business culture insofar as 'the rules, culture and habits of a particular body could frustrate efforts to stamp out disadvantage'.[108] The *2007 Discrimination Law* review by the UK Department for

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[101] Ibid ss 15(1)(a)-(b).

[102] Ibid s 149(1).

[103] Equality and Human Rights Commission (UK), *Statutory Code of Practice Employment* (2010) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>.

[104] *Equality Act 2006* (UK) c 3, s 14(a) as amended by the *Equality Act 2010* (UK) c 15, s 211, sch 26.

[105] Equality and Human Rights Commission (UK), *Employment Statutory Code of Practice* (Equality and Human Rights Commission, 2011) [1.12]

[106] Ibid [1.13].

[107] United Kingdom Government, *The Equalities Review: Fairness and Freedom – The Final Report of the Equality Review* (United Kingdom Government, 2007) 63, 34.

[108] Ibid 35. See also, Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny*, Cm 4262 (The Stationery Office Ltd, 1999).

Communities and Local Government also recommended that the *Equality Act* be supplemented by Guidelines and Codes of Practice.[109] The Discrimination Law Review recommended clear common sense disability standards to ensure everyone's needs are better taken into account in a bid to simplify and harmonise discrimination law.[110] The Discrimination Law Review recognised that discrimination standards needed to be 'practically based, as clear as possible, as short as possible and tailored to different types of public authority...'.[111] Previously, in 2000 and in a similar vein, the Hepple Report recommended that standards needed to be 'clear consistent and easily intelligible' for a broad audience.[112]

An interesting example of where the United Kingdom has moved to develop disability employment standards is in the case of the introduction of a standard to restrict the use of pre-work health questions which can be a barrier to employment for people with disabilities. Another good case study is a disability employment standard which recommends that employers provide Disability Leave as a positive measure to help people with disabilities remain in employment and maintain their foothold in the labour market.[113]

B *Restrictions on the use of Pre-Work Health Questions by Employers*

A current disability employment standard in the United Kingdom that does not currently exist in Australia regulates employers to prohibit them asking health or medical questions of potential employees prior to employment. In both countries it has been a well-established practice for employers to request information about the health of

[109] Communities and Local Government (UK), above n 63, 26.
[110] Ibid 60.
[111] Ibid 104.
[112] Bob Hepple, *Equality: A New Framework — Report of the Independent review into the enforcement of UK anti-discrimination legislation* (Hart Publishing, 2000) [2.15].
[113] Equality and Human Rights Commission (UK), *Statutory Code of Practice Employment* (2010), 89 <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>.

potential job candidates during the recruitment stage before a job offer is made.[114] Employers have asked health-related questions during interviews, or later administer online or paper-based health questionnaires or application forms including medical histories. In some cases potential employees have even be required to undertake a physical examination to determine their fitness to undertake particular duties, whereby a safety specialist or medical professional will make a recommendation. In these cases employment may be offered unconditionally or conditionally, subject to the satisfactory completion of the medical examination.[115] In Australia the collection of such health information by employers is widely accepted by employees, in a context where potential employees believe they have very little power to refuse. The concern is however that employers may either knowingly or inadvertently use pre-work health questions to screen out people with disabilities resulting in otherwise qualified candidates being overlooked.[116] Two recent major Australian research reports into disability discrimination in employment, the 2009 *Shut Out* report[117] and the 2016 *Willing to Work* report, have identified pre-work health questions as a significant barrier to employment.[118]

1 *Purpose of Pre-Work Health Questions*

Employers have historically used health screening to attempt to determine whether applicants are physically and psychologically suited to the work being offered ('fit for work').[119] The prevailing view has been that this type of screening reduces the risk of injuries and accidents in the workplace, as well as minimising absenteeism and sick leave.[120] The origins of these assumptions appear in the laws of both the United Kingdom and Australia from the industrial revolution

[114] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) [29.3].

[115] Under s 22(6)(e) of the *Public Service Act 1999* (Cth), the engagement of an employee can be subject to a health clearance.

[116] National People with Disabilities and Carer Council, above n 28, 38.

[117] Ibid 14.

[118] Australian Human Rights Commission, above n 7, 172-5.

[119] Andrew See, 'Examining the legal implications of being fit for work' (Working Paper, Freehills, 2003) 1.

[120] Robert Guthrie and Jennifer Westaway, 'Emerging legal concerns with chronic diseases in the Australian workplace: Pre-employment medicals, functional capacity evaluations, workers' compensation and disability discrimination' (2009) 16 *Journal of Law and Medicine* 803, 806.

employers conducted compulsory medical examinations on their workers.[121] There is little evidence however that pre-work health questions are an effective tool for managing risks of modern employment.[122] A recent NHS review in the UK concluded that pre-work health questions were not a reliable predictor of injuries or sickness-related absence.[123] This review suggested that the process of pre-work health screening currently subjective depending on the applicant's willingness to disclose their private health information to their employer before a job is offered, with no standardisation as to whether medical professionals have significant discretion as to the recommendations they can make.[124] This review also found that for employers it is a time-consuming and costly process with only a small number of applicants rejected on health-related grounds.[125]

2 *Australian Law on Pre-Work Health Questions*

In Australia the ability of employers to obtain private health information about their employees has its roots in both common law and statute. Employers may arguably obtain health information pursuant to the general principles of contract law, or using their managerial prerogative.[126] Modern employment enterprise agreements may however place restrictions on the use of health questions by employers.[127] Employers may also be subject to specific statutory obligations to gather information about their employees if the industry is especially dangerous, such as the mining industry.[128] In these cases employers justify these types of requests on the basis that they need to establish whether the applicant's health condition may pose a danger to themselves or others under the specific job conditions. Under

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121 Ibid.

122 Joseph Pachman, 'Evidence base for pre-employment medical screening' (2009) 87 *Bulletin World Health Organisation* 529, 529.

123 Siân Williams and Dr Ira Madan, *A review of pre-employment health screening of NHS staff* (The Stationery Office Ltd, 2010) 25.

124 Ibid 5.

125 Ibid 4.

126 Richard Johnstone, 'Pre-employment health screening: The legal framework (1988) 1(2) *Australian Journal of Labour law* 115, 117.

127 *Metals and Engineering Workers Unions Western Australian Branch v East Perth Electrical Services* (1995) WAIRC 9.

128 See, eg, *Mines Inspection Act 1901* (NSW) s 18A. See also, *Explosive Act 1999* (Qld) s 33.

workplace occupational health and safety laws (OHS laws), employers have a duty of care to ensure the health and safety of its workers.[129] There is therefore often an unequal contest between the application of the principle of non-discrimination and OHS requirements by an employer because the OHS laws are far more detailed in their specific requirements and obligations. Employers are also acutely aware that they may also be sued for negligence if they fail to protect people with disabilities from injury in the workplace.[130]

In most States and Territories in Australia, there is no specific prohibition on pre-work health questions. Victoria is the only jurisdiction that prohibits employers from asking pre-work health questions orally or in writing. Under s 107 of the *Equal Opportunity Act 2010* (Vic) persons cannot request information that could be used to 'form the basis of discrimination' against an application. The broad scope of the exception is likely to explain why this prohibition has had a limited impact on business practice in Victoria. This is found in s 108 providing that the information can be requested if 'reasonably required' for a purpose that does not involve discrimination. Requests for information about a person's disability in order to provide reasonable adjustments are intended to fall within this section. In practice however this requirement may also easily be used as a guise for identifying whether a potential employee has a disability and then using this information to discriminate against them.

While employers are required to comply with anti-discrimination laws, it is unclear at law whether pre-work health questions are considered discriminatory. Employers are prohibited from directly or indirectly discriminating against people with disabilities under ss 5 and 6 of the DDA respectively. The AHRC has expressed the view pre-work health questions are a legitimate practice. It has stated:

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[129] See, eg, *Workplace Health and Safety Act 2011* (NSW) s 19(1). See generally Paul Harpur and Ben French, 'Is it safer without you?: Analysing the intersection between Work Health and Safety and Anti-Discrimination Laws' (2014) 30(1) J*ournal of Health, Safety and the Environment* 167.

[130] See, eg, *Paris v Stepney Borough Council* [1951] AC 367; *Haley v London Electricity Board* [1965] AC 778.

> Discussion, questions and examinations regarding a person's disability and its effects may be legitimate, necessary and desirable in many cases ... The Commission considers that discouraging, or unnecessarily restricting, discussion or inquiries regarding a person's disability in these or other legitimate work related respects would be damaging to effective equality of opportunity and thus would be contrary to the objects of the D.D.A. as well as presenting difficulties for employers. The Commission does not interpret the D.D.A. as having this effect. This does not mean, however, that every disability related inquiry should be accepted as permitted or desirable. Inappropriate questions or examinations in relation to disability may lead to, or actually constitute, discrimination.[131]

The position therefore appears to be that health-related questions are not inherently discriminatory but may constitute discrimination depending on the circumstances of the case.

In practice it is likely that the practice of asking pre-work health questions may disproportionately constitute a systemic form of discrimination acting as a barrier to the employment of people with disabilities. While on one hand the practice yields little concrete benefit to employers, the impact on people with disabilities is significant contributing to the 'enormous difficulties' they face obtaining employment.[132] A 2013 UK study by the Equality and Human Rights Commission found that pre-work health questions discouraged people with disabilities from applying for jobs, led them to look for jobs with less responsibility and stress, made them more wary of applying for jobs with an interview, and made them feel less confident in future interviews and assessments.[133]

There is no specific statutory duty on employees in Australia to disclose personal health information to their employers, but if they provide false information their employment may be terminated. Employees may then possibly bring an action for unfair dismissal on

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[131] Australian Human Rights Commission, *Employment and the Disability Discrimination Act Part 1* <https://www.humanrights.gov.au/employment-and-disability-discrimination-act-part-1#questions>.

[132] Richard Johnstone, above n 126, 117.

[133] Equality and Human Rights Commission (UK), *Use of pre-employment health questions by employers* (Research Report No 87, 2013) 74-5.

the basis the termination was harsh, unjust, or unreasonable[134] however the accepted position at law has been that employees can be dismissed if they actually answer the pre-work health questions falsely.[135] Prior to the enactment of the DDA, the reasoning for this was set out in the 1975 case of *Bottrill v James Hardie & Co Pty Ltd*,[136] where Stanley J stated:

> [T]here is no obligation on a workman to volunteer information to his prospective employer, but in my opinion, if a prospective employer requests information relative to the employment situation from a prospective employee with intent that the prospective employer will use such information to decide whether to employ the workman or not, then the employee runs the risk, if he gives false or misleading information to his prospective employer, that the employer in ascertaining that he has been deceived in a material manner pertinent to the work situation may well decide to dismiss the employee on this ground. I think it would require very exceptional circumstances which, in my opinion, do not exist in this case, before this court would judge a dismissal by the employer on this ground to be either harsh, unjust or unreasonable.[137]

Where people with disabilities seeking work do not disclose a medical condition to their employer they may also risk being refused compensation for workplace injuries, including aggravations of pre-existing conditions.[138] Some Australian workers' compensation schemes provide that employees are not entitled to compensation if they fail to disclose or answer questions about a medical condition by their employer in a false or misleading manner.[139] Notwithstanding, there are some cases where courts have recognised the difficulties faced in relation to people with disabilities obtaining workers' compensation. In the 2000 case of *Latham v Horan Pty Ltd*,[140] Bagnall AJ of the Compensation Court of New South Wales refused to draw an adverse inference against the complainant where a disability had

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134 *Fair Work Act 2009* (Cth) s 385(b).

135 See, eg, *Gehrig v McArthur River Mining Pty Ltd* (1997) EOC 92-872.

136 [1975] 42 SAIR 711.

137 Ibid 734.

138 See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5A(1)(c).

139 See generally *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 571B(1)-(2), 571C(1),(2)(b); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 41(1)-(2).

140 Matter No 30752 of 1999 (14 July 2000) as cited in Ben Fogarty, 'Do I tell? Disclosing disability in employment' 83 (2007) *Precedent* 22, 25.

not been disclosed to an employer. His Honour said that 'the court cannot condone inaccuracy in employment forms' but it recognised 'the realities in the labour market whereby workers fear that their prospects of obtaining further employment may be jeopardised'.[141] This would indicate there is some recognition of the difficulties people with disabilities face and that the courts in Australia may have changed their views somewhat since 1975.

3 *Pre-Work Health Questions in the UK*

As early as 2003, the Disability Rights Commission in the UK recommended that the type of pre-work health questions that may be directed to an applicant for employment be restricted to avoid questions that may lead to disability discrimination.[142] The *Equality Act 2010* (UK) introduced a prohibition on pre-work inquiries about disability and health. The Explanatory Notes for the Act noted the 'disincentive effect' of employers making health or disability-related questions that lead to them finding out about disabilities or health conditions in the potential employee.[143] The Disability Rights Taskforce in the UK had recommended that health questions prior to employment be permitted only in limited circumstances.[144]

Under s 60 of the *Equality Act 2010* (UK), a person to whom an application for work is made must not ask about a person's health before offering them work or including them in a pool of applicants.[145] Enquiries about a person's health including whether they have a disability before an offer of employment is made, either conditional or unconditional, are not permitted.[146] This covers any kind of work

[141] Ibid [8] as quoted in Ben Fogarty, 'Do I tell? Disclosing disability in employment' (2007) *Precedent* 22, 25.

[142] Disability Rights Commission (UK), *Disability Equality: Making it happen; First review of the Disability Discrimination Act 1995* (Disability Rights Commission, 2003).

[143] Explanatory Notes, Equality Bill 2010 (UK) [202].

[144] Disability Rights Taskforce, *From Exclusion to Inclusion: A Report of the Disability Rights Task Force on Civil Rights for Disabled People* (Disability Rights Taskforce, 1999) [12].

[145] *Equality Act 2010* (UK) ss 60(1)(a),(b).

[146] Ibid ss 60(10), (13).

including contract work, public appointments, and partnerships[147] and applies to employers and their agents, including HR personnel and occupational health practitioners.[148] The restriction would appear to encompass enquiries about an applicant's health directed towards an applicant, third party or previous employer. The formula is likely to cover indirect questions about absences from work due to ill health,[149] but it remains less clear whether questions about previous workers' compensation claims are captured.

In the UK an employer can only ask questions about an applicant's health to determine their suitability for the particular work or to determine if they are required to provide reasonable adjustments in relation to that process.[150] Employers can also ask health-related questions for the purposes of affirmative action or positive discrimination that is to assist groups of persons whose participation in an activity is disproportionately low.[151] The aim therefore must be in order to ascertain whether positive action should be taken during the recruitment phase to overcome or minimise the disadvantage suffered by people with disabilities.[152] For example, organisations participating in a guaranteed interview scheme may seek to assure all persons with disabilities an interview if they meet the minimum criteria.[153] Employers are also able to check whether an applicant has a disability if that is a specific requirement of the position.[154]

UK employers may also ask health-related questions to monitor diversity in relation to the range of persons applying for work with the organisation.[155] Employers may want to monitor the diversity

147 Ibid s 60(9).
148 Equality and Human Rights Commission (UK), above n 105, 126.
149 Karen Jackson, *Disability Discrimination: Law and Case Management* (Law Society, 2013) 80.
150 *Equality Act 2010* (UK) ss 60(6)(a), (12).
151 Ibid ss 158(1)-(2), 60(6)(d).
152 Ibid s 60(6)(e).
153 Carol Woodhams and Susan Corby, 'Then and Now: Disability Legislation and Employers' Practices in the UK' (2007) 45(3) *British Journal of Industrial Relations* 556, 559.
154 *Equality Act 2010* (UK) s 60(6)(e).
155 Ibid s 60(6)(c).

composition of their organisations to assess whether they need to implement diversity initiatives.[156] There is potential for abuse of this exemption however if the information is then used by an employer to identify people with disabilities in order to rule them out.[157] It is also arguable that this exemption is not necessary as employers could effectively monitor the diversity of the applicant pool by conducting an anonymous survey prior to an offer or making enquiries of applicants after an offer has been made. Employers may also ask pre-work health questions to establish whether applicants can carry out 'intrinsic' functions of the work after 'reasonable adjustments' have been made.[158] The *UK Employment Statutory Code of Practice* does indicate an expectation that this exception should be applied narrowly.[159]

Applicants may initiate legal proceedings for unlawful discrimination under s 60 of the *Equality Act 2010* (UK),[160] but it is notable that the complaints procedure has been little used in the United Kingdom to date. There are currently no reported cases on breaches of s 60 which suggests broader issues of enforcement of this provision may be an issue. The European Human Rights Commission also has jurisdiction under the Act to investigate and take enforcement action.[161]

Research into the impact of the *Equality Act 2010* (UK) on the use of pre-work health questions found that the use of pre-work health questions in small to medium sized organisations in the UK was still 'relatively commonplace',[162] but in large organisations s 60 has had a significant impact.[163] According to this research, only about 10 percent

[156] Government Accountability Office (US), *Diversity Management: Expert-identified leading practices and agency examples* (Government Accountability Office, 2005) 10.
[157] At Work Partnership, 'New research: removing disability discrimination at recruitment' (Press Release, December 2013) [11].
[158] *Equality Act 2010* (UK) ss 60(7), 60(6)(b).
[159] Equality and Human Rights Commission (UK), above n 105.
[160] *Equality Act 2010* (UK) ss 60(4), (11).
[161] Ibid s 60(2).
[162] Equality and Human Rights Commission (UK), above n 133, xii.
[163] At Work Partnership, above n 157, [1].

of employers are asking health related questions compared to over a third before the Act came into force.[164] The majority of employers have reportedly stopped using 'lengthy and complex health questionaries' prior to employment, but still require the information prior to commencement.[165] These results also reflect a significant reduction in opportunities for disability discrimination by employers and by implication, an improvement in the potential employment prospects of persons with disabilities in the UK.

C *Access to Disability Leave*

Another example of an important possible disability employment standard is the provision of access to disability leave for persons with a disability. The UK Royal National Institute for the Blind first developed the concept of 'disability leave' in the 1990s.[166] In the UK disability leave has been characterised as either paid or unpaid leave from work only for people with disabilities due to a temporary period of absence specifically for disability-related reasons.[167] Disability leave may include time for the purpose of assessment, treatment, therapy, recuperation, rehabilitation, and training.[168] Disability leave may be taken as individual days or hours over a period of time or longer blocks of time for a period of time.[169] It may therefore be used

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164 Ibid [2].

165 Ibid [3]-[4].

166 Gary L Albrecht, *Encyclopaedia of Disability: A history in primary source documents* (Sage Publications, vol 5, 2006) 461-2.

167 Disability leave does not provide ongoing income security after the employment relationship has ceased. For example, in *Fowler v London Borough of Waltham Forest* UKEAT/0116/06/DM the claimant had been absent from work for four years and there was no likelihood of him returning when his employment was terminated.

168 Trades Union Congress, *Sickness Absence and disability discrimination: A trade union negotiator's guide to the law and good practice* (Trades Union Congress, 2013) 7.

169 In *Pousson v British Telecommunications plc* [2005] 1 All ER 34 a call centre operator was reluctant to leave his desk to test his blood sugar levels and inject insulin because of complaints by his colleagues. A computer-based absence logging system was invoked against the claimant which resulted in him being placed on a performance plan putting him under pressure to achieve tighter call times. As a result, he had a serious hypoglycaemic attack which led to him sustaining a serious head injury.

to attend medical appointments, come to terms with a new diagnosis, or cope with treatment side effects.[170] It would not however cover absence due to illness not related to a person's disability unless there was some kind of close connection to their ongoing disability.[171] Depending on the circumstances, return to work type arrangements may also be implemented following periods of disability leave. This recognises that people with disabilities may only be able to return to work after a change in their condition if certain limitations or adjustments are put in place at the workplace to adapt to their changed circumstances. Workers following disability leave may require a staggered or phased return to work, building up their hours of work or commencing working on certain days only.[172] It also recognises that if the worker is unable to return to their original position following disability leave, they may need to be redeployed to a different position at work.[173]

Research shows that people with a disability in Australia are three times more likely to exit work than their counterparts[174] and that they are unlikely to return to work after the onset of a medical condition, or worsening of an existing condition.[175] These issues may explain why people with disabilities are more likely to engage in insecure work, which also has implications for the portability of long-service leave.[176] Due to foreseeing these kinds of issues relating to ongoing issues people with disabilities may also decide to retire early after they have

[170] Trades Union Congress, above n 168, 7.

[171] For example, in *Pousson v British Telecommunications plc* [2005] 1 All ER 34, the claimant had been absent from work a number of times because he had diabetes which rendered him more susceptible to viral infections and other illnesses.

[172] Trade Union Congress, above n 168, 12.

[173] Ibid.

[174] John Rigg, *Labour Market Disadvantage amongst Disabled People: A Longitudinal Perspective* (Case Paper No 103, London School of Economics and Political Science, 2005) 27.

[175] United Kingdom Government, above n 107, 35.

[176] 'The reality is that many people with disability are grateful to receive any job, even insecure work, as the pathway to employment for people with disability is extremely complex and is often hindered by discrimination': Disability Employment Australia, *ACTU Inquiry into insecure work in Australia: Disability Employment Australia's submission to the Howe Inquiry* (Disability Employment Australia, 2012) 8.

been diagnosed or identified as having a disability.[177] Legal protections are therefore critical in ensuring persons with disabilities maintain ongoing employment to the extent they remain fit for work.

Access to disability leave importantly limits the power of employers to retire people with disabilities on medical grounds. In some industries in Australia, employers have a statutory power to direct employees to attend medical examinations,[178] and may use this power to require persons with a disability to disclose personal details about their health or even to resign from the workplace. In the 2014 case of *Toganivalu v Brown & Department of Corrective Services*,[179] the complainant lodged a complaint under the *Anti-Discrimination Act 1991* (Qld) after the power to require a medical examination was used unfairly to trigger early retirement by a Queensland government employee.[180] Employers in the private sector can also exercise the

[177] Australian Bureau of Statistics, *Retirement and Retirement Intentions* (2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6238.0Main%20Features3July%202012%20to%20June%202013?opendocument&tabname=Summary&prodno=6238.0&issue=July%202012%20to%20June%202013&num=&view>.

[178] For example, some government agencies can direct employees to attend a medical examination: *Public Service Regulations 1999* (Cth) reg 3.2(1).

[179] [2006] QADT 13.

[180] In *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13, the complainant lodged a complaint under the *Anti-Discrimination Act 1991* (Qld) after these powers were used unfairly to trigger early retirement. Prior to commencing employment with the Department of Corrective Services as a Custodial Correctional Officer, the complainant had injured his knee at a supermarket. He was not required to undergo a medical examination when he was hired. Later when his knee injury was aggravated in an incident unrelated to his work duties while on a plane trip from Fiji to Brisbane, he was absent from work for about six months and thereafter placed on a series of rehabilitation ('return to work') plans. The complainant was able to work his normal hours and days of work as per his normal roster but he was restricted in the kind of duties he was required to undertake. The employer's legal team then discovered that the complainant had received a legal settlement relating to his injury and required a medical assessment of his condition. After an adverse medical assessment, the complainant was retired due to ill health. In this case the tribunal found that the complainant had been discriminated against due to his injury noting he was a 'competent, skilled and respected' employee. The complainant's planned progress indicated that his condition was improving and moving towards returning to full duties. It was irrelevant that he had not produced a medical clearance prior to his employment because the employer had not requested one.

managerial prerogative found in employment contracts and policies, as well as in enterprise agreements[181] to direct employees to attend a medical examination.

1 *Use of Existing Leave Entitlements by Australians with Disabilities*

While there is no legal right to disability leave in Australia, people with disabilities may use other statutory entitlements such as sick leave or annual leave to cover work absences directly related to their disability. These types of leave are not appropriate or sufficient for the purposes for which people with disabilities require and therefore may give rise to opportunities for disability discrimination by employers. Existing statutory standards are based on the assumption workers may be temporarily absent from work due to illnesses like influenza or allergies. The Australian *Fair Work Act 2009* (Cth) does not account for workers who may be absent due to ongoing, intermittent or episodic medical conditions due to disability but are productive and valuable employees nonetheless. Div 7 of pt 2-2 of the *Fair Work Act* provides for paid personal/carers leave and workers are entitled to ten days paid leave on an annual basis if they have been affected by personal injury or illness.[182] It is foreseeable that a person with a disability might reasonably require a period of leave longer than ten days as a direct consequence of ongoing issues related to their disability. Under s 352 of the *Fair Work Act* employers are prohibited from dismissing employees because of absences due to 'illness or injury'[183] for which the employee has provided a medical certificate.[184] The employee must not have been absent for three months, or more than three months in any twelve month period.[185] This statutory entitlement to personal or sick leave may not be sufficient for people with disabilities however the courts have contemplated more flexible and longer periods of time.

If in this case a legal right to disability leave existed for this employee, there would have been little scope for the employer to attempt to use a medical assessment to try and medically retire the complainant.

181 *Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027.

182 *Fair Work Act 2009* (Cth) ss 96(1), 97(a).

183 Ibid s 352.

184 *Fair Work Regulations 2009* (Cth) regs 3.01(1)-(3).

185 Ibid regs 3.01(5)(a),(i),(ii).

The time period that it is reasonable for an employee to be absent from work due to a disability as contemplated in Australian case law do not necessarily reflect the provisions in the *Fair Work Act*. Traditionally, a contract can be terminated at whatever time it is considered to be frustrated.[186] Historically, in unfair dismissal cases, the position appears to be whether the period of leave is reasonable in the circumstances.[187] In the 1994 case of *Frankcom v Tempo Services Pty Ltd*,[188] Stevens DP summarised the relevant principles:

> Distilled to their essence, the key considerations appear to be whether a reasonable period of time elapsed between the date of injury and the date of dismissal, and in that respect, whether there was a pressing or other necessity requiring the employer to take action to terminate, whether the employee had acted properly towards the employer in terms of conduct and rehabilitation, and whether there was consultation about the absence with the employee and attempts made to explore alternatives to dismissal. The cases with respect to what constitutes a 'reasonable period of time' seemed to cover the question from the perspective of both employee and employer. From the employee's perspective, did the employee have reasonable length of service and an expectation of ongoing permanent employment, and furthermore did the employee take all reasonable steps towards rehabilitation. From the employer's perspective, did the employer suffer a detriment from the absence of the employee, and did it have difficulty in making arrangements to carry on its operations in the employee's absence.[189]

Thus the kinds of considerations that may be taken into account when considering whether the leave taken is reasonable include the length of service, expectation of ongoing work, and difficulty in replacing labour.[190] It is notable however that His Honour does not consider the rights of people with disabilities to maintain their connection to the labour force in this case even though the DDA had been in place for two years.

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[186] See, eg, *Marshall v Harland and Wolff* [1972] 1 WLR 899.
[187] *Finch v Sayers* 1976 2 NSWLR 540, 558 (Wooten J).
[188] [1994] SAIR Comm 80.
[189] Ibid [20]-[21].
[190] Ibid.

Recent decisions on the periods of time considered reasonable for an employee to be absent due to an injury or disability vary dramatically. In *McGarva v Enghouse Australia Pty Ltd*,[191] the applicant was absent for almost a year because he had stomach and liver cancer. Driver J of the Federal Circuit Court held that the employee could bring proceedings for adverse action even though his absence exceeded the prescribed time period.[192] The decision was based on s 351(1) of the *Fair Work Act*, which states that employers are prohibited from taking 'adverse action' against employees on the basis of 'physical or mental disability'. Similarly in *Arthur Smith and Brett Kimball v Moore Paragon Australia Ltd*,[193] the employer conducted a redundancy process and retrenched workers absent from work for three years. The Full Court of the Australian Industrial Relations Commission made an order for reinstatement taking into account the appellants had little prospect of finding productive work again. The case involved middle-aged workers with long service histories and a limited skill set who had sustained injuries in the course of working for their employer.[194] These decisions may be contrasted however with *Filsell v District Council of Barossa*,[195] where the applicant employee was diagnosed with chronic fatigue syndrome and had been on unpaid sick leave for 12 months when his employment was terminated and was unsuccessful in an action for unfair dismissal. The case law therefore provides people with disabilities or employers with no certainty about what may be considered a reasonable period of leave. This could be readily achieved by the introduction of a disability employment standard to provide for disability in Australia.

2 *Existence of Disability Leave in the United Kingdom*

In the United Kingdom, there is no legal requirement that employers pay for disability leave however it is recommended in the *UK Employment Statutory Code of Practice* that employers permit workers with disabilities to be absent from work for assessment, rehabilitation, and treatment.[196] The unions in the United Kingdom did

[191] [2014] FCCA 1522.
[192] Ibid [16].
[193] [2004] AIRC 57.
[194] Ibid [67]-[68].
[195] [1992] SAIRComm 102.
[196] Equality and Human Rights Commission (UK), above n 105, 89.

campaign for the requirement of access to disability leave to be included in the Act but were ultimately unsuccessful in this measure.[197] There remains little information available on the uptake by employers of this recommended measure but it is reported that employers usually restrict disability leave to three months in a 12 month period.[198] The unions have remained critical of the ongoing lack of statutory protection observing that 'employers are continuing to get rid of disabled workers by using their sickness absence, capability or other procedures, without taking due account of the disability.[199] This suggests that the UK example provides evidence that a recommendation to provide access to disability leave from work by people with disabilities does not go far enough and in practice this issue needs to be specifically addressed and legally enforceable. Research also shows that only 15 percent of employees in the UK have detailed knowledge of their legal rights under the *Equality Act 2010* (UK).[200] This supports the view that a recommendation rather than a requirement that employers provide disability leave for their employees is insufficient to change established practices.

Prior to the introduction of the *Equality Act* in 2010, the issue of disability leave was already highlighted in the United Kingdom due to a series of cases considering disability discrimination in the workplace. In a 1997 case *Cox v Post Office*,[201] the complainant suffered from severe bronchial asthma. He had been a postal worker since 1984 and in his workplace sickness absenteeism was dealt with under a three-stage procedure triggered by the amount and frequency of absenteeism over a period of time. The complainant was interviewed about his absences six times between 1992 and 1996, all of which were medically certified. He was dismissed in 1996 but reinstated on the basis he was expected to improve his record of illness-related absenteeism. Following an 18 day period of absence later in 1996, the employee was again dismissed. The Employment

197 Trade Union Congress, above n 168, 8.
198 Ibid.
199 Ibid 3.
200 Government Equalities Office (UK), *Evaluation of the Implementation of the Equality Act 2010: Report 2 — Awareness and Impact of the Equality Act* (Government Equalities Office, 2012) 28.
201 Case No 1301162/97.

Tribunal found that the absences should have been considered a reasonable adjustment for a person with a disability. The employer, as a large organisation, should have been able to manage the absences and therefore people with disabilities should not be dismissed because of disability-related absences from work.

This case may be contrasted with a later case of *Royal Liverpool Children's NHS Trust v Dunsby* in 2006.[202] The claimant was employed as paediatric nurse caring for critically ill children and her employer claimed that her periodic and repeated absences due to ill health caused severe operational difficulties for the hospital unit. Her employer implemented its four-stage sickness absence procedure in 2003. By June 2004, she had lost 38 percent of her working time due to a gynaecological condition, childcare difficulties, and personal stress. The claimant attributed some of the absences to migraines caused by a change in medication. She failed to improve her attendance levels despite changes to her shifts and her employment was terminated. She alleged unfair dismissal on the basis of disability discrimination and the tribunal agreed but for the absences related to her medical condition the claimant would not have been at risk of dismissal. The Employment Appeal Tribunal overturned the decision finding there was no firm rule that an employer must disregard disability-related absences.[203] It stated:

> Provisions of the Disability Discrimination Act 1995 do not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent wholly or in part on grounds of ill-health due to disability. The law requires such a dismissal to be justified so a Tribunal does not answer the question whether a dismissal is justified merely by saying that it was, in part, because the employee was absent on grounds of disability.[204]

According to this decision, employers can take into account disability-related absences depending on the justification,[205] thus putting limits around any right to claim disability discrimination. In this case the

[202] 2006 IRLR 351.
[203] Ibid [21]-[22].
[204] Ibid [16].
[205] Ibid [17].

tribunal did not consider whether the employee had a disability and whether employer could have adjusted its procedures. The decision therefore failed to provide guidance to employers and people with disabilities as to the length of time allowed for disability leave.

The pre-*Equality Act* cases also considered whether people with disabilities were entitled to sick pay while absent for disability-related reasons. More specifically, they considered whether extending a sick pay scheme could constitute a reasonable adjustment. In an early 2001 case *London Clubs Management Ltd v Hood*,[206] the complainant suffered from cluster headaches. In 1998 he was absent from his job as an inspector at a casino where he had worked for 26 years and received full sick pay. Management then became concerned about the high level of employee sick leave generally in the casino and exercised its discretion not to pay sick pay to anyone except in particular cases. When he became ill again at the beginning of 1999 the complainant was therefore not paid when absent from work due to his disability. The Employment Appeal Tribunal held that the complainant had not been discriminated against because he was not refused sick pay for a reason related to his disability.[207] This case suggests therefore, if persons with disabilities and without disabilities are treated exactly the same in relation to sick leave pay there is no disability discrimination. The issue that this measure may constitute indirect disability discrimination was not considered in this case.

The decision was later distinguished in the major case *Northamptonshire County Council v Meikle*[208] in 2004. The claimant had worked as a teacher for a local council since 1982 when in 1993 she became significantly visually impaired. The claimant lost the sight of one eye while the eyesight in her other eye deteriorated. She then experienced ongoing difficulties with fulfilling her role as a teacher, but was not provided with any reasonable adjustments. For example she was not provided with a version of the timetable in enlarged print so she could read it, or assisted to attend her classes when they were

[206] [2001] IRLR 719.
[207] Ibid [16].
[208] 2004 IRLR 703.

moved to the other side of the school or permitted extra time to prepare for her classes despite her strained eyesight. The claimant was absent from work a number of times for which she was suspended in September 1999. Her sick pay reduced to half from December 1999 because of a policy limiting full pay to one hundred days. She resigned from her position in 2000 after negotiations broke down alleging she had been the victim of discrimination. The Court of Appeal upheld her complaint of disability discrimination on the basis of constructive dismissal. Keene LJ took a purposive approach to the meaning of 'dismissal' under the *Disability Discrimination Act 1995* (UK) finding there had been a constructive dismissal which itself constituted a discriminatory act.[209] Importantly he also found that the sick pay should not have been reduced because the absence would not have been so prolonged except for the respondent's failure to provide reasonable adjustments, which was not justifiable.[210] It is important to note however that these cases under the *Disability Discrimination Act 1995* (UK) relied on statutory interpretation rather than upholding the policy issues surrounding disability leave.

Another key issue that has been raised in case law in the United Kingdom is whether employers should go even further to provide for paid disability leave. In *O'Hanlon v Commissioners for HM Revenue and Customs*,[211] the complainant intermittently suffered from clinical depression and had taken 320 days leave in a four-year period for reasons attributed to her disability. In her workplace employees were entitled to full pay for a period of six months and half pay for a further six months in any four-year period. The Court of Appeal rejected the argument that the complainant was entitled to full pay as a reasonable adjustment when her half pay was exhausted.[212] Hooper LJ's reasoning was that the purpose of the legislation was to 'integrate them into the workforce' and not 'treat them as objects of charity' taking into account full pay might be a positive disincentive to return to work.[213]

[209] Ibid [50].
[210] Ibid [66]-[67].
[211] [2007] EWCA Civ 283.
[212] Ibid [67].
[213] Ibid [68]-[69].

This analysis is unconvincing and appears to be based on ableism and the notion that people with disabilities will lack an intrinsic motivation and drive to succeed in the workplace like other workers. There is certainly no evidence supporting this proposition. A similar argument has been used in the context of workers' compensation schemes in Australia to justify reduced weekly payments the longer a person is in receipt of compensation.[214] While comparisons between these schemes may be useful to a point, these schemes have very different aims and philosophical underpinnings to anti-discrimination law. People with disabilities may be required to be absent from the workplace due to their personal characteristics and consequences they cannot control which must be recognised as different to employees on leave due to a workplace accident or injury. Disability leave should be considered in the context of workplace rights and not as a welfare measure in driving sustainable employment for people with disabilities.

V CONCLUSION

This paper set out to argue Australia should take a stronger standards-based approach to the regulation of disability discrimination to address systemic discrimination found in employment practices and policies. People with disabilities are currently disadvantaged in the labour market in Australia. This is evidenced by official statistics on labour force participation rates which have not improved over time since the first disability discrimination legislation was enacted. People with disabilities require strong legal protection of their right to non-discrimination in employment because assumptions about their ability as workers are linked to negative and ingrained social attitudes. While discrimination on the basis of disability in the workplace is prohibited under the DDA, indirect discrimination can manifest as policies and practices but which unfairly disadvantage workers with a disability.

[214] Australian Government, *Safety, Rehabilitation and Compensation Review Report* (Australian Government, 2013) 104-5.

The DDA relies on the high-level principles of equality and non-discrimination but leaves far too much doubt as to what they require in set circumstances. It is far too difficult for employers and employees in Australia to determine if adjustments to working conditions on the basis of disability are reasonable because the test is vague and highly discretionary requiring judgment in its application. These complex concepts need to be supported by clear regulatory standards specifying the means by which practical performance is to be achieved in the workplace and by providing detailed guidance as to their exact meaning and scope.

Stronger disability employment standards-based approach would ensure employers and people with disabilities understand their legal rights and responsibilities. The law should be capable of being known and understood in Australian workplaces so that people can readily comply with its precepts. A preventative approach addressing processes that give rise to unlawful discrimination is preferable to a purely reactive approach as is currently the case. This could be achieved by promulgating disability employment standards under the DDA which could set minimum rights and entitlements. Contrary to arguments put forward by employers, and despite the complex contexts of workers with disability, disability employment standards can be developed to address disability discrimination in the workplace.

A standards-based approach to disability discrimination in employment is beginning to emerge in the United Kingdom. The example of the disability employment standard to restrict pre-work health questions provides salient lessons for Australia about the value of this approach. In Australia, it is lawful for employers to ask questions about the health of job applicants making it difficult for people with disabilities who can be unfairly penalised for failing to disclose their disability. Employers justify these requests for personal health information on the basis they have a duty to ensure health and safety, but this should be balanced against the principle of autonomy and desirability of people with disabilities being able to set

employment goals.[215] The United Kingdom has moved to restrict pre-work health questions using a relatively precise formulation recognising they can act as a significant barrier to employment for people with disabilities.

The United Kingdom is also beginning to recognise the importance of disability leave recommending that employers provide their workers with disabilities with the entitlement. This measure recognises that existing statutory entitlements may not provide sufficient protection for workers with disabilities to ensure they are able to fairly retain their employment. As a job security measure, disability leave entitles people with disabilities to take time off work to ensure they remain in employment. To ensure full economic equality, people with disabilities should not be disadvantaged due to periodic or temporary absences from work. Australia needs to consider introducing access to disability leave as a positive measure to ensure people with disabilities maintain their connection to the labour market.

Current statistics on disability and employment in Australia highlights how poorly disability discrimination regulation in Australia is currently providing any practical and therefore real protection for employees with disabilities. Australian discrimination law should provide the tools to address institutional ableism to ensure equality for people with disabilities in the workplace. There needs to be a shift in emphasis away from principles-based regulation towards minimum disability employment standards to meaningfully protect the rights of people with disabilities.

[215] *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS (entered into force 3 May 2008) art 3(a).