DISCRIMINATION AGAINST PEOPLE WITH MENTAL HEALTH PROBLEMS IN THE WORKPLACE: A COMPARATIVE ANALYSIS

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ABSTRACT

For a long time the rights of disabled persons have been ignored worldwide. A major obstacle faced by disabled persons is discrimination in the workplace. Due to the development of a social approach to disability and the efforts of the Disability Rights Movement, legislation has been passed throughout the world to improve this dire situation. The thesis considers the efficacy of some of these statutes. It is concluded that stigma and negative stereotypes remain a constant hurdle in overcoming discrimination.

The forthcoming UN Disability Convention is demonstrative of the recognition of the importance of the needs and rights of disabled people. The convention proposes some innovative measures to overcome stigma and stereotyping. Mental health problems constitute one of the leading causes of disability. The thesis explores how people with mental health problems fit within the concept of people with disabilities and whether they are included in anti-discrimination legislation and affirmative action measures. Special attention is given to statutory definitions of disability, the different forms of discrimination and the concept of reasonable accommodation.

A comparative approach is taken to analyse how South Africa's disability law measures up against that of Britain and Australia in terms of its substantive provisions and enforcement thereof. In considering the South African position American and Canadian jurisprudence is consulted in order to aid in interpretation. It is concluded that although South Africa has a comparatively good legislative framework, it is held back by an overly restrictive and medically focused definition of disability. As a result many individuals with mental health difficulties, desirous of obtaining and retaining employment may be excluded from protection against discrimination in the workplace. It

is argued that it will be necessary either to amend the Employment Equity Act or for the courts to adhere strictly to the concept of substantive equality in order to ensure that the rights and dignity of people with mental health difficulties are adequately protected.

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Chapter 1

INTRODUCTION

1.1. The purpose of the study

On an international scale people are beginning to awaken to the reality of human rights abuses and the impact of discrimination experienced by people with disabilities. However the focus remains on those persons with physical and sensorial disabilities and very little attention has been given to the unique situation in which people with mental health difficulties[1] find themselves. Mental health problems are extremely prevalent. They are one of the three leading causes of disability worldwide. People with mental health difficulties have the highest rate of unemployment and poverty is a continuous problem.[2] Many people with mental health problems keep their difficulties to themselves for fear of unfair treatment.[3]

Employment is not only necessary to provide income but it is also integral to the recovery process for people with mental health problems. Stigma and negative stereotypes remain the primary barrier to employment for this group of people. The media has played a large role in perpetuating a negative perception of mental health disorders and this issue needs to be addressed. It is imperative that effective legislation is available to protect people with mental health difficulties from unnecessary discrimination in employment and to advance their human rights. However it is also important that such legislative measures[4] be framed in a manner that takes cognizance of the social barriers that hinder people with mental health problems in their quest for obtaining and retaining employment. The provision of

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[1] Throughout the thesis the terms mental health difficulties/issues/problems are used interchangeably. It is preferable to use this terminology as it has less negative connotations than 'mentally ill' or 'psychiatrically disordered'. It also encompasses a broad spectrum of difficulties that, as will be demonstrated in the thesis, are not traditionally considered psychiatric disabilities. Mental health difficulties refer to psychological illnesses such as mood, personality and anxiety disorders. It is important to distinguish mental health problems from developmental disorders such as Downs Syndrome, Autism and Dyslexia. The focus of the thesis is on the former.

[2] See generally G Harnois and P Gabriel *Mental health and work: Impact, Issues and Good Practices* (2000).

[3] A survey conducted in Britain in 1996 indicated that 69% of the respondents, people with mental health issues, were afraid to disclose their psychological disorder for fear of discrimination on that basis. J Read and S Baker 'Not Just Sticks & Stones: A survey of the Stigma, Taboos and Discrimination Experienced by People with Mental Health Problems' (1996) at 2.

[4] These can include quota systems, constitutional protection, anti-discrimination legislation and affirmative action measures.

reasonable accommodation is a particularly useful tool to assist in the achievement of equality[5] for people with disabilities and mental health difficulties.

Disability has traditionally been considered as a problem that lies with an impaired individual. This is known as the individual or medical approach to disability. This perception was challenged by the emergence of a new way of thinking about disability in Britain in the seventies. The social model of disability countered the conventional approach to disability by arguing that it is not one's impairment that disables one but rather it is society that is at fault. Society erects barriers, both physical and attitudinal, that prohibit equal participation by impaired individuals. This new understanding ignited the beginnings of the disability rights movement that has resulted in a worldwide recognition of the rights of disabled people, and in particular the right to be protected from discrimination in employment and other areas.

The impact of discrimination in employment on people with mental health problems is severely under-researched. Despite the development a 'mental health system user' or 'psychiatric system survivor' movement there is no generally accepted model, like the social model of disability, which can be applied to understanding the difficulties faced by people with mental health problems desirous of obtaining employment. Thus people with mental health problems are generally 'lumped' in the general category of disabled persons without much understanding of their unique situation or the particular discrimination faced by them. Mental health problems are consistently excluded from statutory definitions of disability, specifically those based on a traditional, medical understanding of disability. This is exacerbated by judicial interpretations based on misunderstanding of and prejudice against mental health problems.

In recent years attempts have been made to improve the situation for disabled people through international instruments and legislative intervention in various jurisdictions. The rights of disabled persons are protected on an international scale by various international law instruments but these instruments provide inadequate protection. As a result an Ad Hoc Committee of the United Nations is currently investigating the protection and promotion of the rights and dignity of disabled persons. The

[5] It is argued in the thesis that pursuit of substantive equality, that is equality of outcome, is integral to the attainment of equal rights for people with mental health problems.

Committee has prepared a draft convention. Some of the provisions thereof will be discussed in Chapter 3.

Disability specific anti-discrimination legislation has been utilised in Britain, Australia and America with varying degrees of success. It will be shown in the thesis that while such legislative measures have been somewhat successful in achieving the goal of preventing discrimination against people with psychical and sensorial disabilities, they have been much less successful in the realm of discrimination against people with mental health problems.

South Africa has taken various measures to protect disabled people in employment. Not only is their right to equality enshrined in the Constitution,[6] people with disabilities are also entitled to affirmative action and anti-discrimination measures as contained in the Employment Equity Act (EEA).[7] South Africa has adopted similar employment equity provisions to those that have proved successful in Canada.[8] However in South Africa, as a result of the legacy of Apartheid, the focus on race and gender has often resulted in disabled people being the 'forgotten political minority'.[9] This situation is aggravated by South Africa implementing a definition of disability that effectively excludes many people with mental health difficulties from the provisions of the EEA.

The thesis explores the relationship between the implementation of a social approach to defining and understanding disability and the degree of protection provided to people with mental health difficulties by these statutes. It will be shown that Britain's slow move towards a more social approach has significantly improved the coverage of people with mental health difficulties. Australia has adopted a radically social approach in its definition of disability but other provisions in its Disability Discrimination Act (DDA)[10] impede the efficacy of the legislation. America has attempted to embrace a social approach to disability in its Americans with Disabilities Act (ADA)[11] but it effectiveness has been thwarted by unnecessarily strict judicial interpretation.[12] It is submitted that despite South Africa's claim to adhere to a social approach to disability, the approach in the EEA and accompanying Code and

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[6] Constitution of the Republic of South Africa, 1996.
[7] Act 55 of 1998.
[8] The success of the Canadian Employment Equity programme is touched on in Chapter 2.
[9] A term used by Sue Randall, a physically disabled person, in her letter to *The Star Newspaper*, 22 February 2005.
[10] Disability Discrimination Act of 1992.
[11] Americans with Disabilities Act of 1990.
[12] The American position will not be discussed in separate chapter, however the difficulties experienced in that jurisdiction will become apparent from the discussion thereof in chapter 6.

Guidelines is distinctly medical in nature. It is concluded that this is the major factor that will prevent the EEA from fulfilling its goals.

1.2. Methodology

The ultimate goal of the research is to establish whether South Africa has provided a coherent framework for the protection and promotion of the rights of people with mental health problems and to provide recommendations for improvement where the law is found to be inadequate. A comparative approach is particularly useful because of the novelty of South African disability law. This is achieved through critical analysis of the anti-discrimination statutes in Britain and Australia. Attention will also be given to American and Canadian jurisprudence where relevant. The wisdom gleaned from these countries is valuable when attempting to analyse how best to facilitate the needs of people with mental health problems in South Africa.

1.3. Structure of the thesis

Chapter 2 considers the development of the social approach to disability and how mental health problems fit within the disability paradigm. It also analyses the nature and impact of stigma and discrimination experienced by people with mental health problems. In particular attention is given to the importance of work for people with mental health problems and some of the realities of hiring an employee with a mental health problem are explored. Finally the role that legislative measures can play in addressing stigma and discrimination are delineated.

In Chapter 3 the various international instruments and international organisation documents relevant to the rights of disabled persons are investigated. It is shown that the current international framework offers little protection for people with mental health difficulties in the workplace. It is anticipated that this will be effectively remedied by the forthcoming UN Convention on the protection and promotion of the rights and dignity of people with disabilities. The articles in the Draft Convention relating to defining disability, the provision of reasonable accommodation and destigmatising measures will be considered. The proposed convention offers innovative means by which stigma and stereotypes may be addressed through educational programmes and more ethical behaviour by the media.

Chapter 4 analyses the legal situation of people with mental health problems in Britain. Although the social approach to disability has its origins in Britain, the first disability discrimination specific legislation, the Disability Discrimination Act of 1995, was predominantly medical in its approach to disability. Several amendments and regulations passed in the ensuing years have culminated in a new Disability Discrimination Act being passed in May of this year. Although many positive changes have been effected there are still areas in which further improvements are needed. This chapter focuses on the definition of disability, the meaning of discrimination, the provision of reasonable adjustments and the enforcement of the British Disability Discrimination Act of 2005.

Chapter 5 focuses on the legislative measures adopted by the Australian Federal Government to prevent discrimination against people on the basis of disability. The main statute fulfilling this function in Australia is the Disability Discrimination Act of 1991. The definition of disability adopted in this Act is without doubt the most progressive and socially based definition of any legislation worldwide. The statute takes the view that the focus of any disability discrimination action should be on the conduct of the discriminator rather than on whether the person discriminated against is actually functionally impaired. It is for this reason that a study of the Australian law in this area is so important. As is noted in the chapter, it is unfortunate that many of the other provisions in the Act and the judicial interpretation thereof has rendered the use of the exceptional definition of disability practically toothless. Fortunately, the Act has, in the past few years, undergone extensive review.[13] It is clear that the prevention of unnecessary discrimination against disabled people and particularly people with mental health problems in employment remains a top priority on the Australian Government's agenda. In this chapter consideration is given to the provisions relevant to discrimination in employment against people with mental health difficulties, with particular focus on the definition of disability, types of discrimination, the exceptions thereto and the enforcement of the DDA 1992.

Chapter 6, which forms the bulk of the thesis, analyses the South African law as it relates to preventing discrimination and promoting the human rights of people with disabilities and mental health difficulties. The major challenges that are explored in this chapter include the use of a medically based definition of disability in the EEA and an omission to define disability either in the Constitution or Labour Relations Act (LRA),[14]which regulates dismissal from employment. The ramifications of

[13] The discussion in this chapter is based upon the Draft Report of a Commission that investigated the legislation. Subsequent to the completion of the analysis in the chapter a final report became available.
[14] Act 56 of 1995 (LRA).

reasonable accommodation being framed as an affirmative action measure in the EEA are considered. It is put forward that an employer must take every step to ensure that people wishing to disclose a mental health problem are able to do so in confidence without fear of unfair treatment. A suitable model for the accommodation of employees with mental health problems is suggested. Unfair discrimination and the defences thereto are also addressed in this chapter. The adequacy of measures for enforcement of the EEA is discussed. Lastly the chapter considers whether the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[15] has the potential to compensate for the inadequacies of the EEA. It is noted that PEPUDA adopts an admirably social approach to disability. However the Act is not applicable to those who are covered by the EEA and thus its impact on workplace discrimination is necessarily limited.

At a conference celebrating World Mental Health Day on 10 October 2005, Mokgata, the national executive director of the South African Federation for Mental Health, noted that despite having good legislation, stigma about mental illness is still growing, and employers are not doing enough to reintegrate sufferers back into the workplace.[16] It is proposed in the thesis that although some of the legislation may be good, it is fundamentally flawed as a means to improve the situation of people with mental health problems in employment.

It is concluded that although the proper tools exist in South Africa, there are many areas in which the law could be improved in order to facilitate this goal. It is shown that there is substantial bias towards functional physical impairment in the legislation relating to people with disabilities. Thus the difficulties experienced by people with mental health problems, one of the leading causes of disability worldwide, is given little or no attention. It is also noted that the law can only do so much to change the attitudes of discriminators. Any legislative measure, in order to reach its full potential, should be used in conjunction with public education and community programmes and this requires significant government intervention.

It is concluded further that in order to maintain its international obligations South Africa may well be obliged to amend the EEA (and most importantly the definition of disability contained therein) so that it may be in line with the forthcoming UN Disability Convention. Until such time as necessary changes

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[15] Act 4 of 2000.
[16] R Heflik 'Employers accused of failing mentally ill staff' *The Star* Tuesday, 11 October 2005.

are implemented, courts should construe the provisions of the EEA in a broad fashion in keeping with the constitutional mandate to adhere to the concept of substantive equality.[17] Despite the fact that disabled persons are entitled to the same protection as other designated groups equal treatment is not always possible[18] because unlike race and sex, it is generally accepted that disability can impair an individual's suitability for a particular job.[19] For this reason the provision of reasonable accommodation is essential for the achievement of substantive equality. It is argued throughout the thesis that reasonable accommodation does not constitute special treatment for disabled people but rather it is the only way in which their right to equality can be realised. It is essential that a suitable framework is available to provide people with disabilities with the protection they deserve whilst at the same time suitably accommodating the needs of an employer. A careful balance should be struck between the rights of the employee and the employer so as to ensure a just result.[20]

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[17] C Ngwena 'Equality for people with disabilities: the limits of the Employment Equity Act of 1998' in Jagwanth and Kalula (eds) *Equality Law: Reflections from South Africa and Elsewhere* (2001) 188. Ngwena argues that the substantive approach to equality is the best means by which to attend to the unique requirements for the protection and advancement of disabled persons. In line with this concept, every measure should be adopted in order to ensure equality of outcome rather than equality of treatment or opportunity.

[18] C Ngwena *loc cit.*

[19] MA Christianson 'Disability Discrimination in the Workplace' in EML Strydom (ed.) *Essential Employment Discrimination Law* (2004) 154.

[20] Unfortunately discrimination litigation can easily favour the commercial needs of the employer and neglect the rights of the individual. In *Woolworths (Pty) Ltd v Whitehead* (2000) *ILJ* 571 (LAC) at 600-601 Willis JA stressed that although profitability is a consideration in a discrimination case, especially in a country such as South Africa with pervasive poverty and high unemployment, it is essential that a balance of interests be struck.

Chapter 2

MENTAL HEALTH PROBLEMS AND DISABILITY

2.1. A new approach to disability

Throughout history people with disabilities have been segregated in institutions, shunned, deprived of their rights and ignored. At the extreme, Nazi Germany determined that disabled individuals were an economic burden and exterminated tens of thousands of disabled people.[21] Whether or not codified into law, the involuntary sterilization of disabled people was common in a number of countries in the first half of the twentieth century, including Britain, Denmark, Switzerland, Sweden, and Canada.[22] Even in 'democratic' America 'economic logic' prevailed. By 1938, 33 American states had sterilization laws and between 1921 and 1964 over 63,000 disabled people were involuntarily sterilized in a pseudo-scientific effort to prevent the births of disabled offspring and save on social costs.[23] Involuntary sterilization was justified in the notorious *Buck v Bell*[24] decision of the US Supreme Court in which it was stated that 'fifty years of feeblemindedness is enough'.

Finally in the late sixties and seventies[25] the constant oppression and discrimination experienced by people with disabilities met some serious resistance in the beginnings of the disability rights movement.[26] Instrumental to disability movement was the development of a new way of thinking about disability.[27] Developments in disability theory have emerged largely from the work of a group of

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[21] D Pfeiffer 'Eugenics and Disability Discrimination' (1994) 9(4) *Disability and Society* 481 at 497. This article offers an excellent recount of the history of despicable practices carried out against disabled persons in the name of eugenics.

[22] *Ibid.*

[23] M Russel and R Malhotra 'Capitalism and Disability: Advances and Contradictions' (2002) *Socialist Register* at http://www.yorku.ca/socreg//2002.html accessed 14 April 2005 at 3.

[24] 274 US 200 (1927).

[25] P Beresford 'The Changing Role of Professor' Winning essay in a competition run by the National Conference of University Professors: England (2004) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 May 2005.at 6. Beresford notes that 'disability is perhaps the last area of difference to be addressed in our society'. By the time disabled people began to mobilise themselves in a fight for civil rights anti-discrimination legislation regarding race and gender was all ready in force in some countries.

[26] J Campbell '"Growing Pains" Disability Politics The Journey Explained and Described' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997). Campbell offers an overview of the political process behind the Disabled Persons Movement over the last 30 years.

[27] The publication of a document called *The Fundamental Principles of Disability* by the Union of the Physically Impaired Against Segregation (UPIAS) in 1976 was highly influential in a precipitating analysis of the way in which disability was defined. The document stated: 'In our view it is society which disables physically impaired people. Disability is something imposed on top our impairments by the way we are unnecessarily isolated and excluded from full participation in society.'

British writers and researchers.[28] This work is often referred to as the 'social model of disability'[29] or the 'social barriers model of disability'.[30] However, as work in this area is constantly being developed and refined by writers from a range of different theoretical backgrounds, Barnes *et al* submit that it is more appropriate to refer to the work as 'the social approach to disability'.[31] The development of the social approach to disability has, in the words of Oliver who coined the term 'social model of disability' in 1983,[32] 'resulted in unparalleled success in changing the discourses around disability, in promoting disability as a civil rights issue[33] and in developing schemes to give disabled people autonomy and control in their own lives'.[34]

Being disabled is conventionally regarded as a personal tragedy that the individual must overcome, or as a medical problem to which the individual must become adjusted.[35] The social model places the blame for the disablement of an impaired person on society as opposed to the individual model of disability in which the person's impairment is seen as the sole cause of disablement.[36] The social approach to disability has been embraced worldwide as a means of empowerment for people with disabilities.[37] The pure social model, although widely praised, has not been without its critics.[38] It is

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Physically Impaired Against Segregation (UPIAS) *The Fundamental Principles of Disability* (1976) at http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/UPIAS%20Principles%202.pdf accessed 5 September 2005 at 1.

[28]See for example the various works of Finkelstein, Oliver, Barton, Barnes, Shakespeare and Mercer.

[29]R Drake *Understanding Disability Policies* (1999) 10.

[30]V Finkelstein 'Disability: a social challenge or an administrative responsibility?' in J Swain, V Finkelstein, S French and M Oliver (eds) *Disabling Barriers - Enabling Environments* (1993) 36.

[31] C Barnes, G Mercer and T Shakespeare *Exploring Disability: a Sociological Introduction* (1999) 27.

[32]M Oliver *Social Work with Disabled People* (1983).

[33] For a discussion on the ways in which the disability movement has played a role in giving people with disabilities a political voice see M Oliver and G Zarb 'The Politics of Disability: a new approach' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997).

[34]M Oliver 'Defining Impairment and Disability: Issues at stake' in C Barnes and G Mercer (eds) *Exploring the Divide* (1996) 30.

[35]Russel and Malhotra 2002 *loc cit.*

[36]G Zarb 'Modelling the Social Model of Disability' (1995) 6(2) *Critical Public Health* 1 at 4. Zarb contends that the medical model of disability is really about impairment and the characteristics of impaired individuals - it is not about disability at all.

[37]See for example T Shakespeare and N Watson 'The social model of disability: an outdated ideology?' (2002) 2 *Research in Social Science and Disability* 9 at 14. The authors state that North American theorists and activists have also developed a social approach to defining disability. The North American approach has focused on the notion of people with disabilities as a minority group, within the tradition of US political thought.

[38]In particular those authors adopting a feminist perspective argue that the social model of disability does not adequately provide for the impact of the actual impairment on the individual. See further L Crow 'Including all our lives: Renewing the Social Model of Disability' in C Barnes and G Mercer (eds) *Exploring the Divide* (1996); J Morris 'Citizenship, self-determination and political action: the forging of a political movement' Talk at Conference in Sydney, Australia (1998) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 May 2005; J Morris *Pride against prejudice: Transforming attitudes to disability* (1991); J Morris 'Impairment and disability: constructing an ethics of care which promotes human rights' (2001) penultimate draft of article appearing in (2001) 16(4) *Hypatia* at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 June 2005; C Thomas 'The baby and the

easy to get bogged down by the plethora of debate among commentators regarding the exact way in which this approach should be formulated.[39] Oliver states that 'these semantic discussions will obscure the real issues in disability which are about oppression, discrimination, inequality and poverty.'[40] There is increasing diversity of views about how theorising in this area should proceed[41] nonetheless there are a number of defining characteristics of the approach and these will be canvassed below.

2.2. Disability as a social construction

The genesis, development and articulation of the social approach to disability by disabled people themselves is a rejection of all of the fundamentals of the individual model of disability.[42] Proponents of the social approach challenge conventional 'individualist and deficit views of disability'.[43] A distinction is made between impairment and disability. As Oliver writes: '[disability is] the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities'.[44] Impairment, on the other hand, refers to some bodily defect, usually constituting 'a medically classified condition'.[45] Thus it is not individual limitations, of whatever kind, which are the cause of the problem but society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation.[46] Disability is, therefore,

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bath water; disabled women and motherhood in social context' (1997) 19(5) *Sociology of Health and Illness* 622; S French 'Disability, impairment or something in between?' in J Swain; V Finkelstein, S French and M Oliver (eds) *Disabling Barriers- Enabling Environments* (1993).

[39] For examples of approaches taken and discussions of the criticisms levelled at the 'pure' social model of disability see A H Neufeldt 'Ways of Thinking about Disability' September 2002 at www.gladnet.org accessed 10 July 2005; T Shakespeare and N Watson 'Defending the Social Model' (1997) 12 *Disability and Society* 293; M Johnston 'Integrating Models of Disability: A reply to Shakespeare and Watson in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1996) 285; T Shakespeare and N Watson '"The body line controversy": a new direction for Disability Studies?' Paper was presented at Hull Disability Studies Seminar (1996) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 May 2005; Shakespeare and Watson 'outdated ideology' 2002 *loc* cit; V Finkelstein 'The Social Model of Disability Repossessed' Paper written for the Manchester Coalition of Disabled People (2001) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 10 June 2005; P Abberley 'The Concept of Oppression and the Development of a Social Theory of Disability' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997).

[40] M Oliver 'The Individual and Social Models of Disability' Paper presented at Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians at Thames Polytechnic London (1990) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 may 2005. at 2.

[41] J Mulvany 'Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder' (2000) 22(5) *Sociology of Health and Illness* 582 at 585.

[42] M Oliver *The Politics of Disablement* (1990).

[43] L Barton 'The struggle for citizenship: the case of disabled people' (1993) 8(3) *Disability, Handicap and Society* 235 at 235.

[44] Oliver *The Politics of Disablement* 1990 *op cit* at 11.

[45] Barnes *et al* 1999 *op cit* at 7.

[46] Oliver 1996 *op cit* at 33.The disadvantage experienced by disabled people is seen as 'institutionalised throughout society'.

a 'special' form of discrimination, or social 'oppression'. It is imposed by a society that expects all its members to conform to the yardstick of able-bodied normality, and builds physical and social environments which penalise any 'misfits'.[47]

Morris describes the impact of discrimination pertinently by stating that if she is unable to get a job, it is because of discrimination, not because she is woman or because she cannot walk.[48] Morris argues that disability is not equated with impairment because 'it is not impairment which denies us our human and civil rights but the experience of disability, the experience of prejudice, discrimination and disabling barriers.'[49] This approach assumes that public policy and programmes should aim to reduce inequalities, to address social and economic disadvantage and also assumes that various measures will be needed by some people in order to gain access to, participate in and exercise self-determination as equals in society. Shakespeare and Watson argue 'if disability is created by society then society can equally uncreate it'.[50] This approach focuses on the disabling aspects of society, on supporting human diversity, and on empowering disadvantaged individuals.[51]

The social approach to disability demands an identification and analysis of the social, political and economic conditions that restrict the life opportunities of those with an impairment. Central to this work is a focus on the rights of people with disabilities and the consequences of the development of a collective identity for social action and social change.[52] Thus, in addition to promoting new ways of conceptualising and analysing disability, the social approach to disability has an ideological component. A focus on political action gives 'disabled people a feeling of self-worth, as well as offering them a collective identity and a stronger political organisation'.[53]

2.3.How do mental health problems fit within the social approach

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[47] A Borsay 'Personal Trouble or Public Issue? Towards a model of policy for people with physical and mental disabilities' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997) 120-122.
[48] Morris 1998 *op cit* at 4.
[49] Morris 1998 *op cit* at 1.
[50] Shakespeare and Watson 'The body line controversy' 1996 *op cit* at 2.
[51] Rioux 1997 *op cit* at 10.
[52] Mulvany 2000 *op cit* at 386. See also T Shakespeare 'Disabled people's self-organisation: a new social movement?' (1993) 8(3) *Disability, Handicap and Society* 249.
[53] R Butler and S Bowlby 'Bodies and spaces: an exploration of disabled people's experiences of public space' (1997) 15(4) *Environment and Planning D: Society and Space* 397 at 412.

There is very little mention of psychiatric disability in most writings on the social approach to disability. Although there is much about the social approach to disability that is applicable and useful in the context of mental illness, the momentum behind the disability movement was the discrimination experienced by physically disabled persons. There is no doubt that it has been largely successful in improving the position of physically disabled persons. However the way in which it is formulated does not always suit the situation that people with mental health difficulties find themselves in. This is not to say that there is no movement against the disadvantage experienced by people with mental health difficulties. The 'survivors' movement or 'mental health system users' movement has been instrumental in illustrating some of the difficulties experienced by people with mental health issues.[54]

2.3.1. Survivors and disabled people

There are many similarities in how disabled people and mental health survivors are treated in society. Both have their experience subjected to medical interpretation and 'treatment'. Both face social oppression and discrimination. As a result, both face disproportionate problems of poverty, unemployment, social and economic insecurity.[55] Plumb contends that the similarity of the social oppression experienced by disabled people and people with mental health difficulties is sufficient to warrant their co-existence within the disability movement.[56] However Beresford and Wallcraft argue that despite these similarities, there remains conflict between people with mental health problems who are unwilling to accept or see themselves as disabled[57] and likewise many disabled people do not feel people with mental health problems are disabled because they do not have physical impairments or because their situation is not permanent.[58] The interplay between survivors and disability and between the survivors' and disabled people's movements are complex and there is little agreement about it.[59]

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[54]For further information on the mental health users movement see P Beresford, G Gifford and C Harrisson 'What Has Disability Got To Do With Psychiatric Survivors?' in J Read and J Reynolds (eds) *Speaking Our Minds: An Anthology* (1996); and A Rogers and D Pilgrim '"Pulling down churches": accounting for the British mental Health Users Movement' (1991) 13(2) *Sociology of Health and Illness* 129.

[55] P Beresford and J Wallcraft 'Psychiatric System Survivors and Emancipatory research: Issues, overlaps and differences' in C Barnes and G Mercer *Doing Disability Research* (1996) 68 at 68.

[56] A Plumb *Distress or Disability* (1994).

[57] Beresford and Wallcraft 1996 *loc cit.* Some survivors have found the social model of disability helpful because of its stress on social oppression and discrimination, others reject it for themselves, because they do not see themselves as having any kind of impairment. They interpret their madness or distress in terms of different understanding, experience or perceptions, rather than as an impairment.

[58]P Beresford 'What Have Madness and Psychiatric System Survivors Got to Do with Disability and Disability Studies?' (2000) 15(1) *Disabilty & Society* 167.

[59] Beresford and Wallcraft 1996 *op cit* at 66.

What follows is a discussion of some of the more important aspects of the relationship between the two movements.

Barnes and Shardlow state that the area in which the user movement has been most successful is in supporting the participation of people with mental health problems as active agents, capable not only of determining their own personal histories, but also in determining future directions for mental health services and in achieving broader cultural goals.[60]

However in comparison to the social approach to disability the survivors' movement has not succeeded in changing the discourse surrounding and perceptions of people with mental health difficulties.[61] In fact while the public debate about disabled people has increasingly been about the need for their inclusion in society, that about survivors has been about the need to exclude them.[62] The disabled people's movement has campaigned against the arbitrary abuse of disabled people's human and civil rights. Whereas the restriction of survivors' rights is condoned by law as necessary and legitimate in order to 'treat' them.[63] The lack of success and research into the survivors' movement is reflective of the hierarchy of difference that exists with the context of disability.[64] Beresford states that although it is important not to create hierarchies of difference, of all areas of disability, the one associated with the greatest stigma and exclusion is (long term) use of mental health services. Furthermore, they are the group of disabled people with the lowest employment levels. [65] This is further demonstrated by the lack of consideration given to psychiatric disability in anti-discrimination legislation and rights instruments throughout the world.[66] It is submitted that this is the result of an inherent prejudice against people with mental health problems. Perlin has coined the term 'sanism' to describe this type of prejudice. He

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[60] Barnes and Shardlow 1996 *op cit* at 17.
[61] Beresford and Wallcraft 1996 *op cit* at 83.
[62]Beresford and Wallcraft 1996 *op cit* at 76.
[63] Beresford and Wallcraft 1996 *loc cit.* The authors argue that the survivors' movement does not disagree that survivors may sometimes need security and asylum to safeguard both their own rights and those of other people. However there should be a clear distinction between this and the way in which they are actually treated by the psychiatric and criminal justice systems, where their rights are routinely restricted and dangerous treatment imposed forcibly and routinely without adequate safeguards or redress. The authors argue further that much less attention has been paid to the mental health service users who have died within the psychiatric system in worrying circumstances than to the smaller number who have harmed others.
[64] Beresford and Wallcraft contend that a lack of funding, interest and the continued dominance of psychiatry have impeded research and progression in the survivors' movement. (Beresford and Wallcraft 1996 *op cit* at 78).
[65] Beresford 2004 *op cit* at 6.
[66] The bias towards physical disability as a more socially desirable impairment will be demonstrated in later chapters. For a comment on the exclusion experienced by people with learning difficulties from the disability movement, similar to that experienced by people with mental illness, see A L Chappel 'From Normalisation to Where?' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997) 45-62. See also J Walmsley 'Including People with Learning Difficulties: Theory and Practice' in L Barton and M Oliver (eds) *Disability Studies: Past Present and Future* (1997).

describes 'sanism' as an irrational prejudice of the same quality and character of other irrational prejudices such as racism, sexism, homophobia and ethnic bigotry.[67] Sanism, he argues infects 'both our jurisprudence and our lawyering practices', it is 'largely invisible and largely socially acceptable'.[68] Furthermore it is sustained and perpetuated by our use of ordinary common sense and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[69] Perlin suggests that every aspect of the law that relates to mental illness is pervaded (subconsciously or consciously) by 'sanism'.[70] He states 'we "slot" them, stereotype them, deny them their social worth, emphasize their "differentness", distort their behaviour and trivialize their humanity'.[71]

Beresford states that people with mental health problems are lumped, as a matter of course, amongst disabled people, with acquired physical, sensory and intellectual impairments, within the state legislation, policy and provision.[72] Existing mental health policy is based on the assumption that the major problems and 'medical symptoms' faced by people with serious psychiatric disabilities result from their illness.[73] Broader social structural factors that affect an individual's experiences of illness, such as poverty, inequality, discrimination and exclusion are not targeted.[74] People with mental health problems have been excluded from disability programmes in areas such as employment and training, housing and accommodation support, generic social support, recreation and disability services.[75] The sociology of mental health has done little to clarify the nature of the social barriers faced by people with serious psychiatric disorders living in the community.[76] According to Williams[77] and Mulvany,[78] people with severe mental health problems have been 'confined' if not 'trapped' within this particular

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[67] ML Perlin '"Where the Winds hit heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"' (1998) 31 *Loy LA L Rev* 775 at 791. See also ML Perlin 'A Law of Healing' (2000) 68 *Cin L Rev* 407 and ML Perlin ' "I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, and the ADA and the Promise of *Olmstead v LC*' (2000) 17 *TM Cooley L Rev* 53.

[68] ML Perlin ' "Things have Changed": Looking at Non-Institutional Mental Disability Law Through the Sanism Filter' (2003) 19 *N Y L Sch J Hum Rts* 165 at 166.

[69] *Ibid.*

[70] Perlin 1998 *op cit* at 778.

[71] Perlin 2003 *op cit* at 171.

[72] Beresford 2000 *op cit* at 169.

[73] This equivalent to the individual medical model of disability which focuses on the functional limitations of an impairment.

[74] Mulvany 2000 *op cit* at 588.

[75] This is often by virtue of the fact that a person's mental health issue does not qualify as a disability as definitions of disability focus on functional limitations.

[76] For an overview on the sociological writings on mental distress see further J Busfield 'Introduction: Rethinking the Sociology of Mental Health' (2000) 22(5) *Sociology of Health & Illness* at 543.

[77] SJ Williams 'Reason, Emotion and Embodiment: Is "Mental" Health a Contradiction in Terms?' (2000) 22(5) *Sociology of Health & Illness* 559.

[78] Mulvany 2000 *op cit* at 586.

dialogue and it is time to extend beyond psychiatry and medical philosophy to examine and identify social barriers that deny or restrict people with mental health problems rights to citizenship. However it must be remembered that the power of the psychiatric establishment and its influence on broader social values and understanding cannot be overstated.[79] It has had a profound effect on the identity of mental health service users. It has been argued that although mental illness can happen to anyone, the strong underlying subtext is that being a mental health system user results in a spoiled identity.[80] Thus many activists feel closely circumscribed in what they can do. They expect their views and analysis to be dismissed and attacked as extreme and symptomatic of their defective understanding, reason and intellect. Or they fear that direct action along the innovatory lines of the disabled people's movement, will be seen as further evidence of their irrationality and madness and receive an aggressive and regulatory response.[81]

Some members of the survivors' movement reject a medical model of madness and distress.[82] The existence of a mental impairment is not denied but the potential damage of labelling is recognised.[83] They see it as intellectually unsustainable and deeply damaging to the people to whom it is attached.[84] They also argue that being 'mentally ill' does not mean that people are abnormal or even different. [85] Mental illness is something that anyone could experience at some stage of their lives and should be regarded as one aspect of the normal experience of being human.[86] Thus the social, economic and civil rights of those experiencing mental health distress should not be affected. However, they have not

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[79] Beresford and Wallcraft 1996 *op cit* at 69.
[80] Beresford and Wallcraft 1996 *op cit* at 70.
[81] *Ibid.*
[82] See for example A Davis 'Who Needs User Research?: Service users as research subjects or participants; implications for user involvement in service contracting' in M Barnes and G Wistow (eds) *Researching User Involvement* (1992).
[83] L Prior *The Social Organisation of Mental Illness* (1993). In his study of a large asylum in Northern Ireland, Prior demonstrates that the constantly shifting boundaries around what is considered to constitute mental disorder may have more to do with policy imperatives and inter-professional rivalry than with the personal experience of people with mental health problems.
[84] This rejection probably has it origins in the ideas of Szasz, Laing and others associated with anti-psychiatry. They provided an important challenge to the medical model of mental illness and opened up the possibility of other ways of understanding behaviour defined as symptomatic of illness. However those ideas have not been developed into an alternative model (like the social model of disability) that could provide the basis for both understanding the origin and nature of distress and providing enabling and empowering assistance to those experiencing such distress. The anti-psychiatry movement was never a direct expression of the experience of those with mental health problems, but instead it was an analysis provided by intellectuals and professionals. (Barnes and Shardlow 1996 *op cit* at 9).
[85] Barnes and Shardlow 1996 *op cit* at 10.
[86] This is similar to the point of view adopted by Shakespeare and Watson regarding the social model of disability. The authors argue that the social model (as espoused by Oliver) has served its purpose and is no longer relevant in the 21st century. However they propose that viewing disability from the perspective that everyone is impaired to a certain degree as opposed to delineating certain groups of impaired people as abnormal would have a very positive impact on the progression of the disability movement. Shakespeare and Watson 2002 *op cit* at 27.

developed a strategic approach to addressing the structural and legal factors which do, in practice, mean that the position of people with mental health problems as citizens is affected.[87]

Barnes and Shardlow state that their research suggests that 'user groups' are not founded on a commitment to a cause, such as the elimination of discrimination. Instead they are based on a shared identity.[88] Involvement in the movement brings with it a strong sense of self-worth and the shared experience of being a mental health system user and the personal experiences and responses to stigma, exclusion and disadvantage.[89] This process has enabled activists to challenge the assumption of incompetence which often follows a diagnosis of mental illness, and to challenge the exclusions which can result from this. Thus like the social approach to disability importance is placed on the empowerment and identity of individuals but there is less focus on effecting systemic changes. The importance of identifying oneself as a disabled person is instrumental to the disability rights movement whereas making one's identity as a mental health user visible may not be easy because of the stigma attached to such a status.[90] The nature of mental distress, which can manifest itself in many different ways, is such that it may itself undermine a person's sense of self and consequently their identity. Stigma and thus a fear of rejection and exclusion means that people may be unwilling to seek help for their mental health problem[91] or even to acknowledge it.[92]

2.3.2. Towards a social model of 'madness' and distress

Barnes and Shardlow state that there is little evidence that the mental health user movement bases its strategies on a 'social model of mental illness' comparable with the social model of disability.[93] Nor

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[87] Barnes and Shardlow 1996 *op cit* at 15.
[88] M Barnes and P Shardlow 'Effective Consumers and Active Citizens: Strategies for users' influence on service and beyond' (1996a) 14(1) *Research Policy and Planning* 3.
[89] Barnes and Shardlow 1996 *op cit* at 7-8.
[90] M Barnes and P Shardlow 'Identity Crisis: Mental Health User Groups and the "problem" of identity' in C Barnes and G Mercer (eds) *Exploring the Divide* (1996) 1.
[91] See further L Thomas *Seeking and Negotiating Academic Support in Higher Education: A Qualitative Analysis of the Experiences of Students with Mental Health Problems* (2003) Dissertation for a MA in Disability Studies at www.leeds.ac.uk/disability-studies/ archiveuk/titles.html accessed 23 July 2005. Thomas analyses the factors that influence to reluctance of students with mental health problems seeking help from the University Disability Office.
[92] Barnes and Shardlow 1996 *op cit* at 3.
[93] Barnes and Shardlow 1996 *op cit* at 7-8.

does the survivors' movement have a coherent and agreed philosophy of its own.[94] Beresford argues however that the beginnings of a philosophy are emerging and that such an approach would probably be based on a 'social model of madness and distress'.[95] Beresford, Gifford and Harrison state that the issues such a model is likely to highlight include:

- the social causes of our madness[96] and distress
- the medicalisation of our experience and distress
- the destructive and discriminatory response to it from both psychiatry and broader society
- the need for a social response to the distress and disablement which survivors experience, addressing the social origins and relations of their distress, instead of being restricted to people's individual difficulties
- the need for survivor-led alternatives to prevent distress and offer appropriate support for survivors.[97]

These are indeed issues that require attention and redress. It will be demonstrated in the thesis that protective and anti discriminatory instruments place people experiencing mental distress within the definitions of disability that are predominantly based on individual and medical approaches. If the individual model of disability is inappropriate for people with physical disabilities (as the social approach contends) then it cannot but be more inappropriate as a basis for defining the disadvantage experienced by people with mental health difficulties.

2.3.3. What can survivors learn from the social approach to disability

Beresford and Wallcraft argue that the social model of disability cannot simply be transposed to the survivors' movement[98] although some disabled commentators, in an effort to be inclusive, have done just that. Mulvany contends that despite the exclusion of psychiatric disability in the writings of most disability theorists, their ideas can be used to inject new vigour and direction into an analysis of the

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[94] Beresford and Wallcraft 1996 *op cit* at 76. Beresford and Wallcraft argue that it is this lack of philosophy, the continuing dominance of the psychiatric profession and system and a political, media and social climate which is increasingly hostile to survivors has contributed to the lack of research into and success of the survivors' movement.

[95] P Beresford 'New Movements, New Politics: Making participation possible' in T Jordan and A Lent (eds) *Storming The Millennium: The new politics of change* (1997).

[96] It must be highlighted that the use of the term 'madness' is undesirable. Terminology that reinforces stereotypical perceptions must be avoided. See L Clark and S Marsh 'Patriarchy in the UK: The Language of Disability' 2nd draft of a discussion document (2002) at http://www.leeds.ac.uk/disability-studies/archiveuk/Clark,%20Laurence/language.pdf accessed 15 may 2005. This discussion document is illustrative of the negative impact that the use of incorrect terminology can have on people with impairments.

[97] Beresford, Gifford and Harrison 1996 *loc cit.*

[98] Beresford and Wallcraft 1996 *op cit* at 69.

plight of people with mental health problems.[99] The application of the social approach to disability to the study of mental ill health orients research and theoretical development towards an analysis of the complexity and multiplicity of the social restrictions, disadvantage and oppression faced by people diagnosed as 'mentally ill'.[100] Despite the experience and impact of mental illness being very personal, considerable evidence exists to demonstrate the effect and importance of the role of structural factors associated with the identification and experience of mental distress.[101] One of the major attractions of this body of work, however, is the use of theory to both understand 'why things are the way they are' and to establish 'a future agenda for social change'.[102] The social approach to disability also calls for a reassessment of the role of legislation as a vehicle for social change.[103]

2.4. The prevalence of mental health problems

According to the World Health Organisation, more than 500 million people around the world are afflicted with serious mental illness, alcoholism and/or drug addiction.[104] The International Labour Organisation states that mental illness hits more human lives and gives rise to a greater waste of human resources than all other forms of disability.[105] 90% of people with mental health problems are unemployed in contrast to persons with physical or sensorial disabilities whose unemployment rate is 50%. This means that only 10% of persons with a serious psychiatric background who wish to work and are judged capable of working are in fact working. Women fare less well than men.[106]

Severe mental illness often dramatically impairs one's capacity to work and to earn a living. It can lead to impoverishment, which in turn may worsen the illness. Therefore all efforts to increase employment opportunities should be undertaken in order to improve quality of life and reduce both impoverishment and the high service and welfare costs engendered by this group.[107] Mental health problems are among the most important contributors to the burden of disease and disability worldwide.[108] Five of the 10

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[99] Mulvany 2000 *op cit* at 587.
[100] *Ibid.*
[101] Barnes and Shardlow 1996 *op cit* at 15.
[102] S Riddell 'Theorising special educational needs in a changing political climate' In L Barton (ed) *Disability and Society: Emerging Issues and Insights* 103.
[103] C Barnes and M Oliver 'Disability rights: rhetoric and reality in the UK' (1995) 10(1) *Disability and Society* 111.
[104] Harnois and Gabriel 2000 *op cit* at 19.
[105] *Ibid.*
[106] *Ibid.*
[107] C Henderson, G Thornicroft and G Glover 'Inequalities in mental Health' (1998) 173 *Br J Psychiatry* 105 at 108.
[108] Harnois and Gabriel 2000 *op cit* at vi.

leading causes of disability worldwide are mental health problems.[109] They are as relevant in low-income countries as they are in rich ones, cutting across age, gender and social strata.[110] Furthermore, all predictions indicate that the future will see a dramatic increase in mental health problems.[111] Harnois and Gabriel state that the time has come to challenge both the low priority given to mental health and the stigma that those with mental ill-health still endure around the world.[112]

For people with mental health difficulties, social exclusion is often the hardest barrier to overcome and is usually associated with feelings of shame, fear and rejection. Mental illness imposes a heavy burden in terms of human suffering, social exclusion, stigmatization of the mentally ill and their families and economic costs. Unfortunately, the burden is likely to grow over time as a result of ageing of the global population and stresses resulting from social problems and unrest, including violence, conflict and natural disasters.[113]

2.5. The importance of work for people with mental health problems

Oliver states, 'to be constantly and consistently denied the opportunity to work, to make a material contribution to the well being of society is to be positioned as not being fully human.'[114] Work has a central role for everyone, and is important in maintaining and promoting mental health. Work provides social identity and status, social contacts and support. It structures and occupies time as well as providing a sense of personal control and achievement. Quite apart from the money that can be earned doing it, work tells us who we are and enables us to tell others who we are.[115] For people who have experienced mental health difficulties, work plays a crucial role. It provides a valued alternative to the 'patient role, status and source of self-esteem. It provides social contacts and integration into the community. It also helps to decrease symptomatology and dependence on services.[116] The deleterious effects of unemployment -in terms of anxiety, depression, loss of confidence and identity - are widely

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[109] These include major depression, schizophrenia, bipolar disorders, alcohol use and obsessive-compulsive disorders.
[110] Harnois and Gabriel 2000 *op cit* at 1.
[111] GH Brundfland 'Mental health in the 21st century' (2000) 78(4) *Bulletin of the World Health Organization* 411.
[112] Harnois and Gabriel 2000 *op cit* at vi.
[113] UK Department for International Development 'Disability, poverty and development' 2000 at 9.
[114] M Oliver 'Disabled People and the Inclusive Society: or the Times They Really Are Changing' Public Lecture on behalf of Strathclyde Centre For Disability Research and Glasgow City Council in Scotland (1999) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 May 2005.
[115] R Perkins and R Buckfield 'Access to employment: A supported employment project to enable mental health users to obtain jobs' (1997) 6(3) *Journal of Mental Health* 307 at 308. See further LA Rowland and RE Perkins 'You can't eat, drink and make love eight hours a day: The value of work is psychiatry' (1988) 20 *Health Trends* 70.
[116] Perkins and Buckfield 1997 *op cit* at 309.

reported.[117] These consequences are magnified for those who have experienced serious mental health problems.

The workplace is one of the key environments that affect our mental well-being and health. There is an acknowledgement and growing awareness of the role of work in promoting or hindering mental wellness and its corollary – mental illness. Although it is difficult to quantify the impact of work alone on personal identity, self-esteem and social recognition, most mental health professionals agree that the workplace environment can have a significant impact on an individual's mental well-being.[118]

Barnes and Shardlow state that that mental health problems are clearly associated with socio-economic disadvantage which, together with the stress associated with material hardship, results in reduction of opportunities for social interaction and loss of self esteem with consequences for a person's identity.[119] As a result of stigmatisation and misunderstanding of the recovery process finding work in the open labour market or returning to work and retaining a job after treatment is often a challenge. One of the authors' interviewee's illustrates the position of a mental health system user: '... because once you've been say, branded as having been in one of those places realistically there is very little hope of getting a job no matter how well qualified you are...'[120]

2.6. Mental health problems and the workplace

Mental health problems in the workplace have a serious impact on the rates of absenteeism and general health of employees.[121] Harnois and Gabriel point out that poor mental health can also effect work performance by a reduction in productivity and output; an increase in error rates; increased amount of accidents; poor decision-making and deterioration in planning and control of work.[122] Stress at work also influences staff attitudes and behaviour. It can cause a loss of motivation and commitment; burn-

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[117] See for example R Smith 'Bitterness, shame, emptiness, waste: An introduction to unemployment and health' (1985) 291 *British Medical Journal* 1024. Also E Agerbo, T Eriksson, P Bo Mortensen and N Westergard-Nielsen 'Unemployment and mental disorders- an empirical analysis' (1998) Working Paper 98-02 Centre for Labour Market and Social Research: Denmark at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=176109 accessed 11 June 2005. This paper offers interesting evidence on the effects of unemployment on people who are mentally ill. It also considers whether long-term unemployment increases the chances of developing mental illness. Although based on Danish research it is suggested that the conclusions reached are relevant globally.

[118] Harnois and Gabriel 2000 *op cit* at 6.

[119] Barnes and Shardlow 1996 *op cit* at 119.

[120] *Ibid.*

[121] Harnois and Gabriel 2000 *op cit at* 7.

[122] Harnois and Gabriel 2000 *op cit* at 9.

out; staff working increasingly long hours with diminishing returns; poor timekeeping and high labour turnover (which can cause a severe economic burden).[123] Obviously mental health problems create difficulty in work relationships. This often culminates in tension between colleagues, poor client relations and frequently an increase in disciplinary problems. Harnois and Gabriel note that in addition to work overload, insufficient instruction, unrealistic deadlines, discrimination and harassment are factors that cause job stress.[124] Some of the many effects of stress include numerous physical ailments as well as mental health problems such as depression and increased rates of suicide. Thus it is important when discussing the position of people with mental health difficulties in the workplace that consideration is given to the impact of workplace stress on an individual's mental health. Developing an appropriate policy for people with mental health issues is not only about non-discrimination. It is also important remember the old adage 'prevention is better than cure'.

It is submitted that the escalation of the costs of disability and absenteeism due to mental ill-health will necessitate more employers facing the challenge of developing policies and guidelines to address these issues. Development of appropriate prevention and mental health promotion policies in the workplace is a critical area of focus. It is crucial that such policies be based on an understanding of the need for early intervention and treatment, as well as the value of reintegrating an employee into the work environment. Harnois and Gabriel argue further that many anti-discrimination statutes specific to employment for people with disabilities around the world have weak enforcement mechanisms. Despite this reality, they contend that there is an increasing need for employers and their human resource managers to understand how these laws affect their company's employment policies.[125] It is time for employers to acknowledge mental health issues as a legitimate workplace concern.

2.7. Obstacles to employment for people with mental health problems

Obtaining competitively paid employment for a person with a background of serious mental illness remains a challenge at the best of times. It is even more difficult in periods of high unemployment when the availability of non-disabled workers is plentiful. Individuals with mental health problems want to work but are often discouraged by many barriers in the system. Employment is an essential part of recovery for people with mental illnesses and recent advances in treatment services and medications

[123] Harnois and Gabriel 2000 *op cit* at 10.
[124] Harnois and Gabriel 2000 *op cit* at 6.
[125] Harnois and Gabriel 2000 *op cit* at 11.

have increased the capacity of people with mental illnesses to join the mainstream and live independently.

A substantial majority of persons with serious mental illness take medication. When appropriately prescribed and monitored, these medications, not only control the positive symptoms of illness (agitation, restlessness and so on), but also have a significant impact on negative symptoms such as apathy, passivity and social withdrawal, as well as interpersonal relationships. 60-80% of persons with serious mental illnesses can be substantially helped with a well-monitored medication regime and an appropriate psychosocial management and support programme.[126]

There is still a debate as to how much an employer should (or wants to) know concerning an employee's psychiatric background. In all modern legislation, disability cannot be sufficient grounds to refuse employment if otherwise the person can do the job. The assurance that there will be a quick and easy access to appropriate medical and psychological help has been found to influence very positively the willingness of employers to offer jobs to persons with mental health problems.[127] Many people feel that they have to lie about their illness or psychiatric background in order to obtain employment. It is important that this is addressed in legislation. However it is suggested that the most effective way to deal with this thorny issue is to create a mutual trusting and respectful attitude between employer and employee so that any matters that arise are easier to address.

Despite its high prevalence the diagnosis of a mental health problem, is not a welcome one due to the negative preconceptions, attitudes and assumptions about mental health problems that perpetuate stigma.[128] Mental illness frightens people and they don't want to think that it is something that could happen to them. As a result clear barriers between 'us' and 'them' are established and people with mental disorders are separated from common humanity, treated as fundamentally different and alien. Most people are generally unsympathetic towards anyone with mental health problems. Morris states that non-disabled people 'hide their fear and discomfort by turning us into objects of pity, comforting themselves by their own kindness and generosity.'[129]

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[126] Harnois and Gabriel 2000 *op cit* at 19.
[127] Harnois and Gabriel 2000 *op cit* at 25.
[128] Royal College of Psychiatrists 'Mental Disorders: Challenging Prejudice' (2002) at http://www.rcpsych.ac.uk/campaigns.htm accessed 30 June 2005.
[129] Morris 1991 *op cit* at 192.

The United States Surgeon General's Report on Mental Health published in 1999 described the impact of stigma as follows:

> 'Stigma erodes confidence that mental disorders are valid, treatable health conditions. It leads people to avoid socialising, employing or working with, or renting to or living near persons who have a mental disorder. Stigma deters the public from waiting to pay for care and, thus, reduces consumers' access to resources and opportunities for treatment and social services. A consequent inability or failure to obtain treatment reinforces destructive patterns of slow self-esteem, isolation, and hopelessness. Stigma tragically deprives people of their dignity and interferes with their full participation in society.'[130]

Stigma marginalizes and ostracizes people because they have a mental health problem. Stigma may have disastrous consequences when a person with a mental health problem starts believing that he/she deserves to be treated in such a way. Stigma can also manifest itself in the 'denial' of the person's competence, ability and potential.[131]

Commenting on the report on a survey of discrimination experienced by people with mental health problems, Clements, the National Director of Mind stated 'the level of discrimination revealed by this report is staggering. It confirms our worst fears- that mental ill-health is the most enduring health taboo, but yet one of the most commonly experienced health problems.'[132] She noted further that '[d]iscrimination is the single biggest problem for mental health policy. How can people recover and establish themselves in the community if they are constantly refused a chance to work or contribute to society?' The results of this survey are indeed staggering and the comments made by the respondents to the survey almost unbelievable. It is important to consider some of the results as they demonstrative of the effects that the stigma of mental illness can have. A third of people (34%) said they had been dismissed or forced to resign from jobs. 69% of people had been put off applying for jobs for fear of unfair treatment. Almost half (47%) the people had been abused or harassed in public, 14% had been physically attacked and a quarter (25%) of people felt at risk of attack inside their own homes 26% of people were forced to move home because of harassment.[133] The report showed that the largest problem area in people's lives was employment, either trying to return to work, staying in their current

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[130] As quoted in World Health Organisation and World Psychiatric Association *Reducing Stigma and Discrimination Against Older People with Mental Disorders* A technical Consensus Statement (2002) at 6. ('Reducing Stigma' 2002).

[131] See E Topliss *Social Responses To Handicap* (1982) and P Abberley 'The Significance of Work for the Citizenship of Disabled People' Paper presented at University College Dublin (1999) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 May 2005.

[132] J Clements as quoted in Read and Baker 1996 *op cit* at 4.

[133] Read and Baker 1996 *op cit* at 2.

jobs, or even getting work in the first place. 38% of people had been harassed, intimidated or teased at work and 34% of people were forced to resign or dismissed.[134]

Byrne observes that the persistent stigma and associated discriminatory practises of being labelled as 'mentally ill' are factors that impact on the reluctance to disclose mental health problems.[135] Many of the respondents to the survey commented that the best way for them to get on in life was to deny the existence of their mental health difficulties or psychiatric history. Finkelstein states that 'the meaning that impairment has for non-disabled people is a real barrier to our own recognition of our difference'.[136] Continuous negative responses force people to keep their mental health problems like a dirty secret. As Mairs says, 'to know that one arouses dismay and fear and pity simply sickens the spirit of anyone, whether sound of limb and mind or not. The way others recognise our difference can therefore mean that our response is to deny our difference.'[137] This reality is epitomized by an alarming comment made by a 30-year-old man diagnosed with obsessive-compulsive disorder. He said '[O]n two occasions I lied when I applied for jobs. On both these occasions I said that my two and a half year absence from employment was due to a term spent in prison. I was accepted for the first and short-listed for the second. Whenever I have been truthful about my psychiatric past, I have never been accepted for a job.'[138]

There are many differing theories about the origins and reasons for stigma[139] such as fear of the unknown,[140] survival of the fittest[141] and what Emens calls ' the hedonic costs'.[142] Emens argues that it

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[134] *Ibid.*

[135] P Byrne 'Stigma of Mental Illness and Ways of Diminishing It' (2000) 6 *Advances in Psychiatric Treatment* 65.

[136] V Finkelstein *Attitudes and Disabled People: Issues for Discussion* (1980) 21.

[137] N Mairs *Waist-high in the World: A life among the nondisabled* (1996) 103.

[138] Read and Baker 1996 *op cit* at 13.

[139] For more information on the impact of stigma on people with mental health difficulties and theories on how the problem of stigmatisation can be overcome refer to P Hayward and JA Bright 'Stigma and mental illness: A review and critique' (1997) 6 *Journal of Mental Health* 345; N Sartorius 'One of the last obstacles to better mental health care: The stigma of mental illness' in J Guimon W Fischer and N Sartorius (eds) *The image of madness. The public facing mental illness and psychiatric treatment* (1999) 96-104; PW Corrigan and AC Watson 'Understanding the impact of stigma on people with mental illness' (2002) 1 *World Psychiatry* 16; AH Crisp, MG Gelder and S Rix 'Stigmatisation of people with mental illness' (2000) 177 *British Journal of Psychiatry* 4; JM Clifford 'Stigma and ineffective legislation' (2001) 178(6) *British Journal of Psychiatry* 576; AH Crisp 'The tendency to stigmatise' 2001 178(3) *British Journal of Psychiatry* 197.

[140] Morris 1991 *op cit* at 85. Morris notes that fear and denial prompt the isolation of those who are disabled, ill or old as 'other'. T Shakespeare 'Cultural Representation of Disabled People: dustbins for disavowal?' In L Barton and M Oliver *Disability Studies: Past Present and Future* (1997). Shakespeare opines that people with impairments are the ultimate non-conformists, and as such are perpetually threatening to the self-image of the average, so-called 'normal' population.

[141] T Shakespeare 'Arguing about genetics and disability' (2000) 13(3) *Interaction* 11 and T Shakespeare 'Choices and rights: eugenics, genetics and disability equality' (1998) 13(5) *Disability and Society* 665. See also R Hurst 'Disability & Policy - Survival of the Fittest' Paper presented at the *Dialogues in Disability Theory & Policy* Seminars, City University, London (1996) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 10 June 2005 at 5.

is not lack of knowledge, stereotypes or a desire to eliminate the 'weak links' that causes discrimination, although these are obviously contributing factors. She contends that people with mental illness are shunned because of the way they make people feel. This is a result of an 'emotional contagion'. Emens notes that if one talks to someone with depression, for example, one will also begin to feel depressed. This is also the case with someone elated as a result of a manic episode of bi-polar disorder. In fact in any interpersonal situation, our moods are influenced by the mood of people we interact with. Thus when someone is experiencing mental distress this has an effect on others around them. This approach is quite revolutionary because it certainly puts a spanner in the works of the 'contact theory' which proposes that contact with people with mental health difficulties will increase tolerance and decrease discrimination.[143] However until a conclusive understanding of stigma is established efforts to educate and eliminate discrimination are the best tools we have.[144] One of the major obstacles is to change the way people with mental illness are portrayed in the media.

Disabling stereotypes which medicalise, patronise, criminalise and dehumanise disabled people abound in books, films, on television, and in the press.[145] They form the foundation on which the attitudes towards, assumptions about and expectations of disabled people are based. They are fundamental to the discrimination and exploitation which disabled people encounter daily and contribute significantly to their systematic exclusion from mainstream community life.[146] Researchers have identified portrayals of mentally ill persons as violent and criminal as the most common depictions of mental illness in the popular media.[147] Olstead concludes, after analysing 10 years worth of newspaper articles, that the representation of mentally ill people as violent criminals is a method employed by the popular press to reinforce the distinction between 'us' (the world) and 'them' (mentally ill people).[148] Olstead argues that even more damage is done by the depictions of mentally ill people as having no social identity.

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[142] EF Emens 'The Sympathetic Discriminator: Mental Illness and the ADA' (2004) Working Paper: The Law School of the University of Chicago at http://www.law.uchicago.edu/academics/publiclaw/index.html accessed 21 April 2005 at 4.

[143] Emens 2004 *op cit* at 30.

[144] Emens 2004 *op cit* at 75. See also R Haghighat 'A Unitary Theory of Stigmatisation' (2001) 178 *British Journal of Psychiatry* 207. Haghighat proposes a multi level approach to the elimination of stigma including continuous education programmes and anti-discrimination legislation. He argues that most interventions are unlikely to change attitudes towards people with psychiatric difficulties but they may modify behaviour.

[145] See also L Clark 'Disabling Comedy: "Only When We Laugh!"' Paper presented at the 'Finding the Spotlight' Conference Liverpool Institute for the Performing Arts (2003) at http://www.leeds.ac.uk/disability-studies/archiveuk/Clark,%20Laurence/clarke%20on%20comedy.pdf accessed 15 May 2005. This is a fascinating review of the use of 'impairments' as material for comedy in Britain. It certainly causes one to reconsider what one should laugh at.

[146] C Barnes 'Discrimination: Disabled People and the Media' (1991) 70 *Contact* 45.

[147] O Wahl 'Media Images of Mental Illness: A review of the literature' (1992) 20 *Journal of Community Psychology* 343.

[148] R Olstead 'Contesting the text: Canadian media depictions of the conflation of mental illness and criminality' (2002) 24(5) *Sociology of Health & Illness* 621 at 621.

Thus the mentally ill are identified primarily through their disorder. This encourages the public view that mentally ill people are not part of the usual 'fabric of society' and different from 'real' people.[149]

Stigmatising is a common human characteristic, it is pervasive and subtle in its effects, and it is difficult to counteract without clear and conscious strategies.[150] Harnois and Gabriel contend that the best way to fight stigma is through appropriate education and information.[151] As a public education campaign would involve the mass media it would be necessary for the media to reevaluate the unfavourable light in which they portray mental illness. Codes of ethics should be strengthened and rigorously applied to eradicate the all too frequent 'sensationalism' with which the press treats stories involving persons with 'alleged' or 'real' mental health problems. Since the media play a crucial role in filtering information that reaches the public, it is obvious that all efforts should be made by mental health professionals to work closely with them to correct the misconceptions which they may harbour.[152] Another area of focus that will assist to the elimination of stigma and discrimination in employment is the dispelling of the most prevalent myths about people with mental health problems in the workplace. Some of the major myths regarding the impact of mental illness include:

- Mental illness is the same as mental retardation
- Mentally ill and mentally restored employees[153] tend to be second-rate workers.
- People with mental health problems cannot tolerate stress on the job.
- Mentally ill and mentally restored individuals are unpredictable, violent, and dangerous[154]

The facts clearly dispute all of these myths and thus employers should be made aware that many of the reasons for their wariness in employing people are completely unfounded and based on prejudicial stereotypes.[155]

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[149] Olstead 2002 *op cit* at 625.
[150] 'Reducing Stigma' 2002 *op cit* at 8.
[151] Harnois and Gabriel 2000 *op cit* at 28.
[152] B Duncan ' The media and mental illness' (2000) at Http://www.disabilityworld.org accessed 5 September 2005.
[153] This refers to people whose mental health problem is effectively treated.
[154] Barnois and Gabriel 2000 *op cit* at 29.
[155] *Ibid.*

2.8. Legislation as a tool for decreasing stigma and discrimination

In theory, legislation both reflects and moulds public attitudes. To date, there has been little experimental evidence showing whether anti-discrimination legislation would change public stereotypes.[156] It is possible that new laws contrasting with personal attitudes would challenge people into debate and self-questioning. The final outcome in some cases is likely to be a change of attitudes, but in most cases the public would choose the easiest route: holding onto their pre-existing attitudes while justifying their new behaviour with the necessity to avoid the sanctions in force. Haghighat submits anti-discrimination laws acting as symbols of 'parental' authority and judgment could merely suppress stigmatising attitudes but at the same time they are likely to function as institutional support, protecting people from injustice and increasing the public tendency, to act in a more egalitarian manner.[157]

The exercise of discrimination can be subtle, such as sitting apart or not smiling, or blatant, such as rejection of an employment application or refusing to rent out accommodation or not allowing people on public premises.[158] The legislative system needs to be encouraged and/or put under pressure through advocacy and lobbying by anti-stigmatisation watch-dogs created within psychiatric associations. It is important to identify gaps in the legal protection and promote enacting laws that allocate sanctions on gross discriminatory behaviour. Thus it is essential not only that legislation provides the mechanisms and framework to prohibit discrimination but that there is effective enforcement.[159] Haghighat argues that destigmatisation through legislative means also requires measures to promote positive discrimination in the sense that employers should be rewarded for having a quota of employees that have mental health problems and provide them with training options and specific sick-leave provisions as a means of recognising the value of people with mental health problems and the ubiquity and acceptability of mental illness.[160]

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[156] Haghighat 2001 *op cit* at 224.
[157] *Ibid.*
[158] Haghighat 2001 *op cit* at 225.
[159] For this reason the analysis of each anti-discrimination statute discussed in the thesis will focus on the substantive provisions relating to discrimination as well as the efficacy enforcement thereof.
[160] Haghighat 2001 *loc cit.*

2.8.1. Introducing a quota system

Internationally there is no legislation that provides specifically for the protection and promotion of people with mental health difficulties in the workplace. However many affirmative action and quota programmes for disabled people do include people with mental health problems too (provided that meet the requirements of medically based definitions). The quota system that is used, for instance, in 10 European countries obliges employers to hire a certain percentage of disabled persons as part of their workforce. The quota usually applies to all of the public sector and to several components of the private sector, under certain conditions.[161]

In Germany,[162] for example, the quota is usually 6% and applies to all employers with at least 16 employees. It is noteworthy that in this system if employers they fail to fulfil their quota, a fine or 'levy' is assessed which is then pooled in a fund to promote the employment of disabled persons. Bagenstos argues that the German quota system has not been entirely successful as it relates only to the hiring of disabled people. It does not improve their situation in the workplace and it also sends out a message that disabled persons are not good workers. Germany has recently introduced anti-discrimination legislation to improve this position, however it applies mostly to the public sector.[163] In Britain their highly ineffective quota system was abolished in 1995 when the Disability Discrimination Act came in to effect. Bagenstos argues that many American disability activists who are unhappy with the results of the Americans with Disabilities Act would like to see a quota system implemented. He states that they would do well to consider the experiences of other jurisdictions as the use of a quota on its own has very little impact on changing attitudes and eliminating social barriers that disable impaired people.[164]

2.8.2. Employment equity

Affirmative action measures have been adopted in both Canada and South Africa for disabled people. The South African approach to Employment Equity and its efficacy for people with mental health

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[161] Harnois and Gabriel 2000 *op cit* at 45.

[162] D Bybee, CT Mowbray and NM McCrohan 'Towards zero exclusion in vocational opportunities for persons with psychiatric disabilities: prediction of service receipt on a hybrid vocational/ case management service program' (1996) 19(4) *Psychiatric Rehabilitation Journal* 13. See also SR Bagenstos 'Comparative Disability Employment Law from an American Perspective' (2003) 24 *Labor Law & Policy Journal* 649 at 649-57.

[163] Bagenstos 2003 *op cit* at 658.

[164] *Ibid.*

issues will be discussed at length in the chapter on South Africa. However it must be noted at the this stage that the advantage that is shared by both the Canadian and South African approach to disability, particularly in the realm of employment, is that disabled people are not only protected against discrimination but the opportunity to enter and remain in employment is bolstered by positive measures too.

South Africa's disability policy is in its infancy but it is encouraging to note that the Canada has been exceptionally successful at ensuring that disabled people are represented at all levels of employment. In 2004 the Canadian government published a document called the *Employment Equity Data Report 2001.*[165] The 2001 Participation and Activity Limitation Survey (PALS), was the source of information on persons with disabilities (Employment Equity defined) for the purposes of this report. PALS collects information on people whose everyday activities may be limited because of a health-related condition or problem.

The data collected showed that in 2001 there were 1 million disabled people in Canada aged 15-64 years. This accounted for 5.1% of the total population. The survey showed that 865 670 of those disabled people had been employed between 1996 and 2001. Thus persons with disabilities made up 5.3% of the workforce. These statistics are incredibly positive, especially considering the fact that in 1991 (when the last survey was conducted) unemployment of people with disabilities was 50% higher than the normal population.[166] One obstacle to be overcome is that the majority of disabled workers are still in low level employment. It should be remembered though that a programme such as employment equity that involves an upheaval of traditional perceptions and practices must proceed steadily and slowly in order to effectively achieve its goals. Otherwise people may be placed in positions for which they are not qualified in order to comply with an employment equity plan. In one employer's annual employment equity report it was stated that 'the biggest lesson is to understand that employment equity is a continuous process, that it must become part of the corporate culture and recognised for its positive contributions to the company's performance in terms of its business and financial success.'[167] This is an important sentiment as it is often difficult to sell the idea of affirmative action to employers who are under the impression that hiring someone with a mental health problem will be an extra burden. It is

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[165] Government of Canada *Employment Equity Data Report 2001* (2004).
[166] *Employment Equity Data Report* 2004 *op cit* at 23-4.
[167] As quoted in the *Employment Equity Data Report* 2004 *op cit* at 45-6.

important to understand that in the long-term, everyone will benefit from having a workforce that is representative of the country's population.

These comments are equally applicable for the implementation of South Africa's employment equity policy. However as it stands there are several areas of the South African law that will prevent South Africa from achieving the same sort of success as Canada.[168] It should be borne in mind that Canada is a wealthy, first world country with a small population and a drive for change. In South Africa, although the legislation may be adequate, the infrastructure and funding is lacking. It is clear that the rate at which disabled people have been assimilated into the Canadian workforce would not be achievable in South Africa. However as a policy, employment equity[169] is an effective means of enhancing employment opportunities, and thus the socio-economic status of disabled people.

2.8.3. The importance of defining disability

As the psychiatric survivors' movement has developed no clear policy as yet on how to eliminate discrimination and stigma there has been little to actively challenge the disinterest in mental health difficulties by policy makers and legislators. Thus people with mental health problems have been lumped with people with physical and other disabilities in their legislative treatment regarding employment.

However, as will be extensively demonstrated throughout this thesis, most anti-discrimination legislation is based on the medical understanding of disability and thus many people with mental health problems are excluded from the much needed protection of the legislation. This is exacerbated by the fact that there is clear bias in such legislation towards physical and sensorial disability. As was shown above, it is very difficult to conceptualise mental health difficulties as fitting within any model of disability as the individuals may not feel that they are impaired or disabled. Any legislation protecting the rights of disabled persons obviously requires a definition of what constitutes 'disability'. Even amongst the disabled community there is little consensus as to the meaning of the term. The word is

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[168] These include the definition of people with disabilities, inadequate enforcement and general lack of funding. These issues will be thoroughly canvassed in the chapter on South Africa.

[169] The Employment Equity Act of 1986 was ineffective and was thus revised in 1995. The Employment Equity Act of 1995 is much more stringent in its requirements and enforcement. See Human Resources Development Canada Guidelines for the Employment Equity Act 1995 at www.hrsdc.gc.ca/en/lp/lo/lswe/we/legislation/guidelines/guidelines.pdf accessed 25 July 2005 accessed 25 July 2005.

emotionally charged, however it is widely understood to refer to disadvantage accruing from the interaction of a person's condition and the environment.[170]

The reason for debate around definitions is because many people have a stake in knowing who is disadvantaged, how many, and under what conditions.[171] Some are interested so that environments can be made accessible and charges of discrimination avoided. Others want to know because of the tax or income support benefits that can follow. On the other side of the coin, insurance firms, tax departments and others want to know because of the implications for revenue or expense involved. Leaders of advocacy organisations and governments want to know for policy, planning and advocacy purposes. Doyle describes what should be included in a definition of disability in anti-discrimination legislation:

> 'The definition of disability must be both inclusive and exclusive: embracing individuals outside the limited popular perception of "disability", yet excluding idiosyncrasies, human traits and transient illness. A distinction must be drawn between chronic or handicapping conditions and temporary or minor maladies.'[172]

It is submitted that this Doyle is correct in his appraisal however the desire to exclude certain conditions and to prevent abuse of the system has resulted in some excessively narrow definitions and judicial interpretations. Legislative definitions of disability are mostly developed from the definition used by World Health Organisation in 1980:

> 'In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being' [173]

Obviously disabled people and activists are dissatisfied with this individually based definition definition, and rightly so. Many attempts have been made to amend this definition since 1980 but none have been particularly successful. The most recent of which is the new (2002) ICIDH-2 model from the WHO which proposes that disability is the disadvantage to the person that results from an interaction

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[170] Neufeldt 2002 *op cit* at 6.
[171] Neufeldt 2002 *op cit* at 7.
[172] B Doyle 'Employment rights, equal opportunities and disabled persons: the ingredients for reform' (1993) 22 *Industrial Law Journal* 89 at 91.
[173] P Wood *International Classification of Impairments, Disabilities and Handicaps* (1980) World Health Organisation: Geneva at 27-9.

between a person's health condition, environmental factors and personal factors, taking account of the person's role and activities.[174]

This definition has also been criticised as it still places too much emphasis on the individual rather than the environmental factors that create disability.[175] For people with mental health difficulties it still doesn't give enough attention to the role of stigma and prejudice. However the one advantage it does have is that it refers to 'health condition' instead of impairment. This may assist those with mental health difficulties who do not see themselves as having an impairment. This definition has however also been criticised as being too vague and thus it makes it difficult for those wishing to 'count' disabled people. It is submitted that for most purposes it is clearer to use the word as referring to the consequence of social and physical environments as they impact the person with impairment- a definition of disability consistent with that used by international organisations of disabled people.[176]

In order to overcome some of the difficulties associated with defining disability Canada has abandoned the idea of defining disability. Rather, for the purposes of employment equity, census and other relevant legislation, a person is considered disabled if they identify themselves as such. For the purposes of the Canadian Employment Equity Act 1995 a person is considered disabled it they

> 'have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who
> (a) consider themselves to be disadvantaged in employment by reason of that impairment, or
> (b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment, and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace.'[177]

It is submitted that this is an excellent approach because it overcomes the problem of medicalising the experience of disability. The way it has been formulated is also useful because it ensures that people with trivial or minor ailments will not be considered disabled. An advantage of self-identification of disability is that it allows the real issue of discrimination to be considered. As will be explored in a later chapter, the Australian disability discrimination legislation has opted for an exceptionally broad

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[174] WHO *International Classification of Impairments, Disabilities and Handicaps 2* (2002) World Health Organisation: Geneva.
[175] Neufeldt 2002 *loc cit.*.
[176] 'Disability is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers' DPI *Proceedings of the First World Congress* (1982) Disabled People's International: Singapore.
[177] Section 1 Employment Equity Act 1995 (Canada).

definition of disability and thus the attention is suitably focused on whether or not discrimination has occurred.

There is some concern that a broad social definition or lack of definition may 'open the floodgates' for malingering persons desirous of claiming that they have been discriminated against. If this were to occur it would undermine the experience of disability and bring those who really are prejudiced by disability into disrepute. However it is submitted that this is not a real risk. As will be shown throughout this thesis, it is not easy to prove that one has been discriminated against on the grounds of disability. It can also prove costly. The stringent approach with which the courts have approached disability discrimination cases,[178] mostly those involving psychiatric disability, show that they are would certainly not tolerate a claim by someone who could not show some sort of disadvantage related to an impairment. Furthermore, most disability discrimination legislation is designed to provide an employer with extensive defences to a discrimination claim.

Canada's self-identification approach is also advantageous from a 'counting' point of view. It is necessary, for the purposes of quantifying the success of the Canadian employment equity programme, to identify how many disabled people are employed within various levels and sectors of employment. Thus by adopting an approach that allows people to self-identify as disabled, people who would otherwise be excluded by a restrictive definition are included in the statistics.

Although obviously beneficial for many reasons, relying on the self-identification of people with disabilities is not ideal for people with mental health issues. Not only does continuing stigma preclude such individuals from wanting to declare themselves as having a psychiatric disability but many people with mental health issues do not believe that they have an impairment.[179] However provisions relating to confidentiality of disclosure in conjunction with educational programmes designed to alleviate the burden of stigma on people with mental health issues may overcome this difficulty.

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[178] In particular in the United States and Britain courts have been loathe to accept that people with mental health difficulties are psychiatrically disabled. See the chapter on Britain and South Africa for more detail.

[179] They may either be unaware of their mental illness or consider their 'impairment' as an illness (as there is more chance of recovery associated with such a term) or merely as a different way of experiencing the world rather than a disability. See the discussion on the effects of stigma above.

2.8.4. The provision of reasonable accommodation

Abberley argues that even although employment is exceptionally important for the empowerment of people with disabilities, it must be recognised that employment of all people with disabilities is an Utopian ideal that is practically unobtainable.[180] This statement is even more salient for people with severe mental health difficulties. It is a reality that some people are just not able to function in the traditional, competitive market place. It is important for those who are able to do so however that an inability to obtain and retain employment is not based on prejudicial attitudes based on negative stereotypes that manifest in discriminatory appointments, terms of employment and dismissals. It is for this reason that anti-discrimination employment legislation and employment equity legislation can play such an important role in improving the well being of people with mental health difficulties. Those persons who do experience functional limitations as a result of their impairment are entitled to have those limitations accommodated. For example Beresford, a leading writer in the area of psychiatric disability, has agoraphobia (fear of open spaces). He states that he would not have been appointed as a professor without the changing attitudes and the opportunity to request 'reasonable adjustments' that have been facilitated by the introduction of British DDA 1995.[181] Thus he notes that his appointment was not only a personal achievement but also a demonstration that people are starting to understand that people with mental health problems can offer something of substance, even to a profession that is not traditionally suited to someone with such an impairment.[182]

Most countries have legislation which postulates that disability shall not be a barrier to a meaningful life. With respect to access to work, most of these laws dictate that an employer should make reasonable accommodation and describe what is meant by this concept. The provisions that apply most often to persons with mental health problems have to be developed individually and often relate to part-time or modified work schedules, job restructuring to eliminate or exchange auxiliary job functions that increase pressure for the worker, and time off for therapy. Whereas the accommodation necessitated for physical disability are very often technical or a one-time affair, those required for psychiatric disabilities tend often to be quite simple but will require an attitudinal change on the part of the employer and, quite often, co-workers. Laws also generally dictate that the cost of 'reasonable

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[180] Abberley 1999 *op cit* at 14.
[181] Beresford 2004 *op cit* at 6.
[182] *Ibid.*

accommodation' should not be 'unreasonable or unbearable' for the employer. Often there will be a defence of unjustifiable or undue hardship.[183]

The way in which the provision of reasonable accommodation is approached can have an impact on its efficacy. Reasonable accommodation is necessary in order to enable people with disabilities to enjoy their basic human rights, in particular the right to dignity and equality. This is an ability that able-bodied/minded people take for granted. Thus it is essential that employers and co-workers don't see the provision of accommodation as a form of special treatment or positive discrimination but rather it should be viewed as a means to achieve equality.[184]

2.9. Concluding remarks

It is submitted protection against discrimination in employment of people with mental health difficulties does not really belong within the popular formulation of disability as seen in disability discrimination legislation. However without clear guidance from a movement equivalent to the disability rights movement it is difficult for legislators and policy makers to know where to proceed. Until a comprehensive approach to understanding and promoting mental health system user's relationship with employment it is submitted that anti-discrimination legislation is based on a definition and understanding of disability that is social in orientation.

Access to satisfying work remains one of the most sought-after goals of the adult population of most countries. In the Capitalist system in which we live, work delineates one's existence. Mental health problems contribute to the global burden of disease more to a larger degree than infections, AIDS, cancer and physical accidents. The impact of mental health problems on absenteeism, productivity and job satisfaction is only starting to be realised.[185]

Given the importance of work, and due to advances made in the prevention, treatment and rehabilitation of persons with mental health problems, it makes eminent sense to address all aspects of the mental well being of employees. For the same reasons, the disability associated with severe mental health problems can no longer serve as an excuse to deny those who so wish reasonable access to

[183] Barnois and Gabriel 2000 *op cit* at 45. The provisions relating to accommodating mental health problems in each of the countries discussed will be considered in some depth in the relevant chapters.
[184] This will be discussed in more detail in chapter 6.
[185] Barnois and Gabriel 2000 *op cit* at 41.

competitive employment. It is a precondition to full citizenship. Breaking the cycle of discouragement and eliminating the numerous societal barriers that affect employment is key to enhancing the economic and social integration of people with mental health problems. The mental health system can have a large influence on challenging negative stereotypes. It is important to recognise that in many parts of the world the mental health delivery system often discourages an individual from entering the workforce or returning to work after a diagnosis of mental ill-health, despite stabilisation of symptoms. Previous successful work history is a key factor in predicting successful return to employment. This obviously puts persons with a background of serious mental illness at a disadvantage. Employers should be encouraged to implement good practices. It should be remembered however that employers are not social agencies and are traditionally reluctant to hire persons with a background of serious mental illness. Employers are concerned that there will be a loss of productivity and this concern has to be addressed. It would be useful to have broader publication of studies that have been done relating to the productivity of disabled persons in comparison to non-disabled. [186]

While access to paid work for persons with serious mental health problems can be influenced by a number of contingencies such as low level of development, traditions, culture, and high level of unemployment, disability, including mental health disabilities, cannot be used as an excuse to refuse access to employment to someone who wishes to work and is capable of working.

[186] RC Kessler and RG Frank 'The impact of psychiatric disorders on work loss day' (1997) 27 *Psycho Med* 861.

Chapter 3

INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF DISABLED PEOPLE

3.1 International human rights

All international human rights instruments protect the human rights of persons with disabilities, as they apply to all persons. This principle of universality is reinforced by the principles of equality and non-discrimination, which are included in human rights instruments. Article 7 of the Universal Declaration of Human Rights[187] states

> 'all are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

The International Covenant on Civil and Political Rights[188] deals with a range of human rights including, for example, the right, without discrimination, to equality before the law. Article 6(1) and (2) of the Covenant on Economic, Social and Cultural Rights[189] further protects the right of every person to have the opportunity to do the work which he/she chooses. Party states must take steps to realise this right, including technical and vocational guidance and training programmes. None of these instruments specifically refer to disability but the fact that they are equally applicable to disabled people was confirmed by at the World Conference on Human Rights Vienna Declaration.[190] Despite this international guarantee as well as the incorporation of human rights into domestic legislation, in reality disabled people have not received equal rights.[191] In commemoration of the 50th anniversary of the Universal Declaration of Human Rights a document was published that exposes the violations of the rights of disabled people throughout the world. In this document it is stated that 'We must all be aware that no society can enjoy full development without proper consideration of all members and that there

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[187] GA Resolution 217A(III) UN Doc A/810 (1948).
[188] GA Resolution 2200A (XXI) of 16 December 1966.
[189] GA Resolution 21/2200A UN Doc A/6316 (1966) which entered into force on 3 January 1976.
[190] 32 ILM 1661 (1993). See also R Wallace *International Human Rights: Texts and Materials* (1997) 264.
[191] For example the high unemployment rates, institutionalisation, discrimination as discussed above. See further AH Neufeldt and R Mathieson 'Empirical Dimensions of Discrimination Against Disabled People' (1996) 2(1) *Health and Human Rights* 175.

is no acceptable future for a society where individuals are excluded and deprived of their rights and dignity.'[192]

3.2. The International Labour Organisation

The International Labour Organisation (ILO) has embraced the principles of non-discrimination and equality of treatment since its foundation in 1919.[193] In 1958 the ILO adopted the comprehensive Discrimination (Employment and Occupation) Convention and recommendation (Convention 111). Convention 111 requires member states to promote non-discrimination by abolishing discriminatory legislation, formulating polices of non-discrimination and enacting legislation that secures equality in employment.[194] Under this convention, all people have the right to equal treatment in employment and occupation without discrimination on a range of grounds. Disability is not specifically included but it may be assumed that it would be included under 'any other status'. Convention 111 does not contain a provision relating to disability discrimination but other ILO standards have been formulated in this regard. These include the ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention No159 (1983) and ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No.168 (1983). Convention No 159 is designed to further the vocational training of disabled people and to promote their integration into the open labour market. Equality of treatment of disabled people is also included as an aim.[195] Article 1 of Convention 159 defines a disabled person as

> 'an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.'[196]

This definition is clearly still based on the individual model of disability with no regard for societal and physical barriers that impede the advancement of people with disabilities. In addition people who have had disabilities or are perceived as being disabled people are not included.

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[192] R Hurst (ed) '"All Human Beings are born free and equal in Dignity and Rights." Are Disabled People Included? An exposure document on the violation of disabled people's human rights and the solutions recommended within the UN Standard Rules' (1998) *A Paper to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights* Disability Awareness in Action at 21.

[193] The ILO was originally formed as part of the League of Nations. In 1946 it became the first specialised agency of the UN.

[194] Article 2 and 3. See further HK Nielsen 'The Concept of Discrimination in ILO Convention No 111' *International and Comparative Law Quarterly* 827 for a detailed discussion.

[195] Article 3.

[196] This definition is very similar to the one adopted in the South African Employment Equity Act.

3.3. Declarations, principles and rules

International instruments, such as declarations, resolutions, principles, guidelines and rules, are not technically legally binding. They express generally accepted principles and represent a moral and political commitment by states. They also can be used as guidelines for states in enacting legislation and formulating policies concerning persons with disabilities.[197] There are three important documents relating to disability that have such standing.

The United Nations (UN) has been very progressive in its recognition of the rights and needs of disabled persons.[198] Firstly in 1975 the UN Declaration on the Rights of Disabled Persons set forth what the rights of disabled people should be and further suggests that steps should be taken to advance the social integration of disabled people. The second important instrument is the UN Standard Rules on The Equalization of Opportunities for Persons with Disabilities (UNSR), adopted in 1993.[199] The UNSR established that member states[200] have an obligation to 'create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities.'[201] These rules recommended that legislative measures should be adopted by nation states to address disability issues. It also mentions the possibility of affirmative action measures.[202] There have been some criticisms targeted at the focus on economic, social and cultural rights in the UNSR. The neglect of political and civil human rights of people with disabilities means that violations such as enforced sterilisation and cruel and degrading treatment are not covered by the rules.[203] In 1994 the Committee of Economic, Social and Cultural Rights, who have the task of overseeing the Covenant[204] investigated the compliance of member states to the rights contained therein with relation to disabled persons. In their General Comment[205] disability discrimination was defined for the first time:

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[197] See United Nations Division for Social Policy and Development 'Overview of International Legal Frameworks for Disability Legislation' unpublished paper August 1998 at http://www.un.org/esa/socdev/enable/disovlf.htm accessed 25 June 2005.

[198] In 1982 the UN commenced its World Programme of Action concerning Disabled Persons and declared the following decade the Decade of Disabled Persons. (General Assembly Resolution 37/52 of 3 December 1982).

[199] GA Resolution 48/96 (1993).

[200] South Africa is also a member state of the United Nations and thus this is significant for the development our law too. The ILO standards are also applicable in the South African context as can be seen by the LRA 1995 in which it is clear that attention was given to the ILO conventions in the creation of South African Labour Legislation.

[201] UNSR Rule 15 (Preamble).

[202] Rule 15 (3).

[203] T Degener and Y Koster-Dreese (eds) *Human Rights and Disabled Persons* (1994) 16-17.

[204] Covenant on Economic, Social and Cultural Rights (1966), coming into force 1976.

[205] General Comment No 5 'Persons with Disabilities' UN Doc E/C12/1994/13.

> 'For the purposes of the Covenant (ICESCR), disability based discrimination may be defined ass included any distinction, exclusion, restriction, or preference, or denial of reasonable accommodation based on disability, which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social and cultural rights.'[206]

What is especially noteworthy about this definition is the inclusion of 'reasonable accommodation' as an enforceable right, rather than as a charitable goal. Unfortunately General Comment no 5 is not enforceable.

The only international instrument that applies specifically to people with mental health difficulties is the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (the MI Principles).[207] These rules emphasize the importance of maximising the fundamental human rights of people with mental illnesses.[208] Rosenthal and Rubenstein describe the MI Principles as articulating 'a panoply of human rights that stress freedom, due process and non-discrimination'.[209] However these rules focus on health care and the prohibition of inhumane treatment. This is in accordance with the general perception that care and protection of people with mental health difficulties is more important than their gainful employment.

Therefore people with mental health problems desirous of obtaining employment do receive limited protection on an international scale. However the majority of that protection is reliant upon a person with a mental health problem being classified in terms of ILO Convention 111 as having a mental disability.

It is clear that although the international organisations have attempted in some ways to create an onus on states to enact legislation and policies to ensure the equal rights and promotion of people with disabilities that the attempts have been fundamentally flawed. Most noticeable is the fact that none of the instruments specifically formulated for disabled people are binding, they merely hold moral and ethical weight.

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[206] As quoted in Hendriks 1996 *op cit* at 163.
[207] GA Resolution 52 (1991).
[208] D Court 'Mental Disorder and Human Rights: the Importance of a Presumption of Competence' (1996) 8 *Auckland U L Rev* 1 at 6.
[209] Rosenthal and Rubenstein 'International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness"'(1993) 16 *International Journal of Law and Psychiatry* 257 at 260.

3.4. The forthcoming UN Disability Convention

While the desirability of an international convention to promote and protect the rights and dignity of persons with disabilities has been advocated by organizations of persons with disabilities for some time, the current effort is the direct result of an initiative taken by President Fox of Mexico in his address to the fifty-sixth session of the General Assembly. President Fox observed that as societies address the complex tasks of the creation and equitable distribution of opportunities and global development, it is important that these efforts involve all citizens. He added that it would be impossible to make the world more just if certain groups were excluded from these processes. For that reason Mexico presented the establishment of a 'Special Committee' to study the elaboration of an international convention on promoting and protecting the rights and dignity of persons with disabilities.[210] In response to the address, the General Assembly resolved to establish an Ad Hoc Committee to consider proposals for a comprehensive international convention to promote and protect the rights of persons with disabilities.[211]

Mathiason, states that for the purposes of proposed disability convention, the defining who a person with a disability is, is neither easy nor unimportant. A too-restrictive definition would exclude deserving persons from the provisions of the convention and an excessively open definition would include persons who did not need the protection afforded.[212] He states further that the complexity of the issue was shown in the Expert Meeting where several experts noted that existing definitions do not deal adequately with what was termed 'psychiatric or psycho-social' disability, in contrast with intellectual impairment. This issue is obviously one of vast importance for this thesis.

It is imperative that this instrument sets a positive example in defining a disabled person in a way that that reflects global trends and understanding of the concept. It is interesting to note that in the Draft comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities ('Disability Convention') the parties involved have still been unable

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[210] J R Mathiason 'Considerations for the proposed International convention to promote and protect the rights and dignity of persons with disabilities' (date unknown) at http://www.worldenable.net/mexico2002/considerations.htm accessed 25 June 2005 at 1.

[211] GA Resolution 56/168 of 2000. The first meeting of that committee took place at United Nations Headquarters from 29 July-9 August 2002.

[212] Mathiason *op cit* at 4.

to define the terms 'disability' or 'person with a disability'. Some have opined that there should be no definition to allow for the complexity of the situation and others have favoured a broad definition.[213]

Providing equal opportunities for persons with disabilities means developing policies and programmes that compensate for the conditions that create disability. Thus it inevitably implies some form of 'reasonable accommodation' and positive discrimination. In this sense, the proposed Disability Convention would be unique and ground breaking. Unlike other human rights conventions, the matter of defining who are the beneficiaries in the proposed Disability Convention is a critical issue. For most other conventions, the intended beneficiaries are relatively clear: women, children, persons of one race or another, and persons in a migrant worker status.

3.4.1. Reasonable accommodation

Mathiason notes that in the Disability Convention the term 'equal' will refer to equal opportunities and equal rights as opposed to equal treatment.[214] Thus the approach would be one of substantive equality. Equality of outcome for persons with disabilities requires actions that will overcome the consequences of disability. Thus the concept of reasonable accommodation must be translated into terms that will be effective in international law.[215]

In the context of equalisation of opportunities for persons with disabilities, accommodation is the provision of adaptations in terms of facilities and services, conditions of work or living, which place persons with disabilities on an equal footing with persons in society who do not have a disability. The accommodation needed will depend on the disability, the economic or social sector and the environment. Mathiason submits that if classes of accommodation can be included in the text of an international convention under the respective area (employment, education, participation), the convention would be stronger.[216] The concept of what is 'reasonable' creates some challenges. Two questions need to be considered in this regard. The first is at what level of accommodation is fair for all members of society. The second is what is reasonable in terms of the resources available to a society, especially public resources, which is an issue of feasibility. Mathiason suggests that what is reasonable

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[213] UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Working Group 'Report of the Working Group to the Ad Hoc Committee A/AC.265/2004/WG' (2004) New York at www.un.org/esa/socdev/enable/rights/ahcwgreport.htm accessed 16 September 2005 at 11 (fn to Article 3).
[214] Mathiason *op cit* at 6.
[215] Mathiason *op cit* at 5.
[216] Mathiason *loc cit.*

will depend on how much a society is willing to pay for accommodation based on a principle of fairness. He submits that these issues need to be addressed in the proposed Disability Convention. In the draft reasonable accommodation is mentioned with respect to employment only and there is no further elaboration on the concept. It is mentioned however as an addendum that many parties involved were of the opinion that the provision of reasonable accommodation in employment should be more detailed. It was also suggested by some that a separate article relating to reasonable accommodation should be included.

3.4.2. Destigmatisation

Article 5 of the draft Disability Convention is particularly exciting. Due to the significance of this provision in relation to what has been discussed about the elimination of stigma and discrimination it is worth quoting in its entirety.

> **'Article 5 Promotion of positive attitudes to persons with disabilities**
> 1. States Parties undertake to adopt immediate and effective measures to:
> (a) Raise awareness throughout society regarding disability and persons with disabilities;
> (b) Combat stereotypes and prejudices about persons with disabilities;
> (c) Promote an image of persons with disabilities as capable and contributing members of society sharing the same rights and freedoms as all others and in a manner consistent with the overall purpose of this Convention.
> 2. These measures shall include, among others:
> (a) Initiating and maintaining an effective public awareness campaign designed to nurture receptiveness to the rights of persons with disabilities; all levels of the education system, to foster an attitude of respect for the rights of persons with disabilities;
> (c) Encouraging all organs of the media to project an image of persons with disabilities consistent with the purpose of this Convention;
> (d) Working in partnership with persons with disabilities and their representative organizations in all measures taken to give effect to the obligations contained in this article.'[217]

This article would certainly go a long way to improving the position of people with mental health problems. As was noted in the previous chapter many of the difficulties experienced by people with mental health issues are directly related to stigma and prejudicial attitudes. An international incentive to improve this situation is exactly what is needed to combat the pervasive stigmatisation of those with mental health problems. This Article certainly accords with the focus of the Disability Convention on the dignity of disabled persons.

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[217] 'Report of the Working Group to the Ad Hoc Committee' 2004 *op cit* at 12.

3.5. Concluding remarks

It is submitted that the draft Disability Convention needs some work but it is certainly a huge step in the right direction. It is contended that the success of the Disability Convention in furthering the rights of people with mental health difficulties hinges upon the appropriate formulation of a definition of disability that is inclusive and understanding of the experience of people with mental health issues. The Ad Hoc Committee is scheduled to have another meeting in February of 2006. It is hoped that the Disability Convention will soon be finalised so that member countries of the UN will be obliged to amend their domestic legislation to bring it in line with the Disability Convention. It is submitted further that once this document is in place it will have a hugely positive impact on the disabled community worldwide. Further, many of the difficulties espoused in this thesis could be overcome by inception of the Disability Convention into domestic law. While the importance - and increasing role - of international law in promoting the rights of persons with disabilities is recognised by the international community, domestic legislation remains one of the most effective means of facilitating social change and improving the status of disabled persons. International norms concerning disability are useful for setting common standards for disability legislation. Those standards also need to be appropriately reflected in policies and programmes that reach disabled people in order to effect positive changes in their lives. Thus until the Disability Convention is in place the protection of disabled people remains vested in domestic anti-discrimination legislation.

The next three chapters will consider the domestic legislation in Britain, Australia and South Africa. The focus of the analysis will be on the definition of disability, discrimination, the provision of reasonable accommodation and the means of enforcement.

Chapter 4

BRITAIN

4.1. Introduction

Britain was the first European country to enact disability specific anti-discrimination legislation, however achieving that goal was no easy task. Despite the fact that Britain was the birthplace of the disabled people's movement, the government of the early 1990's was reticent in its acceptance of the phenomenon of disability discrimination.[218] In 1995 the British government finally relented to internal political pressure and it passed the Disability Discrimination Act of 1995 (DDA 1995).

In the years subsequent to the promulgation of the DDA 1995 there has been much criticism levelled at its formulation however it has been successful in achieving some of its objectives. It may have been the most radical legislation covering disability discrimination in Europe but many disability rights groups argued strongly that the legislation was flawed. The major criticisms related to the fact the Act bound approximately 10% of employers in Great Britain, the definition of disability was complex and limiting and that the enforcement mechanisms were weak.[219] On the other side of the coin there were some commentators, mostly right-wing and business interest groups,[220] who believed that the legislation was too intrusive and financially burdensome on businesses who wished to remain viable in a highly competitive market.[221]

Subsequent to the promulgation of the DDA 1995 there have been extensive amendments, Regulations and Codes of Good Practice issued in order to improve the legislation. In fact the various changes have culminated in the passing of a new Disability Discrimination Act this year. It will become apparent

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[218] B Doyle 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995' (1997) 60 *Modern Law Review* 64 at 64. See also Doyle 1993 *loc cit.*

[219] N Wenbourne 'Disabled Meanings: A comparison of the Definitions of "Disability" in the British Disability Discrimination Act of 1995 and the Americans with Disabilities Act of 1990' (1999) 23 *Hastings International & Comparative L Rev* 149 at 150.

[220] A comment that aptly illustrates the extreme view of some is that of A Waugh 'Way of the World: The Latest Horror' *Daily Telegraph (London)* 4 Dec 1996 at 21 'the cost and loss of efficiency will be bad enough. I predict that there will also arise a new army of the professionally disabled, who will make it their business to be turned down for job after job and live happily on the compensation. I suppose it would be asking too much of any government that is should simply stop passing new laws. Could they not sometimes think twice before inflicting the next fashionable idiocy on us?'.

[221] *Ibid.*

from the discussions below that many of the shortcomings of the 1995 Act were related to its reliance on the medical model of disability. The DDA 2005 demonstrates a tentative move in the direction of the social approach, how effective this will be, however, remains to be seen. In many ways the current South African situation with regards disability discrimination is similar to that contained in the DDA 1995. For this reason it is useful to analyse those aspects that have been successful as well as those that have been modified. It is suggested that reflecting on the development of British disability discrimination law can expose necessary guidance for the correct advancement of South African jurisprudence in the disability discrimination arena.

The aim of this chapter is to demonstrate how the British system caters for the protection of people with mental health problems in the workplace[222] within the realm of disability discrimination laws. The definition of disability under the DDA 1995 and the subsequent amendments thereto, the meaning of discrimination, the duty to provide reasonable adjustments and enforcement measures will all be considered. It is necessary before commencing the analysis of the substantive provisions of the legislation to provide a brief overview of the developments in the past decade relating to disability discrimination in Britain.

4.2. A decade of development

The lack of success of the DDA 1995 necessitated a re-evaluation of the laws relating to disability discrimination.[223] In 1997 the Disability Rights Task Force was established to investigate how best to secure comprehensive, enforceable civil rights for disabled people. The Task Force was also mandated to establish a Disability Rights Commission. This was goal was realised by the passing of the Disability Rights Commission Act of 1999 (DRCA 1999). The DRC has been operational since April of 2000 and has been instrumental to the development and promotion of laws relating to discrimination against disabled persons.[224] In December of 1999 the Disability Rights Task Force published *From Exclusion to Inclusion*[225] in which it concluded that the DDA 1995 'offers significant rights but its gaps and

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[222] The DDA 1995 does not only cover the employment sphere but also the provision of services, goods and facilities. Part II of the Act forbids discrimination on the grounds of disability in employment.

[223] C Gillie, V Keter, F Poole, C Sear, P Strickland and W Wilson 'The Disability Discrimination Bill [HL] Bill 71 of 2004-05' Research Paper 05/25 House of Commons Library (2005) at http://www.theyworkforyou.com/debates accessed on 8 May 2005 at 8. (Hereinafter Gillie *et al* 2005).

[224] The DRC is discussed in more detail under the section dealing with enforcement.

[225] Disability Rights Taskforce *From Exclusion to Inclusion* (1999) available http://194.202.202.185/drtf/full_report/ accessed 8 May 2005. (Hereinafter 'From Exclusion to Inclusion')

weaknesses leave disabled people without comprehensive and enforceable civil rights.'[226] The report made a number of key recommendations relating to major extensions to the DDA 1995; public sector leadership in promoting equal opportunities; refinements to the detail of the DDA 1995; use of non-legislative measures; and further work.[227] Many of these issues were addressed in the Disability Discrimination Bill of 2003.

In November 1999 the European Commission proposed new rules to require Member States to prohibit discrimination in employment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. A Directive establishing a *General Framework for Equal Treatment in Employment and Occupation*[228] led to the passing of regulations that have had a significant impact on the employment provisions of the DDA 1995.

The Disability Discrimination Act 1995 (Amendment) Regulations 2003[229] (2003 Regulations) came into force on 1 October 2004. The 2003 Regulations make many detailed changes to the Act including a new definition of 'discrimination' and 'harassment'. The 2003 Regulations repealed the small employer exemption[230] and also integrated many people who had previously been excluded into the scope of the DDA 1995.[231]

Section 53 of the DDA 1995 permits the Secretary of State to prepare Codes of Practice. The main code relating to employment is entitled 'For the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability' (1996 Code). It came into force and came into force in December 1996. In May 2003 the DRC published a public consultation on two proposed new Codes of Practice on Employment and Occupation and on Trade Organisations and

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[226] 'From Exclusion to Inclusion' *op cit* at Chapter 2 para 1.

[227] Gillie *et al* 2005 *op cit* at 12.

[228] EC 2000/78 This was formally adopted at a Council Meeting on 27th November 2000.

[229] Regulations SI 2003/1673.

[230] The DDA 1995 applied only to employers who had 20 or more employees. This created extensive controversy. The threshold was lowered to 15 or more by the Disability Discrimination (Exemption for Small Employers) Order 1998 SI 1998/2618. However the fact that there was little clarity on how the number of employees should be calculated and a disproportionate number of disabled people in rural areas were affected meant that the lowered threshold was an inadequate amendment. Thus the exemption was abolished by the 2003 Regulations. See further Doyle 1996 *op cit* at 9 and Townshend-Smith *Discrimination Law: Text, Cases and Materials* (1998) 594.

[231] The need for this was clear, as Provisions contained in Part II of the DDA 1995 did not apply to certain categories of employment. Section 64(5)-(8) states that police officers, prison officers, the armed services, fire fighters and employment aboard a ship, hovercraft or aeroplane are beyond the scope of the DDA 1995. The 2003 Regulations changed this by incorporating police officers, fire-fighters, prison officers, barristers and partners in partnerships within the scope of the Act's employment provisions (leaving only armed forces exempt).

Qualifications Bodies. These replaced the previous codes in October 2004 and take account of the European directive. The Code of Practice on Employment and Occupation (2004 Code), although formulated by the DRC before the DDA 2005, will be a major source of guidance on interpretation in this chapter.

2005 has witnessed one of the last steps towards fulfilment of the Disability Rights Task Force's recommendations in the form of the new Disability Discrimination Act[232] (DDA 2005). Disability groups have welcomed the changes implemented by the 2003 Regulations and the new Act, although some 'shortcomings' have been highlighted. The major changes of importance for this chapter relate to the amendment of the definition of disability, the changes relating to defining discrimination and justification of discrimination.

4.3. The definition of disability

The DDA 1995 defines a disabled person as a person who has a disability or who has had a disability in the past. Although disability is defined in the main text of the Act in s1(1), the definition is elaborated upon in schedule 1 of the Act and amplified by both the Guidance[233] and 1996 Regulations.[234]

> 'Section 1(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment[235] which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities.'

Despite the lengths the legislature has gone to in order to provide a comprehensive definition there has still been uncertainty in its application as was seen in *Goodwin v The Patent Office.*[236]

There are several difficulties with the definition of disability in the DDA 1995 and most seem to arise from the fact that the definition is an inconsistent combination of the individual and social approaches

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[232] This Act received royal assent of 7 April 2005.

[233] *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability* (1996) London: HMSO issued under Schedule 2 Paragraph 3. (The Guidance).

[234] Disability Discrimination (Meaning of Disability) Regulations 1996 SI 1996/1455. (Regulations 1996).

[235] Paragraph 12 and 13 of the Guidance states that physical or mental impairment includes sensory impairments such as those affecting sight and hearing and that mental impairments include a wide range of impairments affecting mental functioning, including what are often known as learning disabilities.

[236] (1999) IRLR 4. In this case the Employment Appeal Tribunal offered some guidance to tribunals on how to define a physical or mental impairment. It was held that because the term is not clearly defined in the Act, reference may be made to the WHO's *International Classification of Impairment, Disability and Handicap 1980.* See further *O'Neill v Simm and Co Ltd* Unreported judgment (1997) Case No 2700054, 33 DCLD 2.

to disability. The effects of the prejudice and stigma, experienced by people with mental disabilities in particular, is insufficiently catered for under the DDA 1995 and as a result the definition is found wanting in several respects.

Although there are some specific exclusions[237] in the Act, a person is required to have an actual impairment (and in the case of a mental impairment it must be a clinically well recognised impairment) in order to qualify as being a 'disabled person'. As a result there is no scope for the inclusion of someone who has been wrongly perceived or misdiagnosed as having an impairment.[238] The definition further requires that the impairment must have a substantial adverse effect on normal day to day activities. This is one of the most troubling requirements for people with mental health difficulties as will be discussed in more detail below. The listed day to day activities are limited and if narrowly interpreted, can easily exclude a person with a genuine disability. The medical nature of the definition means that under the DDA 1995 many persons will not have a disability as defined and thus will not be protected even though they may have a *bona fide* claim against a discriminating employer.

In a recent research report compiled by the DRC[239] it was stated that in employment discrimination cases, the DDA definition of disability continues to be highly problematic for both applicants and respondents. For applicants, the burden of proof on them to establish that they are covered by the DDA 1995 definition of a disabled person was found to be a major barrier, while many respondents were also confused about how to apply the definition of disability to individuals in their organisation.

A further reported problem with the definition is that, as the DDA 1995 has become more established, the common strategy followed by respondents is to allege that the person is not disabled. As a result many cases are rejected at preliminary stages before the real substance of the claim can be examined.[240] One applicant stated that she had found having her disability contested even more demeaning than the act of discrimination.[241] The majority of applicants had not considered themselves to be disabled prior to taking a case. Some were not aware that their condition fell under the DDA definition. Others

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[237] These will be discussed below under 'substantial adverse effect'.
[238] Townshend-Smith 1998 *op cit at* 586.
[239] J Hurstfield, N Meager, J Aston, J Davies, K Mann, H Mitchell, S O'Regan, A Sinclair 'Monitoring the Disability Discrimination Act (DDA) 1995 Phase 3' (2004) DRC Research Report available www.drc.org accessed 17 May 2005. (Hurstfield *et al* 2004).
[240] Hurstfield *et al* 2004 *op cit* at 157-8.
[241] Hurstfield *et al* 2004 *op cit* at 230.

deliberately avoided using the label because it felt uncomfortable and they did not like the stigma attached to it.[242]

In 2004 the Joint Committee on the draft Bill concluded that the focus of disability anti-discrimination legislation ought to be on the act of discrimination and not on the exact nature and extent of a person's impairment. The Committee accepted that the existing legislation was based on the medical model and, given the work that developing the social model into a workable legislative form would involve, it recommended that the DRC should 'examine and consult on how the law could be amended in the future to provide protection against discrimination regardless of level or type of impairment.'[243] This recommendation is reflected in the amendments effected by the DDA 2005. The changes made, although a significant stride in the right direction, still does not make the DDA 2005 a statute that reflects the social approach to disability. It is anticipated that the changes to the definition under the DDA 2005 will mitigate some of the difficulties highlighted below. However it remains to be seen however how significant an improvement it will have. The discussion below will consider the requirements under the definition of disability.

4.3.1. Clinically well recognised mental impairment

In Schedule 1, para 1(1) the phrase 'mental impairment' is further explained as including 'an impairment resulting from or consisting of a mental illness only if the illness is a clinically well recognised illness.' Far from offering assistance this elaboration appears to create more confusion. There is little consensus as to whom an illness should be recognised by and furthermore there are additional problems with the use of psychiatric experts who often disagree about the exact diagnosis. There are connected difficulties relating to the stigma of being labelled with a particular illness and the fact that changing understanding about the nature of psychological disorders means that there are many conditions that have not yet been recognised.[244]

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[242] Hurstfield *et al* 2004 *op cit* at 229.

[243] 'Joint Committee on the Draft Disability Discrimination Bill' (2004) HC 352 2003/04 at http://www.disability.gov.uk/legislation/ddb/response.asp accessed 20 April 2005 at para 50.

[244] For example in the previous edition of the American Psychological Association's *Diagnostic and Statistical Manual IV* homosexuality was still considered a mental illness.

The crux of the matter should be, it is submitted, whether the impairment (actual, misdiagnosed or presumed) has a disabling impact on a person's employment opportunities. Focussing on semantic issues of diagnosis can result in a prolonged and expensive process.

Section 18(2) of the DDA 2005 removes the requirement in paragraph 1(1) of Schedule 1 to the DDA that a mental illness must be 'clinically well-recognised' before it can amount to a mental impairment for the purposes of s 1.

In light of the difficulties arising from this requirement, this certainly comes as a very welcome change. In South Africa it is still required that the impairment be clinically well recognised. It is argued that South Africa would be wise to learn from the British experience and follow their example by removing 'clinically well recognised' from the definition of disability.[245] It is submitted that the removal of the requirement was an excellent decision and it will have a significant positive impact on many people with mental health problems in Britain.

4.3.2. Exclusion by reason of public policy

Paragraph 3(1) of the 1996 Regulations states that addiction to alcohol, nicotine or any other substance will not be considered an impairment for the purposes of the Act. This is accompanied by para 3(2), which provides that the former exclusion will not be applied to addictions that were originally the result of administration of medically prescribed drugs or other medical treatment. An interesting aspect highlighted in the Guidance is that for the purposes of determining whether someone has a disability in terms of the DDA1995, the cause of the impairment is irrelevant, even if the impairment is the consequence of a condition that is excluded[246] in the 1996 Regulations. The consequence of this provision is that if someone was suffering with liver cirrhosis (caused by alcoholism) or paranoia as a result of a drug addiction, those impairments would be considered disabilities even if the causes thereof would not.

In addition para 4(1) of the 1996 Regulations sets out 5 conditions that will not be treated as amounting to impairments. They are: a tendency to set fires (pyromania); a tendency to steal (kleptomania); a tendency to physical or sexual abuse of other persons (paedophilia etc); exhibitionism; and

[245] The disadvantages of retaining this requirement are canvassed in depth in the chapter on South Africa.
[246] Guidance Paragraph 11.

voyeurism.[247]The exclusion of substance addictions and certain psychological disorders that have anti-social or criminal consequences shows a desire on the part of the legislators to exclude conditions for which the individual is responsible or which have the potential to bring the law into disrepute. These exclusions highlight the disparity in treatment of physical and mental conditions.[248]

4.3.3. Long-term effects

Paragraph 2 of Schedule 1 reads:

> '2(1) The effect of an impairment is a long term effect if:
> a) it has lasted at least 12 months;
> b) the period for which it lasts is likely to be at least 12 months; or
> c) it is likely to last for the rest of the life of the person affected.
> 2(2) Where an impairment ceases to have a substantial adverse effect... it is to be treated as continuing to have that effect if that effect is likely to recur.'

In *Clark v Novacold*[249] the tribunal pointed out that the likelihood of a condition lasting more than 12 months must be determined when the alleged act of discrimination occurred and not retrospectively at the time of the hearing. If at the time of the alleged discrimination there was a strong likelihood that the effects would happen again, the impairment satisfies the requirement that it had 'long-term effects'. Most psychiatric conditions will last for the rest of the life of the individual, albeit controlled by medication, but for the majority there is always a strong likelihood that there could be a recurrence, particularly if triggered by a stressful event. It is noteworthy that as a result of para 2.2 a person with an episodic disorder[250] or a disorder that results in sporadic effects[251] is also protected. This means that the effects of a condition don't have to occur consistently for the 12 months. Although the inclusion of para 2.2 does provide coverage for some people with mental health problems, at the debate on the Bill of the DDA 2005 in the House of Lords, Lord Carter expressed some concerns about this aspect. Lord Carter argued that case law has shown that the provisions dealing with the long-term impact of an impairment have not been effective in the case of depression.[252]

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[247] South Africa has similar exclusions in the Code of Good Practice, the question of whether these exclusions will pass constitutional muster will be considered in chapter 6.
[248] *Ibid.*
[249] (1999) IRLR 318 CA.
[250] For example an anxiety disorder that manifests in infrequent panic attacks.
[251] See paragraph B3 of the Guidance 'Conditions which recur only sporadically or for short periods (for example epilepsy) can still qualify...'.
[252] House of Lords Debates 20 January 2005 c345-6GC at http://www.theyworkforyou.com/debates/?id=2005-04-06.1500.6 accessed 20 May 2005. (HL Deb).

The requirement that a mental impairment has a substantial long-term effect on day –to day activities can exclude, submitted Lord Carter, some severe episodes of depression where the impairment is profound for short, and typically recurrent, episodes over a two to three-year period and the stigma resulting from those episodes can lead to major discrimination in the workplace. Typically, he argued, an individual who suffers an episode of hypomania or psychotic depression, the whole lasting for about four to six months, is then held back unreasonably in his or her career for many years after recovery and has no recourse to the protection of the law in dealing with an employer's unreasonable treatment. .

He thus moved for an amendment[253] that would have meant that people experiencing separate periods of depression totalling six months over a two-year period would be considered to meet the 'long-term' requirement.[254] Lord Carter was of the opinion that reducing the qualifying period to six months would recognise these clinical realities and would do no more than reflect the continuing vulnerability of the person who has experienced this kind of illness.[255] He submitted further that there was a real problem and that from the wording of the Bill it appeared that depression would not be 'caught' by the existing provisions for recurrent conditions.[256] Baroness Hollis responded that conditions with effects that occur only sporadically or for short periods will qualify for DDA protection where they are part of the same underlying impairment and where that the effects are likely to be substantial and to recur beyond 12 months after the first occurrence.[257] Baroness Hollis defended the government's approach by stating that their aim was to distinguish between a bout of depression caused by the death of a loved one, for example, which should not come within the protection of the DDA, and other episodes that belong to an underlying condition.[258]

The Baroness undertook to consult with the DRC, the Minister for Disabled People and the Department of Health in order to determine whether there was anything that could be done in order to promote understanding of the issue. Subsequent to this a provision[259] in the Bill was drafted to specifically cover people with depression, however this was not carried through to the final DDA 2005.

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[253] Accepted by the Joint Committee but rejected by the Government.
[254] HL Deb 20 January 2005 c344GC.
[255] *Ibid.*
[256] HL Deb 20 January 2005 c345-6GC.
[257] HL Deb 20 January 2005 c347GC.
[258] HL Deb 8 February 2005 cc670-1.
[259] Clause 18(3)(2A) 'Without prejudice to the operation of sub-paragraph (2), the mental impairment consisting of or resulting from depression that has ceased to have a substantial adverse effect on a person's ability to carry out normal day to day activities shall always be treated as if that effect is likely to recur if the person has had within the last 5 years a previous

It is submitted that the addition of the proposed amendment would have had advantageous and far-reaching effects for persons suffering with depression and thus it is unfortunate that it was not included in the final Act. However it is anticipated that as attention has been brought to the issue, it will be adequately addressed when the 2004 Code is updated and brought into line with the DDA 2005.

4.3.4. Normal day to day activities

Normal day to day activities are defined exclusively in Schedule 1. Paragraph 4 (1) states that an impairment is to be taken to affect the ability of the person concerned to carry out normal day to day activities only if it affects one of the following- Mobility; Manual dexterity; Physical co-ordination; Continence; Ability to lift, carry or otherwise move everyday objects; Speech, hearing or eyesight; Memory or ability to concentrate, learn or understand; or Perception of the risk of physical danger.

The first difficulty that is apparent from the listed activities is that very few of them are affected by mental health problems.[260] A plethora of disorders exist that have a serious disabling impact on the person it affects but not necessarily on their ability to perform daily tasks. The category most likely to be relevant is (g), memory or ability to concentrate, learn or understand, although this too seems to be directed at impact that learning difficulties can have on the performance of daily activities. In *Goodwin v Patent Office*[261] the applicant was a paranoid schizophrenic and had been dismissed by his employer following complaints of colleagues. He imagined that others could access his thoughts, and misinterpreted words and actions of colleagues in a paranoid way. Also, he often left the office, due to auditory hallucinations. However, he could care for himself at home, dealing with shopping, cooking and personal hygiene without help. The industrial tribunal had held that the adverse effect of the impairment on normal day to day activities was not substantial, since he was able to perform his domestic activities without assistance and to carry out his work to a satisfactory standard. On appeal the Employment Appeal Tribunal held that he was indeed 'disabled' because his ability to concentrate was adversely impacted. The EAT provided detailed guidance on the proper approach for determining

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episode of such impairment which had a substantial adverse effect on the person's ability to carry out normal day to day activities for a period of 6 months or more.'.

[260] Some attention is given to the impact of mental health problems in paragraph C7 of the Guidance: 'Where a person has a mental illness such as depression, account should be taken of whether, although that person has the physical ability to perform a task he or she is, in practice, unable to sustain activity over a reasonable period.' The effect of this is that a tribunal is entitled to take into consideration the fact that although a person may be physically and even mentally able to perform the 'normal' tasks, they may not be able to sustain this ability indefinitely.

[261] (1999) ICR 302 EAT.

whether a person is disabled and it advised that an adverse impact on one of the listed activities was sufficient to prove disability.

According to Wenbourne[262] the exclusion of working capacity from 'normal day to day activities' one of the greatest flaws in the definition. Townshend-Smith puts forward that the reason for the exclusion of work is to prevent the argument that someone is disabled merely because they are unable to pursue a particular occupation.[263] A further criticism is that the use of the word 'normal' immediately reinforces the idea that people with disabilities are abnormal and 'other' and should be treated as a separate entity. No consideration is given to the disabling impact of stigma and prejudicial attitudes. Once again this demonstrates the reliance of the legislation on the construction of disability as an individual, functional limitation.

These shortcomings were recognised by Lord Carter who moved for an amendment to the listed day to day activities.[264] He submitted that the day to day capacities listed in the Bill were predominantly physical and thus a claimant has to show a substantial adverse effect on a capacity that is not necessarily relevant.[265] The proposed amendment would include many persons previously excluded by virtue of the stringent requirements of the definition and improve the coverage of mental health conditions within the definition of disability by including capacities that are most likely to be severely affected for people with disorders such as eating disorders, depression, anxiety and schizophrenia, such as the ability to care for oneself and to communicate and interact with others. Baroness Hollis conceded that the DDA's definition of disability 'does not adequately cover people who have certain mental and developmental impairments' but argued that the list of capacities in para 4 of Schedule 1 to the Act would capture the specific conditions referred to.[266]

Lord Skelmersdale also moved an amendment to 'toughen up' the definition of disability in the Act so that it better reflects the difficulties experienced by people who have mental health problems. He submitted that when employment tribunals and courts interpret the list of day to day activities in they

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[262] Wenbourne 1999 *op cit* at 156.

[263] Townshend-Smith 1998 *op cit* at 588. It is noted that this is similar to the way in which the American courts have interpreted 'working' as a major life activity. A person relying on the fact that they are substantially limited in their ability to work is required to show that they are limited in a range of jobs.

[264] Amendment No 75 (moved by Lord Carter) 'Page 42, line 32, at paragraph 4(1) at the end there is inserted— "(i) ability to care for oneself; (j) ability to communicate and interact with others; (k) ability to perceive reality".'.

[265] HL Deb 20 January 2005 GC 349 at http://www.publications.parliament.uk/pa/ld200405/ldhansrd/pdvn/lds05/text/50120-36.htm accessed 8 May 2005.

[266] HL Deb 20 January 2005 c350GC.

'are reading the list of activities in Schedule 1 as being finite.'[267] Baroness Hollis responded again by stating that any concerns should be addressed by clarifying the statutory guidance and thus the amendment was withdrawn.[268] In light of the extensive criticisms explained above regarding the limited nature of the list of 'normal day to day activities' any extension of its meaning would be very well received. It is submitted that having a closed list of 'normal' activities in unnecessarily restrictive and lends itself to time wasting semantic debates. It is proposed that the enquiry should be focused on the overall effect that the impairment has on the person's functioning both at home and at work.[269] It remains to be seen, when guidance is issued on the matter, what approach the DRC will take and how effective this will be at nullifying the difficulties outlined above.

4.3.5. Substantial adverse effect

The statute itself contains no further description of what the concept of 'substantial adverse effect' entails as it will in most cases be a question of fact. Paragraph A1 of the Guidance states '[A] "substantial" effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects...' In *Goodwin v Patent Office* it was determined that '"Substantial" might mean "very large" or it might mean "more than minor or trivial". Reference to the Guidance shows that the word has been used in the latter sense.'[270] Wenbourne submits that 'when determining adverse effect, a tribunal should consider what the individual either cannot do or can do only with difficulty, not what the individual can do.'[271] This too is supported by the *Goodwin* case in which it was stated:

> 'Furthermore, disabled persons are likely, habitually, to play down the effect that their disabilities have on their daily lives. If asked whether they are able to cope at home, the answer may well be "Yes", even though, on analysis, many of the ordinary day-to-day tasks were done with great difficulty due to the person's impaired ability to carry them out.'[272]

It is clear from this and the approach taken in the Guidance that just because a person manages to carry out day to day activities doesn't mean that their overall ability to carry them out has not been hindered. In addition the Guidance takes into consideration the fact that a disorder may occur in differing degrees

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[267] HL Deb 8 February 2005 c674-5.
[268] Gillie *et al* 2005 *op cit* at 71.
[269] Wenbourne 1999 *op cit* at 172. Wenbourne suggested that the definition and exhaustive treatment given to the phrase 'normal day to day activities' was 'ripe for review'.
[270] *Goodwin* (EAT) *supra* at 310.
[271] Wenbourne 1999 *op cit* at 154. The Guidance sets out factors to be taken into consideration by a tribunal when deciding whether an impairment has a substantial adverse effect.
[272] *Goodwin* (EAT) *supra* at 309.

and may have varied effects on different people.[273] Paragraph A5 states '...[F]or some people, mental illness may have a clear effect in one...respect... However, for others... there may be effects in a number of different respects which, taken together [amount to a substantial adverse effect].'

4.3.5.1. Presumed substantial adverse effect

There are five situations that are specifically provided for so as to bring them within the ambit of having a substantially adverse effect even if in reality those effects are not present. The effects of medical treatment and people who were disabled in the past will be considered in more detail however the other three situations require brief comment.

The first of these Townshend-Smith describes as 'the clearest example of the "social" model of disability'.[274] An impairment consisting of a severe disfigurement which is treated as having a substantial adverse effect.[275] The 1996 Regulations do however exclude tattoos and body piercing with a decorative or non-medical purpose.[276] This provision recognises that although the disfigurement may not cause any functional impairment it may still lead to social disadvantage or discrimination.[277]

The second category relates to those previously registered as disabled. In terms of the Disabled Persons (Employment) Act of 1944 (DP(E)A) people had to register as disabled in order to qualify for the reserved occupation scheme and quota system established by this Act. The DP(E)A was notoriously ineffective[278] due to inadequate enforcement and the paucity of disabled people amenable to registering as a disabled person. The DDA 1995 rendered the DP(E)A inoperative, however there remained some people registered as disabled. For this reason those previously registered as disabled were deemed to be disabled for the purposes of the DDA 1995 for three years after its commencement.[279]

The third category relates to progressive illnesses[280] such as cancer, multiple sclerosis or infection by the human immunodeficiency virus (HIV).[281] Doyle submits that despite the inclusive tone in statute's

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[273] *Ibid.*
[274] Townshend-Smith 1998 *op cit* at 589.
[275] Schedule 3(1) DDA 1995.
[276] 1996 Regulations Paragraphs 5(a) and (b).
[277] Townshend-Smith 1998 *loc cit.*
[278] See further B Doyle 'Disabled Workers' Rights, the Disability Discrimination Act and the UN Standard Rules' (1996) (25) *Industrial Law Journal* 1 and RJ Townshend-Smith 1998 *loc cit.*
[279] DDA 1995 Section 7.
[280] See Schedule 1 Paragraph 8(1).

treatment of progressive illnesses, the wording of the Act makes it clear that it is only the future effects of a presently existing progressive condition that the law protects.[282] The Act does not protect those who have a genetic predisposition to a disability in the future nor individuals who have a mistaken or erroneous reputation as someone who has or had an impairment or may have one in the future.[283] Townshend-Smith points out that as a result of this it is unlawful to discriminate against someone who has a diagnosed impairment, even though the current effects are minor, but it is lawful to discriminate against someone who is likely to develop the same impairment in the future.[284] Furthermore Doyle suggests that the Act's treatment of progressive disorders is demonstrative of the Act's adherence to the medical model[285] and failure to recognise that societal attitudes can be as crippling if not more so than physical barriers.[286] The reality of these difficulties has been acknowledged in the DDA 2005. Section 18(3) of the DDA 2005 inserts a new paragraph 6A into Schedule 1 to the DDA. New paragraph 6A(1) deems people with HIV, cancer or Multiple Sclerosis to be disabled before they experience any of the effects.

This amendment is illustrative of the government's move to take a more social approach to disability. By recognising that persons may be discriminated against just for having a condition rather than because of the symptoms thereof some of the social barriers created by the DDA 1995 definition are removed. This is a very encouraging change and it will have a large impact on many persons but particularly those with asymptomatic HIV.

4.3.5.2. The effect of medical treatment

The forth and possibly most important feature, relates to the impact of medical treatment. Paragraph 6(1) of Schedule 1 states that '[a]n impairment which would be likely to have a substantial adverse effect... but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.' Sight corrective measures such as spectacles and contact lenses are excluded from this

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[281] Paragraph A15 of the Guidance best describes this provision 'Where a person has a progressive condition, he or she will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some effect...The effect need not be continuous and need not be substantial.'
[282] Doyle 1997 *op cit* at 67.
[283] *Ibid.*
[284] Townshend-Smith 1998 *op cit* at 593.
[285] *Ibid.*
[286] See further Wenbourne 1999 *op cit* at 172.

provision.[287] The meaning of paragraph 6(1) is clarified by paragraph A in the Guidance: an impairment that is being treated or corrected, it is to be treated as having the effect it would have without the measures in question.[288] This is qualified as applying even when the measures result in the effects being completely under control or not at all apparent.[289] The definition of disability is satisfied in this instance by the potential for such effects in the absence of the controlling measures.[290]

This provision is significant for people who control their mental health problems through the use of medication as the enquiry into substantial adverse effect is focused on what the effects of the disorder would be without the medication. In the *Goodwin* case the EAT gave a summary of the rules on disregarding measures being taken to treat or correct a disability, in the context of taking medication:

> 'The tribunal will wish to examine how the applicant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the *deduced* effects. The question is then whether the actual and deduced effects on the applicant's abilities to carry out normal day-to-day activities is *clearly more than trivial.*'[291]

It is submitted that this approach the use of medical treatment is an ideal one. Although it may have been advisable to refer to mitigating measures instead of 'medical treatment' as it is not clear whether counselling, palliative devices or guide dogs, for example, would fall within this section. It will be noted in the chapter on South Africa that the consideration of the impact of medical treatment in the disability assessment can have disastrous effects.

4.3.5.3. Disabled in the Past

The last exception relates to people who have been disabled in the past. This inclusion is noticeable in its absence in the relevant South African legislation. Paragraph 2 to Schedule 2 states that references to a disabled person 'are to be read as references to a person who has had a disability.' What this means is that a person will be considered presently disabled if they were disabled in the past and the symptoms are likely to reoccur. Townshend-Smith suggests that this allows for the consideration of 'potentially

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[287] Schedule 1 Paragraph 6(3)(a).
[288] Guidance Paragraph A11.
[289] Guidance Paragraph A12.
[290] Townshend-Smith 1998 *op cit* at 591.
[291] *Goodwin* (EAT) *supra* at 310.

long term social consequences of disability as well as its current effects.'[292] However as people are only covered if the condition is likely to reoccur it does not really take into account the stigma that attaches as a result of having a mental health problem in the past. However due to the unpredictable nature of psychological disorders it is always possible that there may be a reoccurrence.

Importantly, the 2004 Code illustrates that the provision should not be interpreted so restrictively. The following example is given:

> 'A job applicant discloses on her application form that while at university from 1992 to 1993 she had long-term clinical depression after her father died. It would be discrimination to refuse to interview or recruit her because she has had a disability in the past. The fact that the disability preceded the Disability Discrimination Act 1995 is irrelevant.'[293]

4.3.6. Evaluation of the Definition as amended

The definition of disability as contained in the DDA 1995 was most unsatisfactory and troubling for people with mental health problems wishing to seek its protection. In line with the medical approach to defining a disabled person, insufficient consideration and thought had been given to the social consequences of disability. Many people who have mental health difficulties were unable to seek redress as a result of the narrow and complex definition. There were some attempts to cater for people who are discriminated against, not because of any functional limitation, but because of the societal reaction to their impairment. . However these were few and far between and simply inadequate for a legislative instrument that is aimed at social reform. The definition has received attention in the DDA 2005 and some positive changes have been effected. The removal of the requirement that a mental impairment be 'clinically well recognised' is a small victory for people with mental health difficulties. The proposed amendments to 'long-term effects' and 'normal day to day activities' would have been a significant victory for this group. It is anticipated that the DRC will take into consideration the need to address these issues in a Code of Practice. The novelty of the DDA 2005 means that it will be some time before the impact of the changes to the definition of disability can be assessed.

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[292] Townshend-Smith 1998 *op cit* at 592.
[293] 2004 Code Paragraph 3.5.

4.4. Provisions relating to discrimination

The DDA 1995 is deceptively similar to sex and race anti-discrimination statutes[294] however it introduced some concepts that were completely new to employers and employment lawyers. This resulted in employment tribunals having some difficulty with its interpretation.[295] Some of the differences include the fact that the DDA 1995 did not distinguish between direct and indirect discrimination. It used a different comparative basis for detecting discrimination and includes a defence of justification that is not present in other statutes.[296]

The 2003 Regulations and the DDA 2005 have amended the definition of discrimination so that better coverage and protection is provided for disabled persons. The changes include the elimination of the justification defence for certain types of discrimination and the specific prohibition of harassment and discriminatory advertisements. What follows is a brief discussion of the position under the DDA 1995 and then the current definition of discrimination will be considered.

4.4.1. Defining Discrimination Under the DDA 1995

Under the DDA 1995 the concept of discrimination was a comparative one, the question to be asked was how the disabled person had been treated in comparison with other persons (actual or hypothetical) to whom the reason relating to the disabled person's disability did not apply. The less favourable treatment must have been for a reason relating to the person's disability and not merely because the person was disabled. It is implicit in the wording of the section that if the less favourable treatment was for an unrelated reason such as merit or qualification it would not constitute an infringement. The discrimination clause contained in s5 of the DDA 1995 defined discrimination as either less favourable treatment or a failure to provide reasonable adjustments.[297] Intention on the part

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[294] Sex Discimination Act of 1975 (SDA 1975) and the Race Relations Act 1976 (RRA 1976).

[295] D O'Dempsey, A Allen, S Belgrave and J Brown *Employment Law and the Human Rights Act 1998* (2001) 229.

[296] However in *Clark v Novacold supra* it was expressly stated that the DDA 1995 should not be approached on the basis of assumptions and concepts borrowed from the SDA 1975 and RRA 1976.

[297] 'Section 5 - (1) For the purposes of this Part, an employer discriminates against a disabled person if- (a) for a *reason which relates to the disabled person's disability*, he treats him *less favourably* than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified. (2) For the purposes of this Part, an employer also discriminates against a disabled person if- (a) he *fails to comply with a section 6 duty* imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified. (3) Subject to subsection (5), for the purposes of subsection (1) treatment is justified if, but only if, the reason for it is both *material to the circumstances of the particular case and substantial.* (4) For the purposes of subsection (2), failure to comply with a section 6 duty is justified if, but only if, the reason for the failure is both material to the

of the employer was irrelevant, what was important was the existence of a causal connection between the discriminatory act and the complainant's disability. It was possible to justify the direct discrimination by proving that the reason for the treatment is both material to the facts of the particular case and that it is substantial.[298] What is unusual about this is that it is a normal feature of indirect discrimination and the statute did not differentiate between direct and indirect discrimination.[299]

4.4.2. Justifying discrimination under the DDA 1995

The DDA 1995 recognised that there may be circumstances in which it is necessary for an employer to discriminate. However it was specified that an employer who has failed to comply with their s6 duty to make reasonable adjustments could not justify their discriminatory conduct. Section 5(3) allowed an employer, who did indeed treat the person less favourably for a disability related reason, to claim that the discriminatory conduct was justified. This defence was available in cases of both direct and indirect discrimination and the onus was on the employer to prove that the conduct was justifiable. The less favourable treatment was only justified if the reason for it was both material to the circumstances of the particular case and substantial. Doyle submits that the combination of the words 'material' and 'substantial' in this section created a reasonably high threshold for the operation of the justification defence.[300] An employer would not be able to justify discrimination for a reason based on stereotypical preconceptions and prejudice. Townshend-Smith states that a requirement would only be 'material' to a job if it was reasonably central to the performance of the job and not something that could easily be performed by another employee[301] The question of whether a reason was 'substantial' required a value judgment by the tribunal. What is clear is that for a reason to be substantial it had to be substantiated by some objective evidence, not be based on unfounded assertions.[302] Furthermore it

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circumstances of the particular case and substantial. (5) If, in a case falling within subsection (1), the employer is under a section 6 duty in relation to the disabled person but fails without justification to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with the section 6 duty.' (Emphasis added).

[298] DDA 1995 Section 5(3).

[299] Doyle 1997 *op cit* at 73.

[300] Doyle 1996 *op cit* at 7.

[301] Thus the requirement of materiality could be likened to 'an essential function' or 'inherent requirement' of the job. These terms are discussed in more detail in the chapters on Australia and South Africa.

[302] Townshend-Smith 1998 *op cit* at 600.

is important that the reason put forward by the employer must have been the actual reason for the less favourable treatment, an 'after the fact' explanation was unacceptable.[303]

4.4.3. Forms of Discrimination Under the DDA 2005

There are four forms of discrimination that are recognised under Part II of the Act. They are 1) direct discrimination; 2) failure to comply with a duty to make reasonable adjustments; 3) 'disability-related' discrimination[304] and 4) victimisation of a person (whether of not they are disabled). Some of these are the same as they were under the DDA 1995 however the 2003 Regulations changed the circumstances in which discrimination could be justified. Further the Code of Good Practice 2004 sets out very clearly how each of these forms of discrimination should be approached. Each of these will now be discussed.

4.4.3.1. Direct Discrimination

The Act says that an employer's treatment of a disabled person is direct discrimination if:

- it is on the ground of his disability
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated, and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.[305]

Thus it follows that if, on the ground of his disability, the disabled person is treated less favourably than the comparator is (or would be) treated, then the treatment amounts to direct discrimination. The 2004 Code states that treatment of a disabled person is 'on the ground of' his disability if it is caused by the fact that he is disabled or has the disability in question.'[306] The disability need not be the main or sole reason for the treatment, provided it is an important consideration in the decision to treat the person in the specific manner. Whether this is the case must be determined objectively from all the circumstances. The 2004 Code suggests that if the less favourable treatment occurs because of the employer's generalised, or stereotypical, assumptions about the disability or its effects, it is likely to be direct discrimination.[307] The 2004 Code illustrates the growing awareness of the effect of prejudice

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[303] *Ibid.*
[304] This term is not mentioned in the Act but it is used in the 2004 Code.
[305] DDA 2005 Section 3A(5).
[306] 2004 Code Paragraph 4.7.
[307] 2004 Code Paragraph 4.8.

on those with disabilities. At para 4.11 it states 'direct discrimination need not be conscious – people may hold prejudices that they do not admit, even to themselves.' Often it will be necessary to use a real or hypothetical person with whom the disabled person should be compared (the comparator).[308] This must be someone who does not have the same disability. It could be a non-disabled person or a person with other disabilities. It is not necessary for the circumstances of the comparator and the disabled person to be the same but the comparator's relevant circumstances (including his abilities) must be the same as, or not materially different from, those of the disabled person.[309] Sometimes it may not be possible to identify an actual comparator, in those circumstances a hypothetical comparator may be used.

It is important when using a comparator to focus on those circumstances that are, in fact, relevant to the matter to which the less favourable treatment relates. Although, in some cases, the effects of the disability may be relevant, the fact of the disability itself is not a relevant circumstance for these purposes.[310] In making the comparison in respect of a claim of direct discrimination, the disabled person's abilities must be considered as they in fact are. If reasonable adjustments have been made that enhance the disabled person's abilities, then it is the enhanced capabilities that must be considered.[311]

Notably, treatment of a disabled person that amounts to direct discrimination under the Act's provisions on employment and occupation is unlawful. It can never be justified.[312]To prove an allegation of direct discrimination, an employee must prove facts from which it could be inferred, in the absence of an adequate explanation, that he has been treated less favourably because of his disability than an appropriate comparator has been, or would be, treated. If the employee does this, the claim will succeed unless the employer can show that disability was not any part of the reason for the treatment in question.

4.4.3.2. Failure to make reasonable adjustments

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[308] 2004 Code Paragraph 4.13.
[309] See further 2004 Code Paragraph 4.14.
[310] 2004 Code Paragraph 4.20.
[311] 2004 Code Paragraph 4.22.
[312] DDA 2005 Section 3A(4).

Failure to comply with a duty to make a reasonable adjustment in respect of a disabled person amounts to discrimination in its own right.[313] Such a failure is therefore unlawful. As with direct discrimination, the Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment.[314] In order to succeed in a claim that there has been a failure to comply with a duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty has arisen, and that it has been breached. If the employee does this, the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard.

4.4.3.3. Disability-Related Discrimination

The Act states that an employer's treatment of a disabled person amounts to discrimination if it is for a reason related to his disability, the treatment is less favourable than the way in which the employer treats (or would treat) others to whom that reason does not (or would not) apply, and the employer cannot show that the treatment is justified.[315]

Generally speaking, direct discrimination occurs when the reason for the less favourable treatment in question is the disability, while disability-related discrimination occurs when the reason relates to the disability but is not the disability itself. The expression 'disability-related discrimination' therefore distinguishes less favourable treatment that amounts to direct discrimination from a wider class of less favourable treatment which, although not amounting to direct discrimination, is nevertheless unlawful.[316] The appropriate comparator, for the purposes of determining whether disability-related discrimination has occurred, is a person to whom the disability-related reason does not apply. This contrasts with direct discrimination, which requires a comparison to be made with a person without the disability in question but whose relevant circumstances are the same.

To prove an allegation of disability-related discrimination, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that, for a reason relating to his disability, he has been treated less favourably than a person to whom that reason does not apply has been, or would be, treated. If the employee does this, the burden of proof shifts, and it is for the

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[313] DDA 2005 Section 3A(2).
[314] The duty to provide reasonable adjustments is discussed in detail later in this chapter.
[315] DDA 2005 Section 3A(1).
[316] 2004 Code Paragraph 4.29.

employer to show that the employee has not received less favourable treatment for a disability-related reason. Even if the employer cannot show this, however, the employee's claim will not succeed if the employer shows that the treatment was justified. This type of discrimination is the only instance in which the Act makes provision for justification.

4.4.3.4. The Defence of Justification

In order for an employer to show that less favourable treatment justified it must show that the reason for the treatment is both material to the circumstances of the particular case and substantial.[317] The test for this is objective. The 2004 Code clears up the uncertainty over the meaning of these terms. 'Material' means that there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. 'Substantial' means, in the context of justification, that the reason must carry real weight and be of substance.[318] Examples of material and substantial reasons would be real health and safety concerns or where a person is not qualified to perform the essential functions of the job and this cannot be remedied with reasonable adjustments. Where an employer is also under a duty to make reasonable adjustments but fails to comply with that duty, the existence of a substantial and material reason for disability related less favourable treatment cannot justify the treatment.[319]

4.4.3.5. Harassment

Under the DDA 1995 there was no specific section dealing with harassment of people with disabilities. However it is possible that conduct which would now be considered as harassment could fall within the category of 'any other detriment'. Harassment and ridicule are unfortunately common experiences for people with mental health difficulties. This reality has been recognised and a specific section relating to harassment was included in the DDA by the 2003 Regulations.

The Act states that harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of violating the disabled person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment

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[317] DDA 2005 Sections 3A(3) and 3A(4).
[318] 2004 Code Paragraph 6.3.
[319] DDA 2005 Section 3A(6). See also 2004 Code Paragraph 6.4.

for him.[320] If the conduct in question was engaged in with the intention that it should have either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled person. In the absence of such intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects.[321] Regard must be had to all the circumstances, including how the disabled person perceives the conduct, in order to determine whether this is the case.[322] The 2004 Code provides the following example: 'A woman with depression considers that she is being harassed by her manager who constantly asks her if she is feeling all right, despite the fact that she has asked him not to do so in front of the rest of the team. This could amount to harassment.'[323]

4.4.4. Aspects of employment in respect of which discrimination is unlawful

In relation to recruitment s4(1) of the DDA 2005 provides that it is unlawful for an employer to discriminate against a disabled person in the arrangements made for determining who should be offered employment. This will include considerations such as the nature of the application forms, the interview process, any aptitude testing and any adjustments that enable a disabled person access to the interview.

Section 4(2) sets out four areas relating to the retention of staff: a) in the terms of employment which it affords him; b) in the opportunities which it affords him for promotion, a transfer, training or receiving any other benefit; c) by refusing to afford him, or deliberately not affording him, any such opportunity, or d) by dismissing him, or subjecting him to any other detriment.

The 2004 Code gives extensive guidelines on how these aspects should be interpreted. These provisions are basically identical to those in the original DDA 1995 however one important distinction is included in s16A(3). It provides that it will also be unlawful for an employer to discriminate against a disabled person after that person's employment has come to an end.[324]

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[320] DDA 2005 Section 3B(1).
[321] 2004 Code Paragraph 4.39.
[322] DDA 2005 Section 3B(2).
[323] 2004 Code at 51.
[324] Section 16A(3) provides protection for discrimination by subjecting someone to detriment or harassment once employment has come to an end provided that the discrimination or harassment is sufficiently connected to the previous employment.

The Act does not prohibit an employer from appointing the best person for the job. Nor does it prevent employers from treating disabled people more favourably than those who are not disabled.[325] The employer will not only be liable for unlawful acts committed by itself, in certain circumstances it will also be responsible for the acts of others.[326]

4.4.5. Evaluation of the Provisions Relating to Discrimination (as amended)

The 2003 Regulations and the DDA 2005 have updated the discrimination provisions quite significantly. The fact that direct discrimination may no longer be justified brings the DDA in line with similar anti-discrimination statutes. Of major significance, particularly for those with mental health problems, is the section relating to harassment. This aspect, it is submitted, will offer much needed protection for those who are ridiculed or embarrassed by their colleagues as a result of their disability and it is thus a very commendable addition to the Act. The 2004 Code has gone a long way towards eliminating some interpretative difficulties, the examples are clear and accessible so that more people are able to understand and implement the Act. Overall the provisions relating to discrimination in the Act demonstrate adherence to the social approach of disability. Thus it is submitted that if one is able to prove that one is disabled in terms of the Act, the formulation of the discrimination provisions would not create unnecessary hurdles.

4.5. The Duty to Provide Reasonable Adjustments

4.5.1. The Previous and Current Positions Compared

Section 6 of the DDA 1995 obliged an employer to make reasonable adjustments. Failure to comply without justification amounted to an act of discrimination[327] but it did not give rise to an actionable breach of duty in itself. It was merely an ingredient of the meaning of discrimination.[328] Under the

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[325] 2004 Code Paragraph 3.5.

[326] Section 58 (of both the DDA 1995 and DDA 2005) provides that an employer can be held vicariously liable for discriminatory acts of their employees. The normal requirements for vicarious liability will have to be satisfied. Employers who act through agents (such as occupational health advisers or recruitment agencies) are liable for the actions of their agents done with the employer's express or implied authority. (2004 Code Paragraph 3.23.) A discriminatory act committed by an employee within the scope of his employment (with or without the employer's knowledge or approval) will invoke the statutory liability. Section 58 provides that an employer can escape liability by proving that it took reasonable steps to prevent employees committing such acts in the course of their employment. It is not a defence for the employer simply to show that the action took place without its knowledge or approval.

[327] DDA 1995 Section 5(2).

[328] Section 6(12) This section imposes duties only for the purpose of determining whether an employer has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

new Act, the failure to comply with a duty to provide reasonable adjustments is no longer justifiable. The approach to reasonable adjustments has not been seriously amended in the DDA 2005, for this reason it is sufficient to consider the current provision when analysing this duty.

4.5.2.The concept of reasonable adjustments

Many employers have concerns about the expense of making reasonable adjustments but the duty is essential as it can make the difference between a person being able to be gainfully employed or not. The 2004 Code states that 'evidence shows that many of the steps that can be taken to avoid discrimination cost little or nothing and are easy to implement.'[329] The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people who are not disabled.[330] An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a 'reasonable adjustment'.

4.5.3. When does the duty apply

The duty to make reasonable adjustments applies in recruitment and during all stages of employment,[331] including dismissal and it may also apply after employment has ended.[332] The duty relates to all disabled employees of an employer and to any disabled applicant for employment.

4.5.3.1. Substantial disadvantage

In order for the duty to operate the effect of the arrangement or feature must create a substantial disadvantage. Substantial disadvantages are those that are not minor or trivial.[333] Whether such a disadvantage exists is a question of fact and will have to be determined on the circumstances of the case. However the 2004 Code points out that what is important is not whether the arrangement or

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[329] 2004 Code Paragraph 2.3.
[330] DDA 2005 Section 4A(1).
[331] Provisions, criteria and practices include arrangements, for example for determining to whom employment should be offered, and terms, conditions or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded. The duty to make reasonable adjustments applies, for example, to selection and interview procedures and the premises used for such procedures, as well as to job offers, contractual arrangements and working conditions. DDA 2005 Section 18D(2).
[332] DDA 2005 Section 4A(2).
[333] 2004 Code Paragraph 5.11.

physical feature is capable of causing disadvantage but rather the question should be whether it actually has that effect on the disabled person or (where applicable) that it would have this effect if he were doing the job at the time.

4.5.3.2. The extent of the duty

The extent of the duty to make reasonable adjustments depends on the employment circumstances of the disabled person in question. For example, the duty is more onerous in the case of current employees than applicants for employment or former employees. [334]

4.5.3.3. Sufficient knowledge

Although less favourable treatment can occur even if the employer does not know that an employee is disabled, the employer only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage.[335] This results in a quandary for a person with a mental health problem. One would have to decide whether it is in one's best interests to disclose one's condition in order to receive the adjustments and risk the stigma and prejudice that might result. Alternatively one could choose not to disclose one's condition and continue to cope silently without necessary adjustments. Townshend-Smith suggests that in the past it might have been in the interests of disabled persons to conceal their disability but that this is no longer the case.[336] Disabled persons are encouraged to be frank and open about their disabilities as failure to disclose a disability could excuse an employer from its duty to make adjustments. This situation is improved however by the new requirement that the employer must do all it can reasonably be expected to do to find out whether a person requires adjustments.[337]

The best approach, it is submitted, is one of open communication, an employer should ask an applicant if they would require any adjustments to be made and they should ensure that appropriate

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[334] 2004 Code Paragraph 5.6.
[335] DDA 2005 Section 4A(3)(b).
[336] Townshend-Smith 1998 *op cit* at 600.
[337] DDA 2005 Section 4A(3)(b). The 2004 Code give the following example: 'An employee has depression which sometimes causes her to cry at work, but the reason for her behaviour is not known to her employer. The employer makes no effort to find out if the employee is disabled and whether a reasonable adjustment could be made to her working arrangements. The employee is disciplined without being given any opportunity to explain that the problem arises from a disability. The employer may be in breach of the duty to make reasonable adjustments because it failed to do all it could reasonably be expected to do to establish if the employee was disabled and substantially disadvantaged.'(at 62).

channels exist for current employees to make a request for reasonable adjustments. However employers' should not ask for more information about the impairment than is necessary for this purpose. Nor should they ask for evidence of disability where it ought to be obvious that the Act will apply. The 2004 Code warns that the employer should not concern itself with whether the disability fits within the definition in the Act but should rather focus on satisfying the individuals needs.[338] By taking these measures the disabled person should feel more comfortable about disclosing their disability and suitable adjustments can be made to satisfy all the relevant parties.

4.5.4. Examples of adjustments

The Act gives a number of examples of adjustments, or 'steps', which employers may have to take, if it is reasonable for them to have to do so.[339] Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment.[340] The 2004 Code advises that the proposed adjustments should be discussed with the disabled person in question before they are made. The Act does not give an exhaustive list of the steps which may have to be taken to discharge the duty. Other steps not listed or a combination of adjustments may have to be taken.[341]

4.5.5. When is an adjustment reasonable

Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its cost and effectiveness. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled

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[338] 2004 Code Paragraph 5.7. It is submitted that this suggestion is a very good one because it shows appreciation for the fact that one does not have to be substantially functionally impaired to require a reasonable adjustment in the workplace.

[339] DDA 2005 Section 18B(2) lists examples of steps which an employer may have to take: (a) making adjustments to premises; (b) allocating some of the disabled person's duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his working hours; (e) assigning him to a different place of work; (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment; (g) giving him, or arranging for him to be given, training; (h) acquiring or modifying equipment; (i) modifying instructions or reference manuals; (j) modifying procedures for testing or assessment; (k) providing a reader or interpreter; (l) providing supervision or other support.

[340] 2004 Code Paragraph 5.18.

[341] The Code suggests some of the steps that may be taken: conducting a proper assessment of what reasonable adjustments may be required; permitting flexible working; allowing a disabled employee to take a period of disability leave; employing a support worker to assist a disabled employee; modifying disciplinary or grievance procedures and adjusting redundancy selection criteria. 2004 Code Paragraph 5.20.

person does so, the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable.[342]

4.5.5.1. Factors to be considered

The Act lists a number of factors which may, in particular, have a bearing on whether it will be reasonable for the employer to have to make a particular adjustment.[343] These factors make a useful checklist, particularly when considering more substantial adjustments. If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment.[344] The effectiveness and practicability of a particular adjustment might be considered first. If it is practicable and effective, the financial aspects might be looked at as a whole – the cost of the adjustment and resources available to fund it. The significance of the cost of a step may also depend in part on the value of the employee's experience and expertise to the employer. The other factors mentioned in the Act could include the degree of co-operation from the disabled person, the effect on other employees and adjustments made for other disabled employees.

Chapter 5 of the 2004 Code offers excellent guidance to employers with detailed explanations and examples. The reasonableness of an adjustment is a very important consideration for employers as a failure to comply with a duty to accommodate is no longer justifiable.[345] Thus where the duty applies, it is the question of reasonableness alone that determines whether the adjustment has to be made.[346]

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[342] 2004 Code Paragraph 5.24, at 73 an example is given: 'A disabled employee has been absent from work as a result of depression. Neither the employee nor his doctor is able to suggest any adjustments that could be made. Nevertheless the employer should still consider whether any adjustments, such as working from home for a time, would be reasonable.'.

[343] DDA 2005 Section 18B(1): -The effectiveness of the step in preventing the Disadvantage; -The practicability of the step; -The financial and other costs of the adjustment and the extent of any disruption caused; -The extent of the employer's financial or other resources; -The availability to the employer of financial or other assistance to help make an adjustment; - The nature of the employer's activities, and the size of its undertaking; -In relation to private households, the extent to which taking the step would disrupt the household or disturb any person residing there and other factors.

[344] 2004 Code Paragraph 5.27.

[345] DDA 2005 Section 3A(2).

[346] DDA 2005 Section 4A(1).

4.6. Enforcement and remedies

4.6.1. Under the DDA 1995

Section 8 of the DDA 1995 provided that a complaint under Part II was within the exclusive jurisdiction of the Employment Tribunal. There was some criticism by Townshend-Smith that the assumption that employment tribunals are the appropriate forum for the resolution of disability discrimination disputes is questionable he submits that the DDA 1995 would have been the perfect opportunity to introduce alternative forms of dispute resolution. [347] A difficultly highlighted by Doyle is that although the tribunals are subject to the physical accessibility requirements of the Act, this does not mean that there is legal access in practice. Legal aid does not extend to tribunals nor was there a strategic enforcement agency to finance or assist with legislation.[348]

The DRC's Research Report,[349] which analyses some disability discrimination cases in the Employment tribunal, demonstrates that making a claim under the DDA 1995 is rarely a pleasant experience. It was concluded in the report that a number of barriers continue to have an impact on the effective implementation of the DDA 1995. Barriers such as financial cost and access to legal representation disproportionately affect applicants or claimants, rather than respondents or defendants.[350]

It is not only financially draining but a DDA claim can also have a large psychological impact. In the same report it was found in three cases, that applicants claimed that their experience of the discrimination, coupled with the stress involved in making the claim, had led to the onset of new psychiatric conditions. Only one of these applicants had described her disability as psychiatric.[351] There have been positive responses to the process too. Despite the stress, a number of applicants, particularly those whose cases were successful, thought the process had been beneficial to their mental health. A couple of applicants with mental health difficulties went so far as to see the case as playing a part in their healing process.[352]

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[347] Townshend-Smith 1998 *op cit* at 608.
[348] Doyle 1996 *op cit* at 10.
[349] Hurstfield *et al* 2004 *op cit* at 222.
[350] *Ibid.*
[351] *Ibid.* A woman with depression, anxiety and a germ phobia, who lost her case for failure to make reasonable adjustments, was upset by the outcome of her case and subsequently suffered from panic attacks.
[352] Hurstfield *et al* 2004 *op cit* at 231.

4.6.2. The Disability Rights Commission

One of the main criticisms of the DDA 1995 focused on the weakness of the National Disability Council (NDC).[353] The NDC was an advisory body with no enforcement powers. Doyle describes it as having 'little or no role to play in the employment field'[354] and it had no power to assist complainants nor to conduct formal investigations.[355] As a result a considerable burden was placed on disability organisations and charities to provide assistance for litigants.[356] The NDC was replaced by the DRC in 1999. The powers of DRC[357] greatly exceed those granted to the NDC. One only has to consult the DRC website[358] to realise the huge impact that it has had on the empowerment and promotion of disabled persons in the United Kingdom. There are numerous accounts of successful cases with which the DRC has assisted. The DRC has also instigated several awareness programmes which appear to be having the desired effect of reducing discrimination and the stigmatisation of disabled persons. However most importantly the DRC has been instrumental in the passing of the DDA 2005. Their vigilant review of the DDA 1995 and reports thereon meant that many of the difficulties encountered in the 1995 Act could be eliminated by the new legislation.

The Equality Bill that was introduced in the House of Lords on 18 May 2005 establishes the Commission for Equality and Human Rights (CEHR) that is to take over the functions of the DRC.[359] Although the duties of the CEHR will be very similar to those of the DRC, it is submitted that if the Bill is passed the CEHR will go even further than the DRC to promote understanding and equality for disabled persons.

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[353] The NDC was regulated by Part VI sections 50-52 of the DDA 1995.
[354] Doyle 1996 *loc cit.*
[355] Townshend-Smith 1998 *op cit* at 607.
[356] Doyle 1997 *op cit* at 78.
[357] The DRC is given general duties and powers, together with specific powers, enabling it to work towards the elimination of discrimination against disabled people; promote the equalisation of opportunities for disabled people; take steps to encourage good practice in the treatment of disabled people; keep the DDA 1995 under review; assist disabled people by offering information, advice and support in taking cases forward; provide information and advice to employers and service providers; undertake formal investigations; prepare statutory codes of practice providing practical guidance on how to comply with the law; and arrange independent conciliation between service providers and disabled people in the area of access to goods and services.
[358] http://www.drc.gov.org.
[359] Home Office 'Explanatory Notes on the Equality Bill' (2005) at 6 available http://www.publications.parliament.uk/pa/Id200506/Idbills/002/2006002.htm accessed on 22 May 2005.

4.6.3. The effect of the Employment Act 2002

This Act introduced alternative dispute resolution measures to the employment sphere. The Employment Act requires that in certain circumstances[360] employers and employees attempt to resolve disputes within the workplace before resorting to legal proceedings. The prescribed proceedings include notifying the employer of the grounds for the grievance, a meeting to discuss the matter and allowing an internal appeal against the decision. The effect of this is that an employee who has a grievance against his employer, (including an allegation that his employer has breached Part II of the DDA) may not commence employment tribunal proceedings without first giving the employer a written statement of the reasons for the grievance.[361] The Regulations[362] to the Employment Act provide that the procedures do not have to be followed in specified circumstances.[363]

4.6.4. Other measures

The DDA 2005 also makes provision for a questionnaire procedure by which a claimant can request relevant information from the person against whom the claim is made. This means that a disabled person can seek evidence to prove the alleged discrimination or harassment. He may do this by using a questionnaire to obtain further information from a person he thinks has acted unlawfully in relation to him. If there has been a failure to provide a satisfactory response to questions asked by the disabled person in this way, inferences may be drawn from that failure.[364] When an application to an employment tribunal has been made, a conciliation officer from the Advisory, Conciliation and Arbitration Service (ACAS) will try to promote settlement of the dispute without a tribunal hearing.

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[360] For example this requirement may apply where an employer has dismissed an employee, or is contemplating dismissing him, or taking disciplinary action against him, or where an employee has a grievance against his employer. (2004 Code Paragraph 13.2).

[361] Compliance with these procedures is only required in respect of disputes involving employers and employees who work (or have worked) under a contract of service or apprenticeship. People who fall within the wider definition of 'employment' do not need to use the statutory procedures before bringing a claim in the employment tribunal. Neither do those procedures apply to disputes under the Act involving partners in firms, barristers or advocates, or office holders, for example.

[362] The Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752 reg 11.

[363] One of the parties to the dispute has reasonable grounds to believe that compliance with the procedure would result in a significant threat to himself, his property or another person, or one of the parties has been subjected to harassment and has reasonable grounds to believe that complying with the procedure would result in his being subjected to further harassment, or it is not practicable to comply with the procedure within a reasonable period or if the grievance is that the discrimination occurred in the disciplinary action taken by the employer then the parties do not have to meet to discuss the matter.

[364] DDA 2005 Section 54.

If the alternative resolution procedures are unsuccessful the matter will proceed to be heard by an Employment tribunal. Section 17A (1) of the DDA 2005 provides that if a person believes someone has unlawfully discriminated against him (which includes victimising him or failing to make a reasonable adjustment) or has subjected him to harassment, he may make an application to an employment tribunal.

4.6.5. Remedies Available at the Tribunal

The remedies that the Tribunal may grant under the 2005 Act are very similar to those in the DDA 1995. The Tribunal is permitted to give the following orders a) declare the rights of the disabled person (the applicant), and the other person (the respondent) in relation to the application; b) order the respondent to pay the applicant compensation, and c) recommend that, within a specified time, the respondent takes reasonable action to prevent or reduce the adverse effect in question.[365]

These orders can be used separately or in combination. Recommendations made by a tribunal can only reduce the effects of the discrimination on the complainant, the tribunal cannot effect changes for a wider class of persons who are not party to the proceedings. In terms of compensation, an amount for injury to feelings can be included even if no other compensation is awarded.[366] If an employer fails, without justification, to comply with a recommendation, additional compensation may be ordered.[367]

4.6.6. Evaluation of enforcement measures

Certainly the current measures available for complainants are a noticeable improvement on the original provisions of the DDA 1995. The DRC has already had a large impact on the enforcement and monitoring of the Act and it is proposed that the dispute resolution mechanisms provide a much cheaper and less adversarial means of achieving satisfaction for both parties involved.

The past decade has shown a revolution in the legislative measures used to protect disabled persons against discrimination in Great Britain. It is submitted that the Legislature has done everything possible to ensure that the procedure for DDA claims is as effective and inexpensive as possible. However even the best thought out procedures do not always work out in practice. There still remains

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[365] DDA 2005 Section 17A(2).
[366] DDA 2005 Section 17A(4).
[367] DDA 2005 Section 17A(5).

the hurdle of proving that one is disabled before the substance of the claim can be considered. Although this aspect will hopefully be improved by the amendments to the definition it is submitted that the less stringent the definition is the more effective the system will be. Less time would be spent on the cases, people would not have their cases dismissed at preliminary stages and it would certainly be less degrading for the claimant. It is the discriminatory conduct of the employer that should be on trial, not the person's impairment. It remains to be seen what effect the amendments of the past decade will have on the state of disability discrimination law in Britain. It is anticipated that the government will continue on the positive path towards the social approach to disability in order to give people in Britain maximum protection.

Chapter 5

AUSTRALIA

5.1. Introduction

In 1993 the Australian Human Rights and Equal Opportunity Commission (HREOC)[368] released a report on the 'National Inquiry into the Human Rights of People with Mental Illness'.[369] This inquiry brought into national focus how, amongst other things, people affected by mental health problems frequently faced discrimination and stigmatisation based on ignorance, fear and inaccurate stereotypes.[370] The report concluded that people affected by mental illness are among the most vulnerable and disadvantaged in the community. They suffer from widespread systemic discrimination and are constantly denied the rights and services to which they are entitled. It was stated further that the level of ignorance and discrimination still associated with mental illness and psychiatric disability was unacceptable and had to be addressed.[371] The 1993 Report played an important role in raising awareness about the human rights of Australians affected by mental health problems. It highlighted the extent of mental illness[372] in the community and the need for more concerted government. The recommendations helped bring about major improvements in laws, policies, programmes and funding to meet the needs of Australians affected by mental illness.

The primary source of protection for people with mental health difficulties is the Disability Discrimination Act 1992 (DDA).[373]The DDA protects people with physical, intellectual and psychiatric disabilities against discrimination in *inter alia* employment, the provision of services, facilities and transport. The Act's definitional and substantive provisions provide revolutionary mechanisms for the protection of the rights of people with disabilities, and as will be seen, it is

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[368] The Commission was created in order to give effect to certain international human rights instruments and is charged with the protection and promotion of human rights. It was created by the Human Rights and Equal Opportunity Act of 1986.

[369] HREOC 'The Report of the National Inquiry into the Human Rights of People with Mental Illness' (1993) available http://www.hreoc.gov.au/human_rights/mental_illness/national_inquiry.html accessed 6 June 2005. (The 1993 Report).

[370] C Sidoti 'Mental Health for All: What's the Vision?' Speech given at the National Conference on Mental Health Services, Policy and Law Reform into the Twenty First Century held at Newcastle (1997) available http://www.hreoc.gov.au/disability_rights/speeches/1997/mental.htm accessed 22 May 2005.

[371] The 1993 Report *loc cit.*

[372] Around 1 in every 5 Australians, or over 3 million people, experience a mental disorder of some kind, with 170,000 experiencing at least one schizophrenic episode and up to 10 per cent experiencing depressive disorders.

[373] This Act was proclaimed on 1 March 1993.

particularly well designed for people with mental health problems. This being said, it has been subject to extensive criticism,[374] and rightly so as the DDA's implementation[375] has been 'largely ineffective'.[376] Tucker[377] opined that as enacted the DDA had great potential to provide protections for Australians with disabilities however flaws in the drafting of the Act, overly restrictive interpretation and inadequate enforcement has meant that the DDA has certainly not been as effective as anticipated.[378]

Since the DDA has been in operation it has become apparent that there are certain provisions that are ambiguous, inadequate or unnecessary. For this reason the DDA was reviewed by the Productivity Commission[379](PC) in 2003. The Commission took a wide range of considerations into account when conducting the review including principles of equality, competition and social impact.[380] In the draft report[381] on the inquiry it was concluded that the main thrust of the DDA remained appropriate and thus much of the Act should not be amended.[382] However it was noted in the report that the DDA had been least effective in the elimination of discrimination in the employment sphere and thus the review of the application of the DDA to employment warranted special attention.[383] The PC has made recommendations for amendments to the DDA that have been welcomed and accepted by both Government and the HREOC.[384]

Patmore, in his article analysing the recommendations of the PC, concludes that although the recommendations, if implemented, would go a long way to improving the employment situation of

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[374] See for example L Harris 'The Americans with Disabilities Act and Australia's Disability Discrimination Act: Overcoming the inadequacies' (1999) 21 *Loy LA Int'l & Comp L Review* 51.

[375] See for example BP Tucker 'A Time For Action' (1995a) 69 *L Inst J* 539 at 540 where she states that the Australian Commonwealth 'having passed the DDA, now seems singularly uninterested in enforcing the Act.'.

[376] Harris 1999 *op cit* at 63.

[377] BP Tucker 'The Disability Discrimination Act: Ensuring Rights for Australians with Disabilities' (1995) 21(1) *Monash University Law Review* 15 at 15.

[378] Writing in 1993 Tyler speculated that while the Disability Discrimination Act is likely to have some beneficial impact on the incidence of discrimination in Australia, it is extremely unlikely in itself to meet the great expectations placed upon it by its drafters.' MC Tyler ' The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 19 *Melbourne University Law Review* 211 at 212.

[379] A public authority that, in part, has the function to review legislation that affects competition.

[380] G Patmore 'The Disability Discrimination Act (Australia): Time for Change' (2003) 24 *Comp Labor Law & Policy Journal* 533 at 535.

[381] The final report has recently been released however the bulk of the conclusions and recommendations are unchanged. For this reason the Draft Report will be used as the basis for the analysis in this chapter. Productivity Commission Final Report 'Review of the Disability Discrimination Act 1992' (2004) at http://www.pc.gov.au/inquiry/dda/finalreport/dda1.pdf accessed 15 November 2005.

[382] Productivity Commission Draft Report 'Review of the Disability Discrimination Act 1992' (2003) at http://www.pc.gov.au/inquiry/dda/draftreport.pdf accessed 20 April 2005 at xxv. (PCDR (2003)).

[383] PCDR 2003 at 88-89.

[384] As of June 2005 these recommendations have still not been implemented.

people with disabilities, they remain insufficient.[385] He states further that 'the stark under-employment of people with disabilities in Australia cries out for a well-resourced and extensive governmental inquiry that delves deeply into the systemic causes and consequences of this pressing social problem.'[386]

The HREOC has planned to do just that, following on from the PC's review, the HREOC has proposed conducting an inquiry on issues affecting employment opportunity and outcomes for people with disabilities.[387] Ozdowski, the acting Disability Discrimination Commissioner, stated that the HREOC would be focusing much of its resources on discrimination in employment and that the enquiry, unlike that of the PC would not only focus on the legislation relating to discrimination against people with disabilities but it would consider the day to day practicalities too.[388]

Despite the DDA's shortcomings, it remains the most important piece of legislation for people with mental health problems in the realm of employment. In this chapter the exceptional definition given to disability in the DDA, that has its roots firmly in the social model of disability, will be considered. Other areas covered in the chapter will include types of discrimination that are prohibited, the defences of 'unjustifiable hardship' and 'the inherent requirements of the job' and the enforcement of the Act. Unlike Britain, there are no codes of good practice or regulations to accompany the Act and aid in its interpretation. Thus the analysis will rely on the provisions of the Act itself, case law (where available and appropriate) and the opinions of commentators.

5.2. The Genesis of the DDA

The DDA began life as a fairly limited proposal to improve the employment opportunities for people with disabilities. The DDA was not initiated as a response to any specific development, but rather as a response to a discussion paper that highlighted the need for 'national, comprehensive legislation' to

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[385] Patmore *op cit* at 561.
[386] *Ibid.*
[387] S Ozdowski 'Disability Discrimination Developments' speech given at The National Personnel and Industrial Relations Conference (2004) at http://www.humanrights.gov.au/disability_rights/speeches/2004/aig.htm accessed 2 June 2005.
[388] Ozdowski *op cit* at 1. He highlighted the importance of focusing on employment by stating that 'the high rate of mental health conditions now increasingly recognised as occurring in the community - as many as one in five of us during our lives - makes it almost inevitable that every employer at some point will deal with, or fail to deal with, disability issues. So in talking about disability in relation to any employment issue, we are really talking about recognising and dealing with the diversity of the workforce and community as it is now.'.

prohibit discrimination of the ground of disability in employment.[389] The inquiry by the HREOC into the human rights of people with mental illness provided further impetus. Although the majority of participants in the drafting process supported the need for such legislation there were divergent views on the extent of the need and what should be covered by the Act.[390] This division in opinion is apparent in the Act itself which is a combination of innovation and conservatism.[391]

A lack of involvement by people with disabilities and their advocates in the genesis of the Act as well as the lack of media attention has rendered the DDA less effective than it could have been. Further the paternalistic attitude with which discrimination against people with disabilities is approached in the Australian context remains problematic.[392] However as will be seen in the ensuing discussion much has been done in the years following the DDA's enactment to remedy these difficulties. Furthermore it is submitted that if the recommendations of the PC are implemented as well as other measures that will be discussed below, the initial issues prohibiting the complete success of the DDA can be eliminated. In addition if properly interpreted and enforced the DDA has the potential to be unrivalled as a legislative instrument for improving the lives of people with disabilities.

5.3.The objectives of the Act and how they are to be achieved

In assessing the effectiveness of the DDA it is apposite to consider whether the legislative scheme is capable of achieving its aims. The goals of the Act also act as a guide to its application and interpretation.[393]

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[389] Tyler *op cit* at 220.
[390] Tyler *loc cit.*
[391] In fact there are many criticisms of the actual scheme of the Act. There are those who believe that the Act was unnecessary. Proponents of this view believe the DDA is a waste of resources as it will place an undue burden on businesses and that it would unduly 'bureaucratise' an issue that would be better left to the family. Tyler suggests that these criticisms are unwarranted and originate from a lack of understanding of the legislation. On the opposite side of the spectrum there are those critics who believe that the DDA was drafted with too little imagination. Some of the reasons include the lack of affirmative action measures, the use of the traditional antidiscrimination complaints based mechanism, and the lack of substantive provisions relating to equality before the law. These criticisms certainly have more merit than the former ones, however whether those aspects have hampered the efficacy of the Act will be considered later in chapter. See further Tyler *op cit* 223-5.
[392] Harris 1999 *loc cit.* See also Tyler *op cit* at 215.
[393] B Gaze 'Context and Interpretation in Anti-Discrimination Law' (2002) 325 *Melbourne University L Rev* 26.

The Act has three objectives[394] that are set out in s3 of the DDA. The first of these is to 'eliminate, as far as possible, discrimination against persons on the ground of disability'.[395] The wording of this objective clearly indicates a strong legislative intent to eliminate discrimination.[396] This primary purpose is reiterated in several key sections of the Act: the definition of disability;[397] direct and indirect discrimination;[398] harassment[399] and enforcement.[400] The elimination of discrimination is to be achieved by the Act through a mechanism that allows individuals to bring complaints of discrimination and, concurrently, provides community education services through the Disability Discrimination Commissioner.[401]

The second objective is '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'.[402] Patmore submits that this invokes a familiar right enshrined in the rule of law.[403] However the difficulty is that the mere fact that people are equal before the law does not provide any further explanation as to what sort of law all should be subject. No assistance can be obtained from the DDA itself as it does not contain any express guarantee of a right to equality before the law in its substantive provisions.[404] The PC remarked in its report that the DDA gives people with disabilities the right to substantive equality.[405] Equality of outcome is however limited by the fact that an employer does not have to provide adjustments if doing so would be create an 'unjustifiable hardship'.[406] Despite the PC's assertion that the DDA provides substantive equality, it conceded that equality of outcome, although important for people with disabilities, is not required by the DDA.[407] Further the PC acknowledged that equality of outcome is not applicable in the area of employment because people with disabilities are required to meet the inherent requirements of the job and employers are entitled to choose the best applicant on merit.[408] It

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[394] In relation to people with mental illnesses these objectives derive their origins in the requirements and standards set out in the international instruments discussed above. They stipulate that every person with a mental illness has the same basic rights as every other person, and that every person who has a mental illness or who has experienced mental illness has the right to protection from exploitation whether economic or in other forms.
[395] DDA Section 3(a).
[396] Patmore *op cit* at 536.
[397] DDA Section 4(1).
[398] DDA Sections 5 and 6.
[399] DDA Sections 35-40.
[400] DDA Sections 42-44, 69, 89.
[401] Tyler *op cit* at 225.
[402] DDA Section 3(b).
[403] Patmore *loc cit.*
[404] Patmore contrasts this factor with the RDA 1975 in which an express right is contained.
[405] PCDR (2003) at xxix.
[406] Patmore *op cit* at 559.
[407] PCDR (2003) at xxix.
[408] *Ibid.*

was noted in the report that it is up 'to individuals to turn equal opportunities into outcomes, based on individual merit.'[409] The PC suggested that equality of outcomes should be pursued more directly through improved disability services and other mechanisms.[410] These aspects fall outside of the scope of the DDA and thus it is concluded that the DDA, as it stands, is unable to fulfil its second objective. It is submitted that the introduction of affirmative action measures for people with disabilities might overcome this particular difficulty.

The third objective is 'to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community'.[411] Yet again no effective means for implementing this broad and general principle in the employment context are contained in the DDA.[412] As has been discussed in Chapter 2, changing societal attitudes towards people with disabilities is the key to the elimination of discrimination. It has been shown that integration and interaction with people with disabilities encourages more positive attitudes from those who are not disabled.[413] Thus strategies, such as legislative intervention, that force people to modify behaviour and interact with people with disabilities can often result in a change in attitude.[414] For these reasons it is submitted that the DDA can to some extent achieve its third objective of changing community perceptions of people with disabilities. However the extent to which the DDA can effect such change is severely limited.

Hocking suggests that with regards mental illness, long-term strategies are required in order to improve community attitudes and combat stigma.[415] These include disengaging mental health problems from associated fears and anxieties by improving knowledge and attitudes. This can be done by improved mental health literacy and stopping the constant reinforcement of stigma by the media.[416] It is clear that for this to be achieved, anti-discrimination legislation is insufficient and the co-operation of disability rights groups, government and the community is necessary.

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[409] *Ibid.*
[410] *Ibid.*
[411] DDA Section 3(c).
[412] The Act does make provision for 'action plans' to be submitted by community service providers addressing the elimination of discriminatory practices in the context of the provision of goods, services or facilities.
[413] L Gething 'An investigation of attitudes towards disabled persons in Australia' (1986) 6 *Australian Rehabilitation Review* 46 at 47-8.
[414] Tyler *op cit* at 228.
[415] B Hocking 'Reducing mental illness stigma and discrimination- everybody's business' (2003) 178 *MJA* S47 at S47.
[416] Hocking *op cit* at S48.

In summary, although it is apparent that there is some potential for the DDA to achieve is last two objectives, it can only be realised with the assistance of outside resources, such as educational initiatives and media participation. Thus in reality the first objective is the operative clause for the elimination of discrimination against people with mental health difficulties in the workplace.

The rest of this chapter will consider how, through its provisions, the elimination of discrimination can be achieved. The discussion will consider areas in which the DDA has been successful and in those that it has not and whether the recommendations put forward by the PC would solve the problems that have hindered its success.

5.4. The definition of disability

The definition of disability contained in the DDA is the broadest of any anti-discrimination legislation worldwide.[417] It is primarily this aspect that makes the DDA stand out as model piece of legislation. Although the HREOC based the DDA loosely on the Americans with Disabilities Act 1990 (ADA), it expressly rejected some of the ADA's language.[418] This demonstrates exceptional foresight on the part of the drafters of the DDA because the ADA had only been in operation for 2 years and thus the plethora of problems experienced in the United States in relation to the definition of disability had not yet become apparent. The HREOC regarded the ADA definition as under inclusive and unduly restrictive.[419] Thus the DDA definition does not require that an impairment substantially limit any major life activities, an aspect of the British and American legislation that has caused extensive problems for claimants under the respective acts.[420] This is indicative of the adoption of the social approach to disability by the Australian legislature. The broad definition, submit Basser and Jones,[421] allows for the 'reality of the experience of disability'. It does not depend on person having to prove their abnormality and thus it is a much more respectful way of valuing people with disabilities than is provided by any other legislative model. Bagenstos[422] suggests that the Australian definition properly focuses the attention of courts and litigants on the alleged discriminatory conduct of the defendants rather than on the physical or mental limitations of the claimants.

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[417] Tyler *op cit* at 220.
[418] Harris 1999 *op cit* at 64.
[419] *Ibid.*
[420] See further the chapters 4 and 6.
[421] Basser and Jones 2002 *op cit* at 260.
[422] Bagenstos 2003 *op cit* at 664.

The underlying philosophy of the DDA is that people should not be excluded from the operation of the Act because of a dispute about the nature of their impairment.[423] This definition is empowering because individuals don't have to prove their outsider status to qualify for protection of the Act.[424] The DDA definition was specifically drafted in response to the experience of the state legislation where many problems had arisen relating to the interpretation of strict definitional criteria that were centred on the impairment and medical categorisations.[425]

It is highly desirable to have such a broad definition as extensive legal resources have been consumed in America and Britain by determining who is and who is not a person with disability.[426] The definition does not require any assessment of the type, severity or permanence of the disability, nor is it concerned with how it came about.[427] Instead the DDA focuses on whether a person has been discriminated against on the basis of their actual or perceived disability.[428] This approach is particularly beneficial for those with mental health problems. It is clear from the definition itself that mental health problems are protected just as much as physical or learning impairments. The Act's reliance on social nature of disability discrimination comes through clearly in these provisions.
Disability is defined in s4(1) of the DDA as:

'(a) total or partial loss of the person's bodily or mental functions; or
(b) total or partial loss of a part of the body; or
(c) the presence in the body of organisms causing disease or illness; or
(d) the presence in the body of organisms capable of causing disease or illness; or
(e) the malfunction, malformation or disfigurement of a part of the person's body; or
(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
and includes a disability that:
(h) presently exists; or

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[423] Patmore *op cit* at 541.
[424] Bagenstos *op cit* at 665.
[425] Basser and Jones 2002 *op cit* at 261. This is demonstrated by the case of *Kitt v Tourism Commission* [1987] EOC 92-196 in which Kitt had been employed as a temporary cave guide. In order to enter into permanent employment, he was required to undertake a medical exam. It was discovered that he had epilepsy and as a result he was told he was unable to work in the caves and was given a job selling tickets. Kitt challenged this decision but instead of considering whether he had been discriminated against, the focus of the case was whether epilepsy constituted a physical impairment under the New South Wales Legislation, the Anti-Discrimination Act 1977 (NSW). It was held that certain neurological disabilities, including epilepsy, and mental disorders were not covered by the legislation. The drafters of the DDA took this into consideration and the DDA was specifically designed to prevent such arbitrary outcomes.
[426] *Ibid.*
[427] Patmore *loc cit.*
[428] *Ibid.*

(i) previously existed but no longer exists; or
(j) may exist in the future; or
(k) is imputed to a person.'

This inclusive definition recognises that what constitutes a disability can vary over time and place. Thus a condition that is disabling now may not be in the future as a result of medical advancements. Or a condition that we are not even aware of now may be sufficiently similar to the broad categories to be included. It demonstrates foresight in the ability to predict the problems that may arise, such as those surrounding genetic evidence of future impairments. The definition is especially advantageous for people with mental health problems as (g) in particular covers most forms of psychological disorders and as people may also show symptoms of several disorders but may not actually fit within the narrow definition of the impairment they will be protected too. In addition to the extensive list of covered impairments, Basser and Jones submit that in order to establish that one has a disability it is not necessary to show that one's situation falls into any of the categories listed in the definitional section.[429] Anti-discrimination legislation is to be given a broad interpretation,[430] consistent with its objectives, thus an impairment that does not fit ideally within any of the categories may well be included by such broad interpretation.[431]

It is clear that all mental health problems will be protected and not only those that are socially acceptable or clinically well recognised. Thus there is no provision excluding disorders on the basis of 'public policy'. This is consistent with the philosophy of the Act that the law is not concerned about whether the person subjected to discrimination is disabled as a result of his or her own action or whether they have contributed to their disability in some way.[432] Thus the DDA does not protect 'worthy' people with disabilities and deny protection to those persons who are, at least in part, to blame for being disabled.[433]

Noticeable in its absence is a time requirement in order to qualify as 'disabled'. What this means is that people will not be excluded because their disorder has not lasted for 12 months or longer, thus the difficulties surrounding depression as illustrated in the chapter on Britain would certainly not cause

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[429] Basser and Jones 2002 *op cit* at 260.
[430] The High Court has consistently maintained that anti-discrimination legislation is to be given a 'beneficial and remedial construction'. See for example *Waters v Public Transport Corp* (1991) 173 CLR 349 and *Qantas Airways Ltd v Christie* (1998) 319.
[431] Patmore *op cit* at 538.
[432] Basser and Jones 2002 *op cit* at 261.
[433] *Ibid.*

any problems under this definition. It also eliminates the need for challenging interpretational questions about the potential re-occurrence of an impairment. Thus people with intermittent disabilities such as some anxiety disorders would have no problem falling within the definition.

In Britain the effects of medication are not taken into consideration when determining whether an impairment had a substantial adverse effect on a person's abilities to perform normal day to day activities. However in both America and South Africa any measure that mitigates that actual limitation experienced by the individual is relevant in determining whether and impairment is substantially limiting.[434] In Australia, the DDA recognises that the disabling impact of an impairment does not disappear when the effects of the impairment are controlled. Specific protection is provided for people who have overcome any loss of capacity through their own efforts with or without any assistance or the use of aids or appliances.[435] The HREOC has emphasized that 'the need for protection against discrimination does not disappear as a person becomes more able to participate in the community.'[436] This approach to mitigating measures is of particular importance to people with mental health problems because many psychological disorders can be controlled with medication to some degree. Further the mere fact that someone is able to cope with their disorder better than someone else does not make them any less worthy of protection. Thus by excluding the need for an disability to limit a person in a substantial way the DDA has effectively eliminated many of the unnecessary hurdles that face disabled persons in other jurisdictions.[437]

An aspect of the definition that was taken from the ADA was the concept of perceived disabilities. This recognises that the public's perception and reaction to people with disabilities is a large contributing factor to the phenomenon of disability discrimination.[438] Erroneous perceptions based on 'stereotypic assumptions' are often more disabling than the impairment itself. Thus the inclusion of imputed disabilities protects those who are discriminated against because someone else believes they have a particular impairment, even if in reality they do not.[439] Lynch submits that a wide approach should be taken to the interpretation of this particular section and that the focus should be on the

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[434] Consideration of the law relating to this aspect in both America and South Africa will be given detailed attention in the chapter on South Africa.
[435] Harris 1999 *op cit* at 67.
[436] Harris 1999 *loc cit* (quoting the HREOC Draft Position Paper at 90).
[437] Harris 1999 *op cit* at 92.
[438] Harris 1999 *op cit* at 95.
[439] See for example *Wheatley v Smyth* (1994) EOC 92-655 where the Board had to consider the distinction between an imputed mental illness and an assessment of personal characteristics and *Lovejoy v Myer Stores Ltd & Anor* (1996) EOC 92-813 which related to imputed schizophrenia.

perception of the discriminator and not on whether the person had an impairment in reality or not.[440] He states further that ' To sanction inappropriate prejudices and stereotypes only when they are applied with accuracy by the discriminator, but to turn a blind eye when they are employed erroneously is hypocritical and sends and inconsistent message to the community about the acceptability of discriminatory behaviour.'[441]

5.4.1. Further advantages of an expansive definition of disability

Firstly as has been mentioned above a broad definition renders it unnecessary to engage in complicated discussions about the relationship between impairment and disability. Basser and Jones suggest, and it is submitted, correctly so, that despite the extensive intellectual energy that has been spent on trying to separate these two concepts, the distinction collapses in everyday usage.[442] It is very important to avoid technical debates when attempting to protect a litigant's human rights. A broad definition allows the decision-maker to rightly focus its attentions on the actions of the alleged discriminator.[443]

Secondly, suggest Basser and Jones, minimizing the need to involve medical and other professionals in claims of discrimination is very significant for people with disabilities.[444] One of the greatest hurdles for disabled persons is the medicalisation of their lives and thus the removal of the need for medical and other experts comes as a great relief to them.[445] People with disabilities often find themselves being confused with or reduced to their condition.[446] Having a mental health problem does not deprive someone of personhood.[447] Characterization of a person by their disorder is reflective of the medical model and the DDA shows a strong move away from that model. The broad definition, encompassing the social approach to disability, highlights that the site of a disabled persons difficulties is not in their body but rather in the social fabric and structures of society. As a result the degrading experience of a claimant having to expend significant resources on hiring experts in order to prove that the claimant is 'abnormal enough' is avoided.

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[440] A Lynch 'Is Obesity a disability- actual or perceived- under the Disability Discrimination Act 1992?'(1996) 3 *Deakin Law Review*161 at 180.
[441] *Ibid.*
[442] Basser and Jones 2002 *loc cit.*
[443] *Ibid.*
[444] *Ibid.*
[445] *Ibid.*
[446] Basser and Jones 2002 *op cit* at 262.
[447] The importance of identity for people with mental health difficulties was traversed in chapter 2.

Basser and Jones suggest a third advantage: from a legal perspective the broad definition ensures that legal actions do not founder at the threshold because of a technical decision about who is 'disabled'.[448] The DDA also manages to avoid the anomaly that occurs when people are subjected to less favourable treatment but are unable to challenge such treatment because they are not considered disabled by the law. Basser and Jones submit further that the use of a simple and broad definition offers the potential of encouraging change at a fundamental level. By including minor or trivial disabilities in its scope, they submit, the legislation provides for flexibility in treatment of all members of the community.[449]

Basser and Jones submit that the DDA recognises a fairer society where people do not discriminate against each other on spurious grounds and an effort is made to ensure that everyone in included in all aspects of social good. In pursuance of this objective, factors such as disability are only relevant to the extent that there is knowledge of what needs to be done to accommodate inclusion.[450]

It has been said that almost no aspect of a person's impairment was excluded from the definition in the DDA.[451] However recent cases and recommendations from the PC may show otherwise. In *Purvis v New South Wales (Department of Education and Training)*[452] the High Court offered significant insight into the interpretation and role of the definition of disability.

Although this case relates to education, the principles are equally applicable in the realm of employment discrimination. This case concerned the treatment and expulsion of Daniel Hoggan, a boy who had suffered brain damage in the first year of his life that had caused intellectual and visual disabilities as well as epilepsy. His disability also manifested in behaviour that varied from the norm such as rocking, humming and swearing. Daniel was suspended 5 times for violent behaviour that include punching and kicking the teacher's aide.[453] Eventually Daniel was excluded from the school because of his dangerous behaviour, the principal of the school had feared for the health and safety of the other students and staff.

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[448] *Ibid.*
[449] Basser and Jones 2002 *op cit* at 262.
[450] *Ibid.*
[451] Patmore *op cit* at 542.
[452] (2003) 202 ALR 133.
[453] The school had provided full time support from a teacher's aide and individualized welfare and discipline policies for Daniel.

In 1998 Mr Purvis, Daniel's foster father, lodged a complaint of disability discrimination with the HREOC on Daniel's behalf against the State. After attempted conciliation the matter was heard before the Deputy Disability Commissioner who found ultimately that the exclusion of Daniel constituted a breach of the DDA. The State had the decision reviewed in the Federal Court where Emmett J found that the HREOC had erred in a number of ways and set aside the decision remitting it to the HREOC. Mr Purvis then appealed to the Full Court of the Federal Court[454] where the appeal was dismissed. Mr Purvis then appealed to the High Court where in a 5:2 decision the Court dismissed the appeal.

Rattigan submits that the decision of the High Court deviated quite significantly from the norm of discrimination jurisprudence in order to achieve a fair result. She argues further that this would not have been necessary if the relevant provisions in the Act were adequately drafted.[455] The issue before the High Court was whether the definition of disability includes behaviour resulting from the disability. At the first HREOC hearing Innes C treated Daniel's disability as falling within limbs (f) and (g) of the definition without distinguishing between the disability and the resulting behaviour.[456] On review Emmett J preferred a much narrower view stating that 'it is the disorder or malfunction or the disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability.'[457] The Court of Appeal adopted Emmett J's literal construction of the definition.[458]

The minority of the High Court however took a different view. It held that in keeping with the objectives of anti-discrimination legislation to promote equality and eliminate discrimination, the provisions of the DDA should, as far as is possible, be interpreted in a way that promotes the elimination of discrimination. In taking this approach, a broad construction of the definition of disability would recognize that the behaviour and the disability itself were indivisible.[459] In addition the minority held that 'to focus on the cause of behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here disturbed behaviour) which makes that person "different" in the eyes of others'.[460] This construction certainly makes more sense than Emmett J's more narrow interpretation thatwould

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[454] *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC 93-117.
[455] K Rattigan '*Purvis v New South Wales (Department of Education and Training)* A Case for Amending the Disability Discrimination Act 1992 (Cth)' (2004) *Melbourne University Law Review* 17 at 18.
[456] Rattigan *op cit* at 19.
[457] *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69 at 77.
[458] Rattigan *op cit* at 20.
[459] *Ibid.*
[460] *Purvis* (2003) *supra* at 183.

exclude many mental health problems where the major symptoms thereof are in fact disturbed behaviour.

One concern that was highlighted by the *Purvis* case was that a broad reading of the definition could mean that behaviour that is criminal or quasi-criminal could fall within the protection of the DDA and that a school, for example, would have to tolerate and seek to abate the behaviour no matter how disruptive or dangerous.[461] The majority of the court countered this argument by stating that the definition of disability is not a substantive provision of the DDA, it is merely an aid to the construction of the statute and does not operate in any other way. It held further that although disturbed behaviour could extend to include behaviour that is grossly anti-social, dangerous and even criminal[462] the effect of the DDA and its operation in relation to discrimination are confined primarily by the substantive provisions of the Act.[463]

It would seem from the above that there is very little that could be done to improve the coverage of disabilities by the definition. However the PC has recommended that the definition in the DDA explicitly recognize the 'medically recognized symptoms (where the underlying cause is unknown)' and 'genetic abnormalities or behaviour that is a symptom or manifestation of a disability.'[464] It is clear that the inclusion of behaviour is designed to overcome any uncertainty that may have arisen as a result of the *Purvis* judgment.

These suggested amendments have been welcomed by the HREOC however by contrast a worrying proposal by the Federal Government has not been. In December 2003 the Government proposed to amend the DDA[465] to provide that it is not unlawful to discriminate against a person who is addicted to a 'prohibited drug' on the basis of a disability caused by such addiction. It would however remain unlawful to discriminate against someone if they are addicted to a drug authorized by law or where the

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[461] *Purvis* (2003) *supra* per Callinan J at 196.
[462] *Purvis* (2003) *supra* at 135.
[463] Rattigan *op cit* at 27.
[464] PCDR (2003) *op cit* at 215-6. There has been extensive debate relating to the legality of using genetic information in job selection and also whether genetic information is sufficiently protected by legislation so that people will not be discriminated against on the basis that they have a genetic predisposition for a particular disorder. This amendment is obviously designed to clarify the position somewhat. It is obviously necessary because as genetic testing becomes more accurate and advanced, employers who do not want to employ potentially disabled persons could use genetic information unscrupulously. This new provision would however still be bolstered by the provision for impairments that do not yet exist.
[465] Disability Discrimination Amendment Bill 2003 (Cth) s54A(2) and s54A(10).

person is receiving services to treat the addiction.[466] The proposed amendment is in keeping with the exclusions contained in the British, American and South African legislation and is clearly based on public policy. However the HREOC has responded by saying that it undermines the broad philosophy of the Act by defining what is and what is not, an'acceptable' disability.[467] The HREOC believes that drug addiction would be better accommodated by the DDA through the existing exemptions to unlawful discrimination.[468] The HREOC's response should be commended. Its adhesion to the philosophy and objectives of the DDA is admirable.

5.4.2. Final comment on the definition of disability in the DDA

It is clear from the above that the definition of disability under the DDA is respectful to the rights and experiences of disabled persons. It ensures that no one will fall through the gaps. Further it avoids the anomaly that exists in other jurisdictions that an individual whom an employer rejects as too disabled for a job may not be disabled enough to challenge the employer's action. Questions remain surrounding the true efficacy of a broad definition based on the social model of disability. Has it really empowered the disabled persons of Australia? Does it remove barriers for litigation and do people who are not 'truly disabled' take advantage of the system? Or is it merely a philosophical ideal with no real effect in practice? Bagenstos[469] submits that these questions require systematic examination before it can be concluded that such a definition is 'better' than the more medical definitions contained in the ADA or British DDA for example. The PC's review of the Act is rather sobering. The definition does not appear to have had the empowering effect that was envisaged and victims of disability discrimination remain extremely reluctant to file claims under the DDA. The time, stress and expense of pursuing such a claim are all prohibiting factors.[470] However the PC does conclude that the DDA's benefits outweigh its cost and further that the broad definition may actually reduce litigation burdens by eliminating the need for the a costly and time-consuming enquiry into whether the person is disabled.[471]

Despite the criticisms of the effect of the definition, it remains the most commendable aspect of the DDA. Unfortunately 'a revolutionary disability definition is meaningless if proper implementation

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[466] This amendment is the Federal Government's response to *Marsden v Human Rights and Equal Opportunity Commission* (2000) FCR 1619.
[467] Patmore *op cit* at 542.
[468] *Ibid.*
[469] Bagenstos *op cit* at 666.
[470] PCDR (2003) *op cit* at 367-75.
[471] PCDR (2003) *op cit* at 152-153, 297.

and interpretation do not accompany it,'[472] and this has been the case as will become apparent throughout this chapter. Harris states, 'Although the DDA's language was carefully crafted with the promise of ensuring that all Australians with disabilities are protected against discrimination, the Australian legislature failed to created the type of legislation that can live up to that promise.'[473]

Thus although the definition in the DDA is an excellent one, it is not enough to carry other aspects of the legislation that continue to be problematic. Nor can it solve the problems of interpretation and implementation nor most importantly can it educate and change the attitudes of the Australian public. It is only once these issues are remedied that the full effects of the definition can be realised.

5.5. Defining discrimination

In the Australian context disability discrimination is the unequal treatment of a person because of a disability whether the acts of discrimination are directed at the person or merely impact differently on the person.[474] The DDA identifies four types of disability discrimination: direct discrimination;[475] indirect discrimination;[476] harassment[477] and the asking of discriminatory questions.[478] Each of these will be discussed in turn below.

5.5.1. Direct discrimination

Direct discrimination occurs when a person with a disability is treated less favourably than a person without that disability.[479] The test for direct discrimination is an objective one and focuses on the question of whether a person has been treated less favourably than a person without a disability in circumstances that are the same or not materially different.[480] In determining what constitutes 'not materially different' an adjustment should be made for any accommodation or services required by a

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[472] Harris 1999 *op cit* at 69.
[473] Harris 1999 *op cit* at 64.
[474] Basser and Jones 2002 *op cit* at 268. See also *Adams v Arizona Bay Pty Ltd* (1997) EOC 92-885.
[475] Section 5.
[476] Section 6.
[477] Sections 35-40.
[478] Section 30.
[479] Section 5(1) states 'For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.' (Emphasis in the original).
[480] Section 5(1).

person with a disability to participate in the particular activity.[481] The DDA recognises that disabled persons are entitled to have their disability accommodated to facilitate their participation in the community and the mere fact that they require accommodation does not render the circumstances 'materially different'. Thus the question that should be asked, suggest Basser and Jones, is whether, 'assuming the relevant accommodations are made, the person with a disability has been treated less favourably than a person without disabilities in similar circumstances'.[482]

There are two areas of interest in relation to s5. Firstly the issue of identifying the 'appropriate comparator'[483] needs to be explored. Secondly it is necessary to consider whether s5(2) creates a duty to provide reasonable accommodation or not and thus whether a failure to do so results in unfair discrimination. Confusion surrounding this matter is a result of a combination of the failing of the section to address the issue directly and inconsistent judicial interpretations.[484]

5.5.1.1. The appropriate comparator

When the DDA was first introduced there were some concerns expressed about the drafters decision to follow a 'victim-based' approach[485] that relies on the use of a comparator rather than following the ADA's approach in which a 'right to fair treatment' is legislated so as to avoid the need to make comparisons with others.[486] The difficulty with the use of the comparator is that it applies the traditional, generic anti-discrimination legislation formula to the unique problem of disability discrimination. Tyler notes that where there are real differences between the persons compared, as is the case with disability issues, the comparison will be impossible.[487] The drafters of the DDA were however of the opinion that it would be too radical to change the discrimination legislation paradigm in order to deal with the issue of disability.[488] Thus it is necessary to use an appropriate comparator in order to determine whether discrimination has occurred. In this respect the DDA is the same as the British equivalent. It is submitted that it does however unnecessarily complicate the issue and a rights

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[481] Section 5(2) 'For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.'.
[482] Basser and Jones *op cit* at 268.
[483] The question of the appropriate comparator (as it is commonly known) has been extensively discussed in Australian case law. See for example *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301 and *IW* (1997) 191 CLR 1 at 33, 40 and 66.
[484] Patmore *op cit* at 544.
[485] Harris 1999 *op cit* at 92.
[486] Tyler *op cit* at 225.
[487] *Ibid.*
[488] *Ibid.*

based approach may well have been a more effective way of protecting disabled persons.[489] The difficulties that can arise in the determination of the appropriate comparator can be illustrated by the contrasting judgments of the minority and majority of the High Court in the *Purvis*[490] decision.

In *Purvis*, the facts of which are discussed above, the court was tasked with the decision of whether the school had directly discriminated against Daniel on the basis of his disability by expelling him for his violent conduct. In order to make the determination it was necessary to identify an apposite comparator. The minority and majority of the court parted company on this point. The majority favoured a narrow interpretation that has subsequently been criticised by commentators.[491] The minority opted for a broader construction of the section, one that is more in keeping with the norm of disability jurisprudence.[492]

The majority of the court identified the proper comparator for Daniel as a pupil without the disability, not a pupil without the violence.[493] It held that Daniel's violent behaviour formed part of the circumstances in which the school made decisions about him. Adopting this comparator the majority held that the school had not discriminated against Daniel because they would have treated any other pupil with such violent behaviour in the same manner. The narrow construction by the Court was used in order to balance the obligations imposed by the DDA and the welfare of the other students and staff. Rattigan submits that this construction was motivated by a desire to achieve a just outcome in the circumstances of the case.[494]

The minority of the court relied heavily on the objects and purpose of the DDA and held that it would be wrong and contrary to the purpose of the Act to construe ameliorative provisions narrowly. The learned judges were of the opinion that the proper approach is to remove the disability from the equation, thus any behaviour that is a result of the disability is thus not imputed to the comparator.[495]

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[489] It is submitted that in this respect the South African approach to disability discrimination trumps the Australian. The prohibition of discrimination is based on an individual or group's right to equality.
[490] *Purvis* (2003) *supra.*
[491] See for example Gaze *op cit* at 333 fn 29 where she comments that the interpretation adopted by the majority (the same as the Full Court of the Federal Court) was narrow and technical and it 'deprived the legislation of meaning'.
[492] Rattigan *op cit* at 30.
[493] *Purvis* (2003) *supra* per Gleeson CJ at 137.
[494] Rattigan *op cit* at 29.
[495] This approach is in keeping with those used in other cases. For example in *Sullivan v Department of Defence* (1992) EOC 92-421 where it was held: ' It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment...could be seized upon as rendering the overall

The decision of the minority was motivated by the objects of the DDA which includes the elimination of discrimination as far as is possible. Thus they intended to establish a general principle that a comparison for the purposes of direct discrimination can never involve the inclusion of the behaviour that is the subject of the complaint.[496] The minority reiterated that anti-discrimination must be given a beneficial interpretation and expressed the view that 'it is essential that Australian courts give full effect to the language and purpose of the ameliorative provisions of the Act whatever opinion individual judges may have of the justice or wisdom of particular provisions.'[497]

This case illustrates the difficulties that can arise in selecting an appropriate comparator but it also indicates that it is important to ensure insofar as is possible that adequate defences are available so that 'bad precedents' are not created by narrow interpretations used to arrive at a particular conclusion in specific circumstances. The PC has in fact recommended that the DDA be amended to include clarification on what constitutes circumstances that are 'not materially different' for comparison purposes.[498]

5.5.2. Section 5(2)- Accommodation or Services

Among Australian federal anti-discrimination legislation this provision is unique to the DDA.[499] It is obviously included to take into account that people with disabilities may require additional accommodations in order to participate equally in the community. It also addresses potential complaints by non-disabled employees claiming that unequal treatment to benefit disabled employees is discriminatory.[500] There are significant difficulties in proving that a failure to provide accommodation to an individual constitutes direct discrimination in employment.[501] Section 5(2) has been interpreted by the HREOC and others as implying a duty on employers and others to provide 'reasonable adjustments' to accommodate the needs of people with disabilities.[502]

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circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.'.

[496] Rattigan *op cit* at 33. This principle was applied in the cases of *Commonwealth v Humphries* (1998) 86 FCR 324 and *Garity v Commonwealth Bank of Australia* [1999] EOC 92-966.

[497] *Purvis* (2003) *supra* at 140.

[498] PCDR (2003) *op cit* at 216.

[499] Patmore *op cit* at 543.

[500] See for example *Humphries supra* at 334.

[501] Patmore *loc cit.*

[502] See for example *Eyden v Commonwealth of Australia* [1999] EOC 93-000; *Maguire v Sydney Organising Committee for the Olympic Games* [2000] EOC 93-041; [2001] EOC 93-123; [2001] EOC 93-124 and *McNeill v Commonwealth* [1995] EOC 92-714.

In *Purvis*[503] the court also considered whether or not s5(2) of the DDA imposes an obligation to make reasonable accommodation for people with disabilities. The majority of the High Court, although not considering the matter in great detail, concluded that 'there is no textual or other basis in s5 for saying that a failure to provide such accommodation or services would constitute less favourable treatment.'[504] The minority canvassed the issue more thoroughly and concluded that the section recognises rather than imposes the obligation of accommodation. Although there is no express obligation under the DDA to accommodate a person with a disability, as a matter of practice to avoid a finding of unlawful discrimination an employer should accommodate the disabilities of the person unless it would impose an unjustifiable hardship.[505] McHugh and Kirby JJ for the minority further commented that it was a mistake to construe the term 'accommodation' as 'reasonable accommodation', a term not used in the Act. They stated that the addition of 'reasonable' to the requirement added an 'unwarranted gloss on the Act'.[506] Ozdowski is of the opinion that an analysis of the case law subsequent to the *Purvis* case demonstrates that all the decision of the High Court in *Purvis* means in this context is that the legal basis of reasonable adjustment is found in the DDA's coverage of indirect rather than direct discrimination.[507]

The PC has recommended that in order provide some clarity on this matter it is necessary to amend s5 so as to include a 'failure to provide "different accommodation or services" required by a person with a disability' in the definition of direct discrimination.[508] This recommendation has been welcomed by academic commentators[509]and rightly so. The duty to reasonably accommodate disabled persons has been described as the 'essential key in making anti-discrimination law work in the context of disability'.[510] Thus the PC's attempt to eliminate the ambiguity surrounding the concept in Australian law is laudable. It is anticipated that this proposed amendment will be widely supported and if so, its inclusion in the DDA will only serve to better protect the rights of people with disabilities.

5.5.3. Discrimination on the 'ground of disability'

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[503] *Purvis* (2003) *supra*.
[504] *Purvis* (2003) *supra* at 184.
[505] *Purvis* (2003) *supra* at 154.
[506] *Purvis* (2003) *supra* at 155.
[507] Ozdowski *loc cit.*
[508] PCDR (2003) *op cit* at 224.
[509] See generally Patmore *loc cit* and Rattigan *loc cit.*
[510] Harris 1999 *op cit* at 97.

Another feature that distinguishes the Australian Act from the ADA but one that it has in common with the British and South African legislation is that there is no need to prove that an alleged discriminator intended to discriminate against a person on the ground of disability. Basser and Jones submit that this is another aspect that supports the Australian position that the achievement of social justice does not depend on the apportioning of blame or fault.[511] Motive and intention to discriminate are irrelevant to the fact of discrimination.[512] In *Garity v Commonwealth Bank of Australia*[513] it was found by Nettlefold C that

> 'The effect of an impugned practice, not the underlying intent, is the governing factor in determining whether the practice gave rise to discrimination...The task is to determine whether the *'true' basis* of the employer's conduct is or was grounded on the prescribed consideration... The test to be applied is *objective*, in the sense that it is necessary to show no more than that, because of the aggrieved person's disability, she received less favourable treatment.'[514]

The question of 'causation' as it is sometimes called, the search for the reason for the less favourable treatment, has been much debated in the lower courts and thus the High Court in *Purvis*[515] briefly considered the question in order to obtain some clarity on the matter.

In the first hearing Innes C had described the test for causation as a 'but for' test. In drawing his conclusion, that Daniel had been discriminated against on the ground of his disability, he relied on *inter alia Y v Australia Post*[516] and held that since Daniel's behaviour was so closely connected to his disability, treatment on the basis of his behaviour was treatment on the basis of his disability.[517]

The High Court held that although Innes C had erred by calling the test a 'but for' test, he had conducted it properly. The minority agreed with his conclusions that the benevolent motive of the principal of the school did not detract from the discriminatory nature of the conduct.[518] Counsel for the State had argued that the true reason for the treatment was not Daniel's behaviour (and thus his disability) rather the treatment was based on the protection of the health, safety and welfare of others.

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[511] Basser and Jones *op cit* at 263.
[512] *Waters v Public Transport* (1991) 173 CLR 349. A High Court case decided under the Equal Opportunity Act 1986 (Victoria).
[513] [1999] HREOCA 2.
[514] *Garity supra* at 79. (Emphasis added) This proposition is also supported in *Humphries supra.*
[515] *Purvis* (2003) *supra.*
[516] [1996] EOC 92-865.
[517] *Purvis obo Hoggan* (2001) *supra* at 167.
[518] *Purvis* (2003) *supra* at 171.

This argument drew on the case of *Australian Iron & Steel Pty Ltd v Banovic*[519] where it was held that a tribunal is required to find the true reason for the discriminatory act. However it was also held in this case that the test is an objective one, a factual enquiry and that sometimes genuinely assigned reasons may mask the true basis of the decision.[520]

Decisions are often taken for many reasons and thus it is difficult to determine what the true basis of the decision is. The DDA makes this task a little easier in s10 which states that if an act is done for two or more reasons and one of the reasons is the person's disability (whether or not it is the dominant or a substantial reason doing the act) then for the purposes of the DDA, the act is taken to have been done for that reason.[521] Thus in *Purvis* the mere fact that the State asserted that the conduct was based on health and safety concerns, does not, for the purposes of the Act, mean that the action was not taken on the grounds of Daniel's disability.

Basser and Jones submit that the removal of the requirement of intention to discriminate means that many well-intentioned acts will nonetheless be considered discriminatory.[522] The authors argue that this is a very important because it means that the rights of people with disabilities will not be undermined by paternalistic or patronising actions no matter how well intentioned.[523] The Australian approach goes even further because a discriminator need not even be aware of the effect of their behaviour on people with disabilities.[524] The law is not concerned with passing moral judgment. The discriminator is not seen as a 'bad' person, the law is merely concerned with rectifying improper actions and restoring balance.[525] As a fairer society is what Australia is after, it is logical that well-meaning acts of discrimination should be prohibited alongside ill-intentioned, accidental and disinterested acts of discrimination.[526]

5.5.4.Indirect disability discrimination

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[519] (1989) 168 CLR 165. See also *Waters supra.*
[520] *Banovic supra* at 176.
[521] Sections 10(a) and (b) DDA 1992.
[522] Basser and Jones *op cit* at 264.
[523] *Ibid.*
[524] The fact that people may have prejudices that they are not even aware of themselves and further through ignorance may not know that such behaviour would impact on disabled person unfairly is also mentioned in the British Code of Good Practice 2004.
[525] Basser and Jones *loc cit.*
[526] Basser and Jones *op cit* at 265.

Section 6 provides that indirect discrimination occurs where a person is unfairly excluded from equal participation in society as a result of the imposition of a requirement or condition with which a disproportionate number of people with disabilities will be unable to comply.[527] Basser and Jones argue that this provision is an attempt to incorporate the principles of substantive equality into Australian law, going much further than other anti-discrimination measures in prohibiting acts that are discriminatory in effect[528] rather than their intent.[529]

There are a number of problems with the definition of indirect discrimination that have been considered by the PC. The first of these is the 'proportionality test' contained in s6(a). Patmore states that having to prove a disproportionate impact places an additional evidentiary burden on complainants and further that the technical nature of the requirement is complex,[530] time consuming and expensive.[531] Furthermore the test does not appear to add much to the definition of indirect discrimination.[532] Thus the PC has rightly recommended that s6 should be simplified by removing the proportionality test.[533]

The second difficulty surrounds the debate over the correct interpretation of the term 'reasonable' in s6(b). The term is not defined in the Act however it has been given judicial consideration in cases decided under similar definitions of indirect discrimination contained in other anti-discrimination statutes. In *Waters v Public Transport*[534] the High Court divided on the meaning of the term 'reasonable'.[535] The minority of the court adopted a narrow view of the term and stated that the purpose was to remove only 'those cases in which a requirement or condition serves to effect a genuine distinction.'[536] For example a job requirement that a person be over 6 feet for an acting role

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[527] Section 6 of the DDA states: 'For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition: (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and (b) which is not reasonable having regard to the circumstances of the case; and (c) with which the aggrieved person does not or is not able to comply.'.

[528] A case that illustrates the point well is that of *Scott v Telstra Corp Ltd* [1995] EOC 92-885. In this case Telstra had a blanket policy of providing standard handsets for telephones but refused to provide any alternate telecommunications devices for people with hearing impairments. Telstra argued that they provided the network and that the handsets were supplementary to that. It was held however that the requirement that the network be accessed by standard handsets was clearly one with which a disproportionate number of people with hearing impairments could not comply. Thus the refusal to provide teletypewriters to people with profound hearing loss was held to be unlawful indirect discrimination.

[529] Basser and Jones 2002 *op cit* at 269.

[530] See *Minns v New South Wales* (2002) FMCA 60-253.

[531] Patmore *op cit* at 544.

[532] *Ibid.*

[533] PCDR (2003) *op cit* at 226.

[534] *Waters supra.*

[535] The term was contained in s17(5) of the Equal Opportunity Act 1984 (Vic) which stated: ' if the requirement or condition is not reasonable'.

[536] *Waters supra* at 363.

may be appropriate, however a general preference for taller people may have a disproportionate effect on certain people with disabilities.[537] The minority argued that it was inappropriate to consider financial factors that might have motivated the decision.[538] Financial and economic considerations should be contained within justifications and exemptions to discrimination rather than at the stage where the occurrence of discrimination is determined. Patmore is of the opinion that this is the correct approach to be adopted as it ensures that the distinction between discrimination and unlawful discrimination does not become blurred.[539]

The PC however agrees with the majority opinion in the *Waters*[540] case.[541] The majority of the High Court in that case held that that term 'reasonableness' involved a weighing of all relevant factors. This required consideration of discriminatory effect upon the complainant and the factors in favour of imposing the requirement or condition.[542] This opinion reflects a liberal approach to defining 'reasonableness'. The minority argued that a liberal approach is problematic because it creates a new exception thus the line is blurred between what is considered discrimination and what is an exemption thereto. Patmore suggests that the question is really whether financial considerations should be relevant to the consideration of 'reasonableness' or should they be set aside until 'unjustifiable hardship' is decided?[543] The PC has not been clear on their interpretation however it is their recommendation that s6 should be amended to 'include criteria for determining whether a requirement or condition "is not reasonable having regard to the circumstances of the case"'.[544] It is not known what those 'criteria' will be but any clarity on the subject would be a welcome amendment.

The third problem identified by the PC is that the overall burden of proving the discrimination unlawful rests with the complainant. The DDA does not specifically state who should prove 'reasonableness', but as the burden is primarily on the complainant it falls on them to prove. This is problematic because the information necessary to prove reasonableness often lies with the respondent and is inaccessible to the complainant.[545] The PC concluded that it was inappropriate to place the

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[537] Patmore *op cit* at 545.
[538] *Waters supra* at 364.
[539] Patmore *op cit* at 546.
[540] *Waters supra.*
[541] Patmore *op cit* at 547.
[542] *Waters supra* at 378-9; 383-4; 395-6 and 408-11.
[543] Patmore *op cit* at 547.
[544] PCDR (2003) *op cit* at 231.
[545] PCDR (2003) *op cit* at 228. For example in the employment context an employee would not be able to access all the records necessary to prove the business needs of the employer.

burden on the complainant and thus recommended that the DDA be amended to place the burden of proving 'reasonableness' in the definition of indirect discrimination on the alleged discriminator (who is best to discharge the onus). Patmore submits that this is consistent with the approach adopted in other anti-discrimination statutes.[546]

5.5.5.Harassment

Section 35 makes harassment in employment unlawful.[547] The section provides that harassment by a person of another person, who is an employee, co-worker or applicant for a job and who has a disability, in relation to that disability is unlawful.[548] In s36 the DDA extends the protection against harassment to associates of people with disabilities.[549] For example an employee is subjected to snide remarks and inappropriate jokes about her brother who suffers from multiple personality disorder. This would constitute harassment of an associate of a person with a disability. This recognises once again that it is often societal attitudes that are more disabling than actual disabilities.

The inclusion of provisions prohibiting harassment is obviously very important to people with mental health problems. As Crocker, the president of the Mental Illness fellowship of Australia Inc, notes 'mental illness has long been the butt of jokes, poor media presentation and marginalisation by society'.[550] She suggests that the provisions relating to harassment are insufficient and thus it is timely during the review of the DDA to seriously consider legislative provisions to protect people with mental health difficulties from vilification.[551] In the ACT Government's response[552] to the PCs draft report it stated that the Discrimination Act 1991 (ACT) describes racial vilification (s65) as 'a public act, inciting hatred towards, serious contempt for, or severe ridicule of, a person or a group of people on the ground of their race'.[553] The ACT Government supported the development of a similar provision in the DDA however the support is conditional upon vilification being a 'public act'. If

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[546] *Ibid.*
[547] For illustration of the operation of these provisions see *Adams v Arizona Bay Pty Ltd supra* and *McNeill supra.*
[548] Sections 35(1)-(3) DDA 1992. This principle is extended to commission agents and contract workers in subsecs 35(4)-(6).
[549] 'Associate' is defined in s4(1) of the DDA as '(a) a spouse of the person; and (b) another person who is living with the person on a genuine domestic basis; and (c) a relative of the person; and (d) a carer of the person; and (e) another person who is in a business, sporting or recreational relationship with the person.'.
[550] A Crocker and M Springgay 'Review of the Disability Discrimination Act 1992: Comment on the Draft Report' (2004) at http://www.mifa.org.au/pdfs/draftreview.pdf#search='mental%20illness%20discrimination%20australia accessed 2 June 2005 at 2.
[551] *Ibid.*
[552] 'Comment by the ACT Government on the Productivity Commission's Inquiry into the Disability Discrimination Act 1992' March 2004.
[553] Act Gov Comment *op cit* at 13.

vilification were not defined as a public act it would be difficult to distinguish it from harassment.[554] The PC's draft report suggests the establishment of a public awareness campaign.[555] Crocker submits that this will be insufficient. Crocker states 'a legislative imperative to present accurate and non-stigmatising information and images about psychiatric disability would give some redress to vilification of people with disabilities' and she suggests further that vilification needs to be included in the Act as an unlawful activity in relation to people with disabilities.[556]

It is submitted that such a provision has the potential to achieve what the DDA has not yet managed. That is a change in community attitudes about disabilities. It is anticipated that legislating against disparaging treatment of people with disabilities will assist in the elimination of stigma that an attitudinal change will be encouraged.

5.5.6 Asking of discriminatory questions

Section 30 of the DDA provides that it is discriminatory to ask for information in circumstances where a person without a disability would not be required to provide that information. This provision respects one's right to privacy. The mere fact that one has a disability does not mean that the employer has a right to know any more about one or one's medical or psychiatric history. Thus it would be unlawful for a potential employer to ask the applicant (whom he knows is schizophrenic) whether she experiences delusions. Quite obviously this is not a question he would ask all applicants.

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[554] *Ibid.*
[555] PCDR (2003) *op cit* at 235.
[556] Crocker and Springgay *op cit* at 3.

5.6. Unlawful workplace discrimination and its exemptions

The DDA makes a distinction between the definition of discrimination and acts of discrimination that are unlawful. Unlawful discrimination in employment is specifically spelled out however it may still be lawful if the conduct is covered by one of the exemptions contained in the Act.

Disability discrimination is made unlawful in a number of activities in the workplace by s15 of the DDA. These activities include *inter alia* recruitment,[557] terms and conditions of employment, access to benefits, training, promotion and dismissal.[558] Certain non-employees are also covered such as commission agents, contract workers and partners.[559] All employers are covered, there is no exemption for small businesses and furthermore non-employers such as employment agencies, trade unions and qualifying bodies are also bound by the DDA.[560] The employment provisions are very broad. They are however limited by the exemptions which provide that in certain circumstances discrimination will not be unlawful.[561] The two most important exemptions in the Act are 'unjustifiable hardship' and the 'inherent requirements' exemption. Each of these will be explained below.

5.6.1.The unjustifiable hardship exemption

Section 15(4)(b) of the DDA renders discrimination lawful if the employee requires the provision of services or facilities that would impose an 'unjustifiable hardship' on the employer. The concept is not defined in the Act but rather in s11.[562] It states that 'all relevant circumstances' must be taken into account and it lists several non-exhaustive considerations. These include firstly the nature of the benefit or detriment likely to be accrued or suffered by any person concerned.[563] Secondly, the effect of the

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[557] Section 15(1) states 'It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability or a disability of any of that other person's associates: (a) in the arrangements made for the purpose of determining who should be offered employment; or (b) in determining who should be offered employment; or (c) in the terms or conditions on which employment is offered.'

[558] Section 15(2) states 'It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability or a disability of any of that employee's associates: (a) in the terms or conditions of employment that the employer affords the employee; or (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or (c) by dismissing the employee; or (d) by subjecting the employee to any other detriment.'

[559] Sections 16-18.

[560] Sections 19-21.

[561] Patmore argues that the more significant of the exemptions ought to be maintained however some clarification in their scope and application is necessary. Patmore *op cit* at 549.

[562] The Productivity Commission has recommended that s11 be amended to clarify that community-wide benefits and costs should be taken into account. PCDR (2003) *op cit* at 255.

[563] Section 11(a).

disability on the person concerned.[564] Thirdly, the actual financial circumstances and the costs of providing the adjustment will need to be taken into account.[565] Clearly the larger the company the more it can usually afford. In some cases relatively minor alterations will be beyond the capacity of some small businesses.

Where this defence is raised the tribunal or court must engage in an investigation into the interests of all parties involved. Basser and Jones[566] submit that the factors to be taken into consideration go beyond financial considerations[567] and involve balancing the respective rights and interests of the parties.[568] Financial hardship is relevant, but alone it will rarely displace the objective of ensuring that people with disabilities have the same rights and opportunities as those without disabilities.[569]

The PC has identified two problems with the exemption. Firstly it only applies to the 'hiring and firing' of employees.[570] As a result the perverse situation is created where employers will discriminate at the hiring stage in order to avoid making accommodations for the duration of the employment when the defence of unjustifiable hardship is no longer available.[571] The difficulty that the limited application of the exemption can result in is demonstrated (in the education context) by the *Purvis*[572] case. In education the exemption does not apply once a student is enrolled in a school. Thus there was no provision catering for the lawful exclusion of a disabled student once they were admitted to the school. The High Court held that the limited operation of the exemption was an anomaly that required correction by parliament.[573]

The PC identified a second issue and that was that the proposed amendment to s5 of the Act would have to be taken into account. It suggested that in order for the definition of direct discrimination to operate in a balanced and equitable manner the defence must be available 'in all situations' requiring an

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[564] Section 11(b). The person with a disability must actually be able to use the accommodation.
[565] Section 11(c).
[566] Basser and Jones 2002 *op cit* at 271.
[567] For example in *Cocks v Queensland* [1994] EOC 92-717 it was held that the financial cost of making the Brisbane Convention and Exhibition Centre accessible did not constitute an unjustifiable hardship because an estimated 315 400 people who could not use the stairs would be able to access the building with dignity.
[568] The complexity of the balancing act involved is demonstrated in a number of cases. See for example *Maguire* [2001] *supra*, *Hills Grammar School v Human Rights and Equal Opportunity Commission* [2000] EOC 93-081, *Telstra supra*.
[569] Rattigan *op cit* at 45.
[570] Harris 1999 *op cit* at 77.
[571] PCDR (2003) *op cit* at 245, the Commission relied on a submission by the HREOC.
[572] *Purvis* (2003) *supra*.
[573] *Purvis* (2003) *supra* at 156. The anomaly in the educational context has been amended by Act 19 of 2005 which introduced the Education Standards. These standards become operational on 1 September 2005.

adjustment that might impose and unjustifiable hardship.[574] Thus the PC concluded that 'the unjustifiable hardship defence should be available on an equal basis in all areas in which the DDA makes discrimination unlawful.'[575]

5.6.2.The inherent requirements of the job

The DDA contains a provision similar to the ADA,[576] and the corresponding South African legislation that allows an employer or potential employer to answer an allegation of discrimination by showing that the complainant is unable to perform the 'inherent requirements of the job'.[577] The DDA does not contain a definition of what would constitute an inherent requirement however case law makes it clear that the question should be answered on the individual facts of each case.[578]

The PC declared the inherent requirements provision 'appropriate' with no need for amendment. This comment was however qualified by suggesting that guidelines to explain how inherent requirements should be identified in practice could be helpful.[579] The PC's suggestion regarding guidelines acknowledges the fact that this exemption has been rather contentious in practice.

X v Commonwealth[580] illustrates the issue appropriately. X, the appellant, was discharged from the Australian Defence Force because he was HIV positive. At the hearing in which X first challenged his dismissal it was found that he was symptom free and in good health at the time of his dismissal. The ADF argued that he was not deployable (which was an inherent requirement of the job) because his blood would pose a danger to the health and safety of others.[581] The HREOC rejected this contention on the basis that the requirement that a soldier be HIV negative was not and inherent requirement but rather an external one imposed by the ADF. If the requirement was removed X would perfectly capable of carrying out all aspects of the job including deployment. The HREOC construed the inherent requirement narrowly, finding that an incident of employment is not the same as an inherent requirement of employment. It was found that 'there must be a clear and definite relationship between

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[574] PCDR (2003) *op cit* at 255.
[575] PCDR (2003) *op cit* at 251.
[576] The ADA protects only 'qualified individuals' that is those who, 'with or without accommodation, can perform the essential functions of the employment position that such an individual holds or desires'. See further Harris 1999 *op cit* at 56.
[577] Section 15(4)(a).
[578] Basser and Jones *op cit* at 273.
[579] PCDR (2003) *op cit* at 240.
[580] (1999) 200 CLR 177.
[581] See Harris 1999 *op cit* at 69-71.

the inherent or intrinsic characteristics of the employment and the disability in question.' The Federal Court, in a retrograde step, overturned the HREOC's decision and held that the matter revolved around 'bleeding safely' and risk to others. On X's appeal to the High Court the court divided on the issue of inherent requirements. The majority held that X's disability did not just pertain to the incidents of army service but it to its inherent requirements. The majority adopted a broad interpretation of 'inherent requirements' as including practical and operational considerations.[582] This gives employers greater room to argue that the person is unable to perform the inherent requirements.

Patmore submits that exemptions that impact claimants adversely should be narrowly construed in keeping with the first objective of the DDA, that is, the elimination of discrimination.[583] Thus the formulation adopted by Kirby J for the minority in *X* is to be preferred: inherent requirements are those duties that are 'essential, permanent and intrinsic.'[584] Patmore argues that the benefit of the narrow interpretation of the term is that 'the employer could not dismiss the employee based on his own criteria or interests, but only on the basis of the employee's incapacity (and not mere difficulty performing them) to perform permanent and essential duties.'[585] The HREOC has issued guidelines, as a response to *X* that seem to narrow the term. However in the absence of a statutory definition, the doctrine of precedent dictates that the overly broad interpretation of the court in *X* is to be applied. Patmore submits that an amendment is necessary and suggests that the inclusion of Kirby J's formulation would remove any ambiguity.[586]

Basser and Jones suggest that factors to be taken into consideration when determining whether an employee can fulfil the inherent requirements of a job include: the ability to perform the tasks or functions that necessary aspects of the job; productivity and quality requirements;[587] the ability to work effectively in the team or other type of work structure;[588] and the ability to work safely.[589] In *Y v*

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[582] *X v Commonwealth supra* at 187-92.
[583] Patmore *op cit* at 549.
[584] *X v Commonwealth supra* at 229.
[585] Patmore *op cit* at 552.
[586] Patmore *op cit* at 553.
[587] It is important however that an employer cannot refuse to employ someone on the basis of quality or productivity standards that are unrealistic or not imposed on non-disabled employers in practice.
[588] This consideration may be particularly challenging for people with mental health problems who may, by reason of their condition, be anti-social or difficult to get along with. However it is submitted that an employer should take all reasonable measures to attempt to accommodate the person by offering alternative placement, for example. If working in a team is a necessary concomitant to the job, the person who is unable to do so may just have to accept their limitation and attempt a different occupation more suited to their needs and abilities.
[589] Basser and Jones *loc cit.*

Australia Post[590] the employer was able to ascertain from evidence of Y's conduct that he was unable to fulfil the requirements of his position. Y suffered a residual schizophrenic illness and also suffered an avoidant personality disorder. Y had a poor employment history with evidence of tardiness, harassment of a female co-worker, threats of violence and inefficiency at work.[591] Thus it follows from this case that when the person's disability actually prohibits him from complying with the inherent requirements, he is simply not suitable for the job.[592] In *O'Callahan-Evans v Mitsubishi Motors Australia Ltd*[593] it was held by the Industrial Relations Court that 'the employer has the right to terminate the applicant's employment for reasons which essentially relate to his operational requirements, and the right to choose employees that are best suited to the work at hand.'[594] The *ratio* of this case is concerning because it focuses on the subjective belief of the employer as to the employee's suitability for a job. Harris submits that if the DDA permits employers to reject job applicants based on the subjective beliefs that the individuals (without accommodation) may not be 'best suited' then the goal of ensuring equal rights for people with disabilities will be unattainable.[595]

Although it is very easy to understand the necessity for the exemption, it still operates unfairly for some people with disabilities. Many people with mental health problems are unable to obtain the necessary qualifications or work experience.[596] For this reason it is desirable that employers show a commitment to the advancement and training of people with disabilities. It is likely that this would only be achieved through affirmative action or other legislative measures. In the absence of such, it is imperative that the narrowest possible construction is given to the defence. Legislation such as the DDA that has committed itself to the furtherance of human rights for people with disabilities cannot allow a defence

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[590] *Australia Post supra.*
[591] *Ibid.*
[592] Commissioner Webster held that he was satisfied, on the balance of probabilities, that Y:- (a) Is unable to carry out the inherent requirements of the position of a postal delivery officer or mail officer; and (b) That there are no services or facilities which could be implemented or provided by Australia Post to Y that would enable him to carry out those requirements' Australian Post *supra* at 27.
[593] No. 1173 SA (950482) (1995) unreported judgment of the Industrial Relations Court at http://www.austlii.edu.au accessed 22 May 2005. In this case the complainant did not disclose a previous arm injury in a medical history form or during a pre-employment medical examination. The doctor who examined her testified that had he been aware of her medical history he would not have recommended her for the job as she was prone to carpal tunnel syndrome, the potential onset of which would be exacerbated by the repetitive nature of the job (which was in a paint shop). The complainant was diagnosed with carpel tunnel syndrome after she had commenced her employment.
[594] *O Callahan-Evans supra* at para 24.
[595] Harris 1999 *op cit* at 73.
[596] This is because the onset of many psychiatric disorders in the late teens or early twenties when most people obtain qualifications. Also for some who required time spent in an institution they would be unable to obtain any meaningful experience or qualifications.

that effectively permits employers to discriminate by loosely claiming that a person is not able to comply with the inherent requirements of the job.

5.7. Enforcement

5.7.1. Individual Complaints

The DDA adopted a complaint mechanism rather than following the ADA's example of creating a right to fair treatment.[597]Although a rights based approach was recommended, such a deviation from the norm was considered too radical.[598]It is commonly accepted that individual complaints mechanisms are extremely limited, however they are nonetheless the most common strategy used in Western human rights legislation.[599] The opportunity to bring an action to vindicate the experience of discrimination also has a positive psychological impact on the individual mounting the complaint. Basser and Jones submit that the ability to assert one's rights, complain about a wrongdoing and receive redress is an important part of living in a democratic society and in itself can have an empowering effect.[600]

5.7.2. The complaint process: complaint, conciliation, court case

The complaints process may be initiated[601] by a number of people, including an individual with a disability,[602]a person acting on behalf of the person with a disability when they are unable to act on their own[603] and associates of persons with disabilities where an associate has been the subject of discrimination.[604] There is also provision for complaints to be made by more than one person in representative actions.[605]

Once a complaint is made, the first step in resolving it is through conciliation. This is an informal meeting between the parties and the conciliator. The PC acknowledged the advantages of using conciliation as the primary dispute resolution mechanism. It is an accessible process producing quick,

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[597] Tyler *op cit* at 225.
[598] *Ibid.*
[599] Basser and Jones 2002 *op cit* at 274.
[600] Basser and Jones(2002) *loc cit.*
[601] In terms of s46 of the HREOC Act, a complaint may be lodged. The complaint must then be referred to the President, who must inquire into the complaint and attempt to conciliate it. See also s46P of the DDA.
[602] HREOC Act Section 46P(2)(a).
[603] HREOC Act Section 46P(2)(c).
[604] HREOC Act Section 46P(2)(b).
[605] Basser and Jones 2002 *loc cit.*

satisfying and cost-effective outcomes.[606] Conciliation is non-adversarial and is conducted in confidence[607] by officers of the HREOC who have extensive expertise in human rights and disability issues.[608] A difficulty noted by the PC is that the inequality of resources between employer and employee can undermine the process because the basis of a successful conciliation is the assumption that the parties have equal bargaining power.[609]

Where resolution is not reached through conciliation, the President of the HREOC formally terminates the complaint.[610] Once this has occurred an application may be made to the Federal Court of Australia or the Federal Magistrates Court.[611] A complaint can also be referred to a court where it raises and issue of public importance. It is possible to request that the court make an interim order that the complainant be restored to the position they were immediately before lodging the complaint.[612] There is a wide range of remedies[613] that the court can order once it is satisfied that there has been unlawful discrimination. Of particular interest is the fact that the court has the power to order that the respondent employ or re-employ the applicant or to require the respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by the applicant. This demonstrates that the court will not hesitate to interfere in a contractual relationship if it is clear that unfair discrimination has occurred. It is important that judges take their responsibility of giving effect to the objectives of the Act very seriously. Gaze notes that Australian judges have tended to give narrow or literal readings of anti-discrimination legislation and that as a result 'some very narrow and technical distinctions have been introduced, making success more difficult for complainants and discouraging the bringing of actions.'[614]

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[606] PCDR 2003 at 275.
[607] If the matter proceeds to a formal hearing then nothing said at the conciliation can be used at the hearing. However the disadvantage of the confidential nature of conciliation is that it is unlikely that an individual complaint will lead to systemic change and because the outcomes are private there is no educative effect.
[608] Basser and Jones 2002 *loc cit.*
[609] PCDR 2003 at 285.
[610] HREOC Act Section 46PH(1) lists a number of grounds on which the President may terminate a complaint.
[611] Previously the HREOC had the power to hear and determine complaints under the 3 anti-discrimination statutes. However this power was found to be unconstitutional in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. As a result the Human Rights Legislation Act 1995 gave effect to this decision and the HREOC can no longer conduct hearings.
[612] HREOC Act Section 46PP.
[613] HREOC Act Section 46PO(4), these include an order requiring the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the applicant, an order declaring that the respondent has committed unlawful discrimination and prohibiting the respondent form continuing or repeating such acts and compensation among others.
[614] Gaze *op cit* at 333.

The Victorian Equal Opportunity Commission has estimated that 'some 70 percent of people who think they've had their rights abused, generally across the board, in fact elected not to bring a complaint.'[615] Probably the largest deterrent for persons with disabilities wishing to vindicate the abuse of their rights is the fact that pursuing a complaint in court is an extremely costly experience. Whereas the HREOC is free, the court costs and legal fees apply in the courts. Also legal representation is recommended and that is certainly not inexpensive, furthermore applicants run the risk of getting an adverse cost award.[616] As Tyler points out, poverty seems to be the natural corollary of disability[617]and thus these potential costs of the court process means that the instigation of a complaint is simply beyond the means of those who need it most. This is of course exacerbated by the fact that legal aid for applications is very limited.[618] A further concern identified by the PC was that many fear victimisation, particularly if they belong to a small community or institution.[619] This could, it is submitted, be easily remedied if people were aware of the DDA's provisions that make victimisation an offence.

5.7.3. Proposals for reform

For the abovementioned reasons the PC has recognised that there is a need for reformation of the complaints procedure. There are five recommendations that are of importance. Firstly, at present complainants have an option of whether to make a complaint under Territory or Commonwealth legislation however when a complaint is made under the DDA the complainant has to deal with the HREOC in Sydney. The costs and inconvenience of doing so can be prohibitive. Thus the PC has recommended that the HREOC enter into formal arrangements with State/Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction.[620] This is important, as more people are likely to utilise the HREOC if there is a local presence.

Secondly, it was clear that the fear of receiving an adverse cost order was exacerbated by the uncertainty about the circumstances in which this would occur.[621] Thus it is suggested by the Commission that criteria should be set for when court costs will be awarded and further that the HREOC Act should be amended (subject to a review of the implications for other federal

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[615] PCDR 2003 at 276.
[616] Basser and Jones 2002 *op cit* at 275.
[617] Tyler *op cit* at 214.
[618] Basser and Jones 2002 *loc cit.*
[619] PCDR 2003 at 281-3.
[620] PCDR 2003 at 294.
[621] Patmore *op cit* at 557.

discrimination laws) to incorporate grounds for not awarding costs against complainants in the Federal Court and Federal Magistrates Service.[622] It is anticipated that people will be more likely to act upon discriminatory conduct if the potential costs of doing so are more certain.

Thirdly it was suggested that s46PO of the HREOC Act should be amended to allow complainants 60 days to lodge an application relating to unlawful discrimination with the Federal Court or Federal Magistrates Service.[623] This would mean that people have more time to instigate their application and 60 days seems a much more reasonable time limit than 28 days.

The fourth recommendation is that the HREOC Act should be amended to allow the HREOC to initiate complaints under prescribed circumstances.[624] Patmore submits that this will assist the difficulties that arise out of the unequal bargaining power between employers and employees.[625]

The last recommendation is one that will have a great impact on the chances of the DDA achieving systemic change. The PC suggests that disability organisations should now be allowed to initiate their own complaints.[626] This means that that the achievement of equality will no longer rest solely on an individual with limited resources initiated a complaint. It is unlikely, it is submitted, that this amendment would have much impact on the incidence of workplace discrimination as it is doubtful whether conduct or practices that affects an individual employee would be an issue that a disability organisation would have an interest in.

5.7.4. Disability standards

Harris submits that establishing enforcement regulations and guidelines is of paramount importance for the successful implementation of any legislation.[627] Tucker comments further that the 'success or failure of [an Act] literally depends on the formulation of adequate standards'.[628] Standards serve not only to ensure compliance with the statute but also alert the public as to whom the statute applies.[629]

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[622] PCDR 2003 at 302.
[623] PCDR 2003 at 303.
[624] PCDR 2003 at 318.
[625] Patmore *loc cit.*
[626] PCDR 2003 at 309.
[627] Harris 1999 *op cit* at 74.
[628] Tucker 1995a *op cit* at 539.
[629] *Ibid.*

The DDA[630] specifies that the HREOC may formulate standards but, as mentioned above, these have only been implemented in the area of transport and, in 2005, in education. The purpose of including standard setting in the DDA was to provide for a change in attitude towards, and treatment of, people with disabilities.[631] This has clearly not been achieved and furthermore it is unlikely that even if implemented that they will achieve this objective.[632]

5.7.5. Guidelines

Under s67(1)(k)of the DDA, the HREOC may prepare and publish Guidelines, also known as 'Advisory Notes', to improve the public's understanding of rights and obligations under the Act. Although a number of these have been published their utility is 'limited and potentially problematic'.[633] The DDA Guidelines have no authoritative status and following them provides no defence against a complaint of disability discrimination. Given this, Basser and Jones submit that it is hardly surprising that the Guidelines have not played a major role in addressing fundamental inequality in society.[634]

5.7.6. Public inquiries

Under s67 the HREOC has the power to undertake a public inquiry when several individual complaints deal with the same topic, where the Attorney-General considers the matter to be of public importance or where, in the context of the individual complaint (with the consent of the parties) this would be a better way of becoming informed about all the issues in the case.[635] These inquiries cannot take place without the involvement of the HREOC and the inquiries are the responsibility of the State. Basser and Jones submit that this mechanism has developed so that it can involve the community informally in the process of dealing with systemic discrimination.[636] What this means, the authors submit, is that the public inquiry process 'enables broad community participation in discussion of important policy issues, and has been used as an inexpensive mechanism to engage the community in the elimination of systemic discrimination.'[637] The format of the inquiry varies depending on the issues raised and the resources available. However the methods used include submissions from interested parties, a public

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[630] DDA Section 31(1).
[631] Basser and Jones 2002 *op cit* at 276.
[632] *Ibid.*
[633] Basser and Jones 2002 *op cit* at 278.
[634] *Ibid.*
[635] Basser and Jones 2002 *op cit* at 279.
[636] *Ibid.*
[637] *Ibid.*

forum or use of the Internet.[638] The public inquiry strategy has been used to resolve many issues including the captioning of movies and the interference caused to hearing aids by cellular telephones. The advantages of the public inquiries include taking the onus off the person or organisation that lodged the complaint, secondly it reduces the risk that the complainant will have to pay the costs of the application. It also has the potential to effect systemic change[639] because a public notification of the resolution of the dispute will be given, thus it creates awareness not only of the issue but of the DDA too.

[638] *Ibid.*
[639] *Ibid.*

Chapter 6

SOUTH AFRICA

6.1. Introduction

In 1997 the government published its policy on disability in a White Paper entitled 'Integrated National Disability Strategy'.[640] A reading of this document makes it apparent that the government subscribes to a social approach to disability and seeks to comply with the imperative of substantive equality. Government seeks to transform society towards a 'Society for All' in which all sectors, including employment, integrate disability in all their policies and practices so as to raise awareness about disability as well as create an enabling environment for people with disabilities. In the paper it is unequivocally accepted that disabled people have been marginalised and disempowered by society. Government advocates a holistic strategy for dealing with disability.[641] In the foreword to the White Paper, Mbeki states that disabled people enjoy the same rights as able-bodied persons and that we have a responsibility towards the promotion of their quality of life. In order to achieve this Mbeki states that we must stop seeing disabled people as objects of pity but as capable individuals who are contributing immensely to the development of society. We must play an active role in working with them to find joy and happiness and the fulfilment of their aspirations.[642]

It is particularly difficult in South Africa to obtain reliable statistics about the prevalence of disability.[643] This is due to the fact that different definitions of disability[644] are used, different survey techniques are implemented and a poor service infrastructure exists. Estimates are that between 5 and

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[640] Office of the Deputy President, November 1997.

[641] C Ngwena 'Equality and Disability in the Workplace: A South African Approach' A Seminar Presentation in the School of Law, University of Leeds, England (2004) at http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm accessed 22 June 2005 at 16.

[642] TM Mbeki 'Foreword' in the White Paper on an Integrated National Disability Strategy (1997).

[643] JM Reyneke and H Oosthuizen 'Are the rights of the disabled a reality in South Africa? Part 1' (2003) 28(2) *Journal for Juridical Science* 91 at 91.

[644] There is no general definition of the term 'disability' and much depends on the context within which it is used. The definition used in the Social Assistance Act 59 of 1992 to determine entitlement to disability grants describes a disabled person as: 'A person who has attained the prescribed age and is owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.' The EEA defines disabled people as: 'People who have long-term or recurring physical or mental impairments which substantially limit their prospects of entry into or advancement in employment'. Other legislation referring to the rights of the disabled, for example the Constitution, the LRA and PEPUDA do not give a definition for a person with a disability. (Difficulties relating to the EEA definition will be discussed in depth later in this chapter).

12 percent of South Africans are moderately to severely disabled.[645] Statistics further show that only one in five disabled people are economically active and that the majority depend on social welfare and family support.[646] It is noted in the White Paper that despite this large percentage of disabled people, few services and opportunities exist for people with disabilities to participate equally in society.[647]

Due to the fact that other forms of discrimination have been much more visible in South African society, and most noticeably race discrimination, the plight of people with disabilities has gone largely unnoticed. This has been even more apparent with regards people with mental health problems. The extreme levels of inequality and ongoing discrimination experienced by disabled people in the workplace suggested it was necessary to enact legislation expressly designed to remove barriers which lead to discrimination.[648] As has been argued, anti-discrimination legislation is a useful tool for fulfilling this aim and can assist in the prevention of discrimination against such persons and also in their upliftment.[649] However the limitations of such legislation in achieving equality must be borne in mind. As Dupper states, one would 'be naïve to believe that the concept of unfair discrimination will eradicate all forms of inequality in South African society and in our workplaces.'[650] It was recognised in the White Paper that such legislation should also provide mechanisms to ensure that disabled people enjoy equal opportunities in the workplace.[651] This should include, for example affirmative action programmes and processes to support diversity.[652]

It is arguable that the labour market was at the centre of Apartheid. When the new government assumed power in 1994 it was faced not merely with a policy vacuum, but also with a terrible legacy in the South African labour market: mass unemployment and poverty, discrimination and inequality, intense conflict at the workplace, low levels of productivity and a marked absence of the managerial and technical skills required to drive an economy increasingly open to the rigorous tests of international competition.[653] For this reason the a 5 year plan was introduced to restructure the Department of

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[645] White Paper Foreword.
[646] Reyneke and Oosthuizen (2003) *op cit* at 93.
[647] Foreword to the White Paper. It is stated in the paper the people with disabilities in South Africa face high levels of inequality and discrimination and that a lack of employment opportunities and service provision to this sector of society are leading causes for this state of affairs.
[648] White Paper (1997) Chapter 3.
[649] JM Reyneke and H Oosthuizen 'Are the rights of the disabled a reality in South Africa? Part 2" (2004) 29(1) *Journal for Juridical Science* 88 at 88.
[650] O Dupper 'Preliminary Remarks' in EML Strydom (ed.) *Essential Employment Discrimination Law* (2004) at 8.
[651] *Ibid.*
[652] Reyneke and Oosthuizen 2004 *op cit* at 92.
[653] Dupper 'Preliminary Remarks' 2004 *loc cit.*

Labour, reform South African labour legislation and to develop an active labour market policy.[654] For the most part this plan has been achieved.[655] It was necessary for the South African Labour Market to repair the damage caused by the legacy of Apartheid but at the same time remain a viable economic force within the international market.[656] The dogged determination with which the new government attempted to promote equality and to prevent discrimination is illustrated by the fact that South Africa is one of the few countries that has both a constitutionally entrenched protection of equality and supplementary legislation to ensure that effect is given to the all-important right.[657]

South Africa has adopted a comprehensive policy in order to eliminate discrimination against people with disabilities. Not only are disabled people protected in the Constitution[658] but anti-discrimination legislation[659] has been enacted too. The government has also opted to include people with disabilities as a designated group entitled to affirmative action measures. Although consistent with most recommendations put forward in this thesis for effective elimination of discrimination, there are some problems with the legislation itself. Recognising the importance of employment to disabled people, the Employment Equity Act (EEA)[660] has extensively provided for the protection and promotion of people with disabilities in the workplace. This protection is supplemented by the sections of the Labour Relations Act (LRA)[661] that relate to dismissal and the requirement that disability and ill-health be reasonably accommodated before dismissal may be contemplated. In addition to the workplace protection provided for disabled people, the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA)[662]deals specifically with discrimination on the basis of disability where the EEA is not applicable.

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[654] An understanding of the historical development of labour law in South Africa is important in order to contextualise the current legislative framework. Most noteworthy is the development of 'unfair labour practices' and the role of the Industrial Court in shaping the way in which South African employment law is understood today. However due to a constraint of space these issues cannot be explored in this thesis. Thus for further information refer to O Dupper 'The Current Legislative Framework' in EML Strydom (ed) *Essential Employment Discrimination Law* (2004) 15; MA Christianson 'Disability Discrimination in the Workplace' in EML Strydom (ed.) *Essential Employment Discrimination Law* (2004) 154; JM Reyneke and H Oosthuizen 'Are the rights of the disabled a reality in South Africa? Part 2' (2004) 29(1) *Journal for Juridical Science* 88; M Christianson 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years' (2004) 25 *ILJ* 879 at 880. (Hereinafter Christianson Incapacity 2004); AA Landman 'Fair Labour Practices The Wiehahn Legacy' (2004) 25 *ILJ* 805 at 807 and I Currie and J De Waal *The Bill of Rights Handbook* 5th ed (2005) 502.

[655] It has resulted in the promulgation of several statutes, some of which are discussed in detail in this chapter.

[656] O Dupper 'Preliminary Remarks' in EML Strydom (ed.) *Essential Employment Discrimination Law* (2004) 9.

[657] MA Christianson 'Disability Discrimination in the Workplace' in EML Strydom (ed.) *Essential Employment Discrimination Law* (2004) 154.

[658] Constitution of the Republic of South Africa 1996.

[659] Both the EEA and PEPUDA are aimed at preventing unfair discrimination.

[660] Act 55 of 1998.

[661] Act 66 of 1995.

[662] Act 4 of 2000.

It is clear that the government has attempted to provide far-reaching protection for the rights of people with disabilities. However comprehensive the protection, it is submitted, it is fundamentally flawed. The major reason for this is an overly restrictive definition of disability that focuses on the functional limitations of an individual. Despite the commitment of the government to a social model of disability, no attention is given to the role of social barriers such as negative attitudes and stigma. The incorrect framing of reasonable accommodation as an affirmative action measure compounds these difficulties. It will be demonstrated that the narrow definition of 'person with a disability' in the EEA, which is medical in orientation, has many negative consequences for people with mental health problems wishing to seek its protection. Many mental health system users or people with mental health difficulties are denied the protection given to their physically disabled counterparts. Furthermore, the formulation of the definition is incompatible with the constitutional mandate to adhere to a substantive approach to equality.[663] It will be argued in this chapter that it is only through the courts' adherence to the advancement of substantive equality with due respect given to the inherent dignity of the individual with a mental health problem that these difficulties can be overcome. Alternatively, it is proposed that the definition of 'person with a disability' be revisited or that mental health be included as a ground specifically protected against discrimination.

It is apposite to consider those rights contained in the Bill of Rights that are of particular relevance to people with disabilities. Thereafter the discussion will focus on the laws regulating employment and the impact thereof on people with mental health problems. The relevant provisions of the EEA including the all-important definition of disability and reasonable accommodation, and dismissal under the LRA, will be traversed in some detail.

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[663] The Constitutional Court has unequivocally pronounced that the equality clause envisages the achievement of substantive equality and not merely formal equity: *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 12 BCLR 1517 (CC) at para 62: '[S]ubstantive equality is envisaged when s 9(2) unequivocally states that equality includes 'the full and equal enjoyment of all rights and freedoms' at per Ackermann J. See also *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC); *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC).

6.2. The Constitution and the rights relevant to employment of disabled people

As Mbeki stated in the foreword to the White Paper, disabled persons have the same rights as everyone else. Natural persons are entitled to all the rights contained in the Bill of Rights. The discussion below briefly considers those rights most pertinent to disability discrimination in the workplace. Although these rights are specifically ensured by the Constitution, in practice, the majority of employees will enforce their rights through specific legislation such as the EEA, PEPUDA or the LRA. However the rights remain important as they inform the interpretation, application and enforcement of the various legislative measures.

6.2.1. Section 9: Equality

Ngwena states that trying to give content to the meaning of equality can be difficult in any discipline, not least in the sphere of law. Judges concede that equality is a challenging concept.[664] In *Andrews v Law Society of British Columbia,*[665] MacIntyre J of the Supreme Court of Canada described equality as a far more 'elusive concept' than any of the other rights in the Canadian Charter of Rights and Freedoms. Ngwena comments that the notion of equality is fluid and as a concept, equality defies simple definitions. For most societies, the parameters of equality have, over time, tended develop to reflect changing human aspirations.[666]

Equality is a pervasive value under the Constitution. It has been described as a core value underpinning post-apartheid South Africa. The right to equality is extensively accommodated in the provisions of the Bill of Rights, not only is it explicitly mentioned in s9 but it is also one of the founding values on which the South African democratic society is built. In the preamble to the Constitution equal protection of the law for everyone is set out as a goal. Equality is set out as one of the founding values of the Constitution in s1. Equality is mentioned as a value in ss 7, 36 and 39. Further emphasizing the importance of equality is the fact that it is the first right included in the Bill of Rights. In terms of section 9(1) of the Constitution everybody is equal before the law and has the right to equal protection and benefit of the law. The state may not unfairly discriminate against anyone on grounds of his or her

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[664] Ngwena 2004 *op cit* at 2
[665] [1989] 1 SCR 143.
[666] Ngwena 2004 *op cit* at 3.

disability. Physically disabled or mentally or psychiatrically impaired persons enjoy, therefore, the same rights as any other person.[667]

Section 9 reads as follows:

> '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. *To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.[668]
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.[669]
> (5) Discrimination on one or more of these grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'(Emphasis added).

De Waal, Currie and Erasmus argue that it is clear from the text that affirmative action measures designed to enhance the position of previously disadvantaged people form part of the right to equality.[670] As mentioned above, the Constitutional Court has clearly demonstrated that it is substantive equality rather than formal equality that is envisioned by the Constitution.[671] Thus the use of positive measures, such as affirmative action and the provision of reasonable accommodation, are not seen as 'reverse discrimination' or as an exception to the right to equality. The better view is that such measures form part of the right to equality and are a necessary concomitant of substantive equality. In last year's decision of the Constitutional Court in *Minister of Finance & Another v Van Heerden*[672] the court confirmed that the Constitution's affirmative action provisions (and therefore also of the EEA) should not be regarded as an exception to the rule against unfair discrimination which has to be proved by the person relying on it as a justification. It is in fact part and parcel of the right to equality. Without

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[667] Reyneke and Oosthuizen 2003 *op cit* at 94.
[668] The use of the word 'including' denotes that unfair treatment based on a ground analogous to those listed may also result in unfair discrimination. See for example *Hoffman v SAA* (2000) 21 *ILJ* 2357 (CC). It will be argued later in this chapter that the use of the concept of 'analogous' grounds will be very important to people with mental health difficulties who are unable to prove that they are disabled.
[669] It is under this provision that the EEA and PEPUDA were promulgated.
[670] J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4th ed (2001) at 223.
[671] The concept of substantive equality will be given further attention in the discussion of the right to positive measures under the EEA.
[672] [2004] 12 BLLR 1181 (CC).

it, the court contended, the right to equality if merely formal and meaningless. It is suggested that the provision of reasonable accommodation should be accorded similar status to that of affirmative action. It is not preferential treatment but instead it is the means by which people with disabilities or mental health problems can be placed on an equal footing with able bodied and minded persons. Thus the right to equality should be interpreted in a fashion that acknowledges that mere prohibition on unfair discrimination against people with disabilities will not undo the damage done by past discrimination, nor will it guarantee such persons an equal opportunity in obtaining and retaining employment.

Ngwena notes that the right to equality should be viewed as a part of an interconnected web of fundamental norms that ultimately spin around the goal of respecting human dignity in a country that is reinventing itself.[673] Equality under the South African Constitution can be described as means to an end, and that end is respect for human dignity. This is not to suggest that the right to human dignity is more important than other rights, as all rights in the Bill of Rights enjoy parity. Rather, it is to underscore the holistic and enduring nature of human dignity, and its link with the South African approach to equality. In fact the enquiry into unfair discrimination formulated by the Constitutional Court, has as its centre, human dignity.[674] In *Prinsloo v Van der Linde and Another*[675] a case decided under the s8 of the Interim Constitution, the centrality of dignity in South African equality jurisprudence was affirmed for the first time. The court held that unfair discrimination in terms of s8(2) 'Principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.[676]

6.2.3. Section 10: The right to dignity

In terms of section 10 of the Constitution, everyone has inherent dignity and the right to have their dignity respected and protected. In *S v Makwanyane*[677] the Court held that:

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[673] Ngwena 2004 *op cit* at 4.
[674] The essential role that dignity plays in the enquiry into unfair discrimination has been subject to some criticism from commentators. See for example A Fagan 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220; C Albertyn and B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; DM Davis 'Equality: the majesty of Legoland jurisprudence' (1999) 116 *SALJ* 398; DM Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) at 69-97. Davis comments that the Court doesn't even attempt to examine the right to equality and dignity is not explained. This he says is an 'unpromising start in our search for a coherent equality jurisprudence.' (at 95-6).
[675] 1997 (3) SA 1012 (CC).
[676] *Prinsloo supra* at para 31.
[677] 1995 (3) SA 391 CC; 1995 (6) BCLR 665 CC.

> 'Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Bill of Rights.'

In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[678] it was held that human dignity also provides the basis for equality — in as much as every person possesses human dignity in equal measure and everybody must be treated as equally worthy of respect. Ackerman J's formulation of human dignity in *Ferreira v Levin* [679] is worth quoting:

> 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their *humanness to the full extent of its potential.* Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual *is permitted to develop his unique talents optimally.*' (Emphasis added).

Therefore it must be recognised that just because one is disabled disability does not detract from the fact that one has unique talents that should be fostered and optimally developed.

6.2.4. Section 11: The right to life

Section 11 of the Constitution deals with the right to life. In *S v Makwanyane*[680] O' Regan J said the following about the right to life:

> '... the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, *but the right to human life: the right to share in the experience of humanity.* This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured.' (Emphasis added).

In light of this statement it must be understood that people with disabilities have significant value to add to society. For too long they have been ostracized, ignored and segregated because people were too ignorant or fearful to associate with a person who is different from them. Thus s11 ensures that discriminatory treatment that results in a disabled person's quality of life, or ability to participate in ordinary human activities being diminished will not be tolerated.

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[678] 1999 (1) SA 6 CC.
[679] 1996(1) SA 984 CC.
[680] *Makwanyane supra.*

6.2.5. Section 12: The right to freedom and security of the person

Section 12(1) of the Constitution provides for the right to freedom and security of the person. Everyone has the right, as set out in subsec1(e) not to be treated in a cruel, inhuman or degrading way. Section 12(2) expressly delineates the ambit of the right to security of the person so as to include protection of physical integrity, and extends it to the protection of psychological integrity. This provision is important because it protects people with mental health problems from damaging ridicule or abuse, which is unfortunately common in the workplace, which would infringe the person's psychological or physical integrity.

6.3. The Labour Relations Act 1995

Before the promulgation of the EEA, the prohibition of unfair discrimination was included in Schedule 7 of the LRA.[681] This section provided prospective employees with protection against unfair discriminatory practices. This means that an employer could not, when advertising for or interviewing or hiring new employees, unfairly discriminate on one or more of the grounds listed in the LRA.[682] An employer was, however, allowed to discriminate against prospective employees where the inherent requirements of the particular jobs necessitate the appointment of a person of a particular sex or race.[683] Further, discrimination will not be unfair if it takes place in accordance with an affirmative action programme. As will be seen, this provision is echoed in the EEA. Once the EEA was enacted, Schedule

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[681] Item 2 of Schedule 7 of the Labour Relations Act states that it is an unfair labour practice to unfairly discriminate against an employee:
' 1. For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –
(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
2. For the purposes of sub-item (1)(a) –
(a) ' an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms; and(c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination.'

[682] Except for the addition of 'family responsibility' the grounds were identical to those listed in s9(3) of the Constitution. For a more detailed discussion on the application of this provision see A Van Niekerk 'Discrimination in selection and recruitment' (1995) 4(1) *CLL* 105 at 106-7.

[683] This defence will be discussed in more detail under the EEA.

7 of the LRA was repealed. An amendment to the LRA in 2002 incorporated the remaining residual unfair labour practices in s186(2) of the LRA.[684]

6.3.1. Dismissal

The LRA requires that a dismissal must be substantively and procedurally fair. This is very important as it protects employees against being dismissed without a valid reason or having an opportunity to defend themselves. In order to be fair a dismissal must be for reasons of incapacity, misconduct or operational requirements.[685] The LRA also provides for automatically unfair dismissals, in keeping with the constitutional prohibition on unfair discrimination.

It is possible that a dismissal of a person with mental health difficulties could fall into any of the categories of dismissal included in the LRA. The distinction between the three dismissals falling under the heading 'other unfair dismissals' is indistinct and it becomes all the more blurred when issues of disability are considered. It is however important that the correct reason for dismissal is identified as the process and consequences can be quite different.[686] Although protection against discrimination for people with disabilities is explicitly provided for in the LRA,[687] the Act contains no definition of the

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[684] For details of the areas covered by the residual unfair labour practice provisions see s186(2 (a)-(d) and Currie and De Waal (2005) *op cit* at 503-4.

[685] The LRA's provisions relating to dismissal builds on the Industrial Court's jurisprudence on the matter. Christianson submits that the IC formulated its approach to dismissal based on *ILO Convention* 158 of 1982. (Christianson Incapacity 2004 *op cit* at 882.) Article 4 of this convention sets out the three broad reasons for a 'fair' dismissal, 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.' Article 7 of the same Convention provides for the procedural fairness of any dismissal based on a substantively fair reason.

[686] A useful illustration of the importance of determining the reason for dismissal in relation to mental health problems is the case of *Spero v Elvey International (Pty) Ltd* (1995) 4 LCD 342 (IC). This case involved the unfair dismissal of an employee, suffering from depression and stress, for operational reasons. This case was decided under the unfair labour practice provision s46(9) of the Labour Relations Act 28 of 1956. The applicant had been employed as a sales person by the Respondent. He had arrived at work slurring his speech and appearing drunk and disorientated, probably on account of an overdose of prescribed medication. He had been hospitalised the next day in a psychiatric clinic. The employer dismissed the applicant on the basis that his condition posed an unacceptable commercial risk. The court concluded that there was no evidence that employee's condition potentially harmful to employer's operations. Furthermore, that in the case of a temporary incapacity the employer is required to consult with and counsel the employee. Dismissal should be used as a last resort only. The court held further that a single indiscretion of this nature by a junior employee could never fairly justify dismissal. The court added, however, that in view of the lack of guidance in the case law and literature on the correct approach for employees affected by psychological stress (however defined) or by medicinal dependence or abuse, and despite the fact that the employer had acted unfairly, it would not be equitable to impose an order which manifestly penalised the employer and disregarded or jeopardised its commercial interests. (at 345).Thus it was held that the applicant had been unfairly dismissed and the court ordered that the applicant be reinstated. However the court explicitly stated that the employer would not have been reinstated had the medical reports not indicated that the employee had 'put his depression aside' and was no longer dependent on medication.

[687] LRA Section 187(f).

term. It is not defined for the purposes of the Constitution either. Thus it is not clear whether the definition in the EEA should be adopted for all purposes.[688]

Section 10(1) of the EEA states that any disputes arising in relation to dismissal should be dealt with in terms of the provisions of the LRA. Thus when the dismissal of a mentally distressed person (who may or may not be considered disabled) is under consideration, an employer must endeavour to abide by the provisions of the LRA. The Code of Good Practice: Dismissal (the Dismissal Code) contained in Schedule 8 of the LRA provides detailed guidance on how to dismiss an employee in a fair and reasonable manner.

According to the *Technical Assistance Guidelines on the Employment of People with Disabilities* (TAG)[689] every attempt should be made to retain people with disabilities.[690] Further the TAG states that if an employer is unable to retain a person with a disability because they are no longer able to perform the essential functions of the job the employer may terminate the employment relationship.[691] However it is stated that when doing so regard must be had to the Dismissal Code in particular items 10 and 11. The key principle in the Dismissal Code is that, employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business.[692]

6.3.1.1. Automatically Unfair Dismissals

In terms of section 187(1) of the LRA certain dismissals are automatically unfair, *inter alia*, if the dismissal is based directly or indirectly, on any arbitrary ground, including disability. Thus the employee would not have to demonstrate that such a dismissal was unfair. Such a dismissal will, however, be fair if it relates to the inherent requirements of the job in question. This defence is available to the employer if he can show that the person, due to the injury or disease, cannot perform the essential functions of the job.[693] If the employer is unable to prove his defence, the judge has no

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[688] The definition of disability in the EEA will be given extensive attention later in the chapter.
[689] Department of Labour 2003.
[690] The TAG Item 12.2.
[691] The TAG Item 12.1.
[692] Reyneke and Oosthuizen (2004) *op cit* at 89.
[693] Section 187(2)(a). This defence will be considered in further depth under the EEA.

discretion and the dismissal will be unfair. The aggrieved employee will be entitled to reinstatement, re-employment or compensation.

6.3.1.2. Dismissal for Misconduct

Dismissal for misconduct is regulated by s188 of the LRA. In order to be fair, a dismissal for misconduct must be substantively and procedurally fair and in the assessment of such fairness the Dismissal Code should be taken into account. Workplace misconduct caused by mental health problems has not received much judicial attention in South Africa. Thus it is useful to consider the American position. It is submitted that misconduct by an employee who has mental health problems can be a valid cause for dismissal particularly if the person poses a risk to the health and safety of co-workers. In terms of the ADA if an employer fires, or does not hire, an individual who is able to perform the essential functions of the job, the employer may assert, in some instances, a direct threat defence.[694] To succeed with such a defence the employer must demonstrate that the employee cannot perform the job functions without a significant threat to the health and safety of others.[695] As has been noted in previous chapters contrary to popular belief, current research demonstrates no more that a 'weak' or 'modest' association between mental disorders and the risk of violence. Thus unfounded assumptions that a person with a mental health problem will be violent and pose a risk to the safety of others is unlikely to be a valid reason to terminate the individual's employment.

Like anyone else, a person with a mental health problem reacts to stress. However a mental health problem can be exacerbated by stress and sometimes, although rarely, this can culminate in a violent or threatening reaction. It is important that when a person with a mental illness has contravened the workplace policies, particularly when it is in a violent or threatening way that the employer is not too

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[694] A very recent judgment in *IMATU v City of Cape Town* (Unreported judgment of the Cape Labour Court 19 July 2005 per Murphy AJ Case no C521/2003) demonstrates an attempt of an employer to use a similar defence in terms of the Occupational Health and Safety Act (OHSA) 85 of 1993. In this case the City sought to rely on sections 8 and 9 of OHSA in rejecting an application to be a fire-fighter by a person who has insulin-treated diabetes. The City argued that it has a duty in terms sections 8 and 9 of OHSA to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees and to third parties. In dismissing this argument the court held that the employment of a person with insulin-treated diabetes is unlikely to be considered wrongful if such employment is justified in order to observe the City's duty not to unfairly discriminate in its employment practices. The court held that should the City conscientiously assess fire-fighters individually, it would have discharged its duty to take reasonable preventative steps to minimise any foreseeable risk, especially if it makes reasonable adjustments where required. Most importantly, the court concluded that the City's legitimate concerns about public liability must yield to the constitutional principle of non-discrimination.

[695] S Sullivan 'Employers Beware: The Ninth Circuit's Rejection of the "Direct Threat to Self" Disability Discrimination Defense in *Echazabal v Chevron*' (2001) 25 *Seattle U L Rev* 517 at 519.

quick to label the person as violent and dismiss them on that basis. The circumstances surrounding the behaviour should be analysed as it may turn out that the person is simply reacting to bullying or harassment by a co-worker.[696] Hubbard submits that a sensitive managerial style and easily made reasonable accommodation can avoid the unnecessary dismissal of employees with mental health difficulties.[697]

This is not to say that an employer should simply tolerate misconduct because the person has mental health problems. Miller notes that an employer does not have to excuse misconduct that results from a disability if the employer does not excuse similar misconduct from other employees.[698] This submission by Miller is consistent with the guidelines set down in the Dismissal Code which suggests that historical and contemporaneous consistency of treatment by employers should be considered when analysing whether a dismissal for misconduct is fair. In the case of *SA Commercial Catering & Allied Workers Union on Behalf of Chauke & Others and Southern Sun Hotel Interests (Pty) Ltd t/a Jhb International Airport Holiday Inn*[699] the fairness of the dismissal of several employees for unauthorized consumption of beverages[700] was brought into question. The employees, although guilty of the same conduct had been treated inconsistently, some had been dismissed whilst others had received only a written warning. One of the applicant's, Nyembe, who received a written warning only, suffered from chronic schizophrenia.

Moletsane C, in reviewing the decision of the chairperson of the enquiry, found that the Chairperson had erred in taking into consideration the fact that Nyembe suffered from 'chronic schizophrenia illness and needs treatment for life'.[701] Moletsane C stated that it was clear that there was no medical proof that the stealing by Nyembe was caused by his chronic mental illness. The Commissioner found further that this had resulted in inconsistent treatment. Thus the dismissals were held to be unfair.[702] Moletsane C reiterated the importance of penalties being both historically and contemporaneously consistent. This case demonstrates that employers will not be expected to tolerate misconduct from an employee solely

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[696] A Hubbard 'The ADA, the Workplace, and the Myth of the " Dangerous Mentally Ill"' (2001) 34(4) *U C Davis L Rev* 849 at 854.
[697] Hubbard *op cit* at 921.
[698] SP Miller 'Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability' (1997) 85 *Cal L Rev* 701 at 728.
[699] (2005) 26 ILJ 399 (CCMA) (*Holiday Inn).*
[700] The applicants were employed by the respondent hotel in positions that required them to handle beverages. After experiencing stock losses the respondent monitored certain areas of the hotel by video camera.
[701] *Holiday Inn supra* at 404.
[702] *Holiday Inn supra* at para 33.

by reason that the person has a mental health problem. There must be a causal link between the conduct and the mental illness in order for the impairment to be taken into consideration or accommodated.

Rothstein argues that part of the employer's duty to provide reasonable accommodation may well include, in limited circumstances, the excusing of minor misconduct that is tied to a mental disorder, especially where an employee has since obtained treatment that reduces the likelihood that the misconduct will reoccur.[703]

The American courts have expressed conflicting opinions relating to misconduct by psychiatrically disabled employees. In *Hamilton v Southwestern Bell Tel Co*[704] it was held that 'the ADA does not insulate emotional or violent outbursts blamed on an impairment'.[705] A contrary conclusion was drawn in the case of *Den Hartog v Wasatch Academy* [706] where it was stated that the language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should consider whether a psychiatrically disabled employee's misconduct could be remedied through a reasonable accommodation.

There is a further concern in this area that a person, accused of misconduct, may attempt to 'blame' their behaviour on a previously undisclosed mental illness. This may be particularly worrying if an employee is prone to insubordination or lying, which may well be as a result of a mental health problem but it is difficult for the employer to be sure. Bearing the above in mind, it is submitted that when approaching misconduct by an employee with mental health difficulties that it is particularly important to consider the factors suggested in item 7 of the Dismissal Code.[707] The circumstances surrounding the contravention of the rule, the employee's personal circumstances (that is the disorder

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[703] LF Rothstein 'The Employer's Duty To Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments under Disability Discrimination Laws' (1997) 47 *Syracuse L Rev* 931at 967.

[704] (1998) 136 F3d 1047 at 1052 (5th Cir).

[705] *Hamilton supra.* See also *Maddox v University of Tenn* (1995) 62 F3d 843 at 8484 (6th Cir) 'the employer must be permitted to take appropriate action with respect to an employee who has engaged in criminal or egregious conduct, regardless of whether the employee is disabled'.

[706] (1997) 127 F3d 1076 at 1088 (10th Cir).

[707] Item 7 states ' Any person who is determining whether a dismissal for misconduct is unfair should consider- a) whether or not the employee contravened a rule or standard regulating conduct in or of relevance to, the workplace; and b) if a rule or standard was contravened, whether or not- i) the rule was valid or reasonable rule or standard; ii) the employee was aware, or could reasonable be expected to have been aware, of the rule or standard; iii) the rule or standard has been consistently applied by the employer; and iv) dismissal was an appropriate sanction for the contravention of the rule or standard'.

itself, side-effects of medication, disciplinary history and possible effects of stress) and the gravity of the offence should be considered quite carefully when the employee concerned has a mental illness.

This approach is demonstrated by the case of *Automobile Association of SA v Govender NO & others.*[708] The third respondent, a patrolman in the employ of the AA, was dismissed after being found guilty of reckless and negligent driving; endangering the public; bringing the AA into disrepute and acting aggressively and pointing a firearm at a member of the public while representing the AA. It was common knowledge that, at the time of the offences, the employee was physically ill and suffering from severe depression for which he was receiving medication. The CCMA found that the employee had been under the influence of medication which affected him both physically and mentally when he perpetrated the acts of misconduct. Thus dismissal was inappropriate in the circumstances. It substituted dismissal with a final warning that, if the employee's negligent taking of medication resulted in acts prejudicial to the AA within the next six months, he could be dismissed.

On review the Labour Court was of the view that the Commissioner's finding that the employee lacked the necessary mental intention to commit misconduct was justifiable even in the absence of relevant medical evidence. It appeared that he had acted out of character and under stress aggravated by what appeared to be an overdose of medication. The court was however disturbed by the sanction imposed by the commissioner. The employee's action had caused the AA financial harm and damaged its reputation. The sanction imposed by the commissioner would not prevent a disastrous repetition of the incident while the employee's mental and physical illness persisted. The sanction did not adequately take the interests of the employer into account, and was therefore unjustifiable. The commissioner should have considered alternatives, such as leave of absence or a transfer to a position that would not involve driving even if this amounted to a demotion.[709]

The court accordingly reviewed and set aside the sanction imposed by the CCMA and remitted the matter for the commissioner to consider alternative employment positions if this was feasible, alternatively compensation for the employee. The recommendation of the LC is much more reflective of the understanding that mental health problems should be accommodated where possible. At the same time it takes into consideration the employer's interests. It is submitted that the LC adopted a

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[708] (1999) 4 LLD 774 (LC).
[709] *Govender supra* at 775.

satisfactory approach to dealing with misconduct caused by a mental health problem. It takes cognisance of the importance of work for people with mental health problems and recognises that dismissal should only be used as a last resort. Further it reiterates the point that a mental health problem does not automatically exclude aberrant behaviour by an employee.

It may often be the case that some simple accommodation, such as allowing the employee to walk around outside if they are feeling agitated, even if leaving the building would normally require special permission, would prevent a reoccurrence of the misconduct.[710] Dismissal may not be appropriate when a person is unable to control their emotions due to a disorder. It may be necessary for an employer to consider alternative solutions such as a warning, alternative placement, when available, and a recommendation for counselling. It is imperative that the employer avoids dismissing a person for misconduct to disguise a disability related dismissal. Christianson submits that sometimes an employee's incapacity or the circumstances surrounding such incapacity can mirror a dismissal for misconduct and it is the duty of the employer to decide whether the alleged act or omission is a true incapacity or whether it is misconduct.[711] Grogan argues that 'employees cannot be disciplined for acts or omissions for which they are not to blame' but an 'inability to perform remains a ground for termination of a contract'.[712] It is necessary to determine the proper reason for the dismissal as dismissal for incapacity and operational requirements are considered 'no-fault' dismissals and this affects the amount of compensation as well as the procedure to be used.[713]

6.3.1.3. Dismissal for Incapacity

The LRA does not define incapacity and a consideration of the case law and the guidelines in the Dismissal Code demonstrates that it is not an easy term to define or to confine within the parameters of the Act.[714] This becomes even more problematic when a distinction between incapacity and disability is attempted.[715] As was noted above there is sometimes an overlap between the different types of dismissal. Not only does dismissal for incapacity coincide with misconduct on occasion, but there is also symmetry between incapacity and instances where an employer can no longer afford to continue

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[710] Hubbard *op cit* at 925.
[711] Christianson Incapacity 2004 *op cit* at 884.
[712] J Grogan *Workplace Law* 7ed (2003) 189-90.
[713] Christianson Incapacity 2004 *op cit* at 885.
[714] M Christianson 'Dismissal for Incapacity' in M Christianson, C Mischke, EML Strydom (eds) (2002) *Essential Labour Law Volume 1: Individual Labour Law* 3rd ed 199.
[715] *Ibid.*

employing an employee who is incapable of doing the work and thus the employee is dismissed for operational requirements.[716]

Section 188 states only that incapacity can be a fair reason for dismissing an employee. In the Dismissal Code incapacity is broadly divided into poor work performance and incapacity due to ill-health or injury. There is some debate over whether or not incompatibility can classify as a third category of incapacity. This may be very important when dealing with people with mental health difficulties. Le Roux and Van Niekerk describe incompatibility:

> ' incompatibility conveys a notion of an inability to work in harmony whether within the "corporate culture" of the business or with fellow employees. Incompatibility should be distinguished from eccentricity.'[717]

Thus the authors treat incompatibility as a form of dismissal for operational requirements. Their conclusion was based on the strength of the decision in *Wright v St Mary's Hospital.*[718] Du Toit *et al* disagree with this proposition and argue that 'purporting to retrench an incompatible employee... would by definition be an unfair dismissal. To the extent that incompatibility results in poor work performance, on the other hand, it is for practical purposes a form of incapacity.'[719] In *Jardine and Tongaat Hulett Sugar Ltd*[720] Rycroft C found that incompatibility is not recognised as a separate ground for dismissal in the LRA. There does not seem to be consensus by the courts either as to whether incompatibility falls within incapacity or operational requirements.[721] It seems to depend largely on the factual circumstances. A simple personality clash, for example, is quite disparate from a situation where a verbally abusive manager is creating disharmony and the majority of the workforce calls for his dismissal. It must be remembered however that an employer is obliged to assist an

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[716] Le Roux and Van Niekerk distinguish the two forms: 'While both are "no fault" dismissals and it is entirely logical that the operational requirements of a business are prejudiced by the continued employment of incompetent or seriously ill employees, the notion of incapacity is not one which is related to any need to restructure the business or to reorganize work or patterns of work in response to fluctuating market conditions. Dismissals for operational requirements are effected by reason of some external factor relating to the operation of the employer's undertaking which results in the loss of employment rather than any inherent inability on the part of the employee to do the job.' PAK Le Roux and A Van Niekerk *The South African Law of Unfair Dismissal* (1994) at 219.

[717] Le Roux and Van Niekerk (1994) *op cit* 285.

[718] (1992) 13 *ILJ* 987 (IC).

[719] Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2000) 3rd ed 377.

[720] (2002) 23 ILJ 547 (CCMA).

[721] For example in *Gordon v St John's Ambulance* (1997) 3 BLLR 313 (CCMA) a senior employee's dismissal for poor work performance was found to be unfair on the basis that the reason was in fact a personality clash that did not affect her performance. In *SA Quilt Manufacturers v Radebe* (1994) 15 *ILJ* 115 (LAC) and *Erasmus v BB Bread Ltd* (1987) 8 *ILJ* 537 (IC) the employees called for the dismissal of a senior employee who intimidated and harassed them. To the extent that the disharmony was affecting the efficacy of the business, the dismissals were allowed for operational reasons.

employee who is allegedly causing disharmony before acting against him[722] and further that if the employee is a genuine 'misfit' proper warnings and counselling would be required before the employee could be dismissed fairly.[723] The courts have accepted that an employee whose mere presence creates dissatisfaction among co-workers could be dismissed for operational reasons.[724]

It is submitted that with regards incompatibility of persons with mental health problems that a dismissal by reason of their disorder would be automatically unfair. However if the employer could demonstrate that an ability to get on with others and not to disrupt the working environment was an inherent requirement of the position that such a dismissal would be fair. It is important however that an employer faced with a mentally ill employee who has difficulty with co-workers and is causing discord should consider any reasonable accommodation that could assist the employee. Such may include transfer, change of supervisor and so on.

The TAG states that if an employer is unable to retain a person with a disability because they are no longer able to perform the essential functions of the job the employer may terminate the employment relationship.[725]

The Dismissal Code prescribes very specific guidelines that should be followed to dismiss a person on grounds of ill health and injury. In case of temporary inability to work, all possible alternatives short of dismissal should be considered. In determining alternatives the following relevant factors might be taken into account: the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement. Where the disability is of a permanent nature, possible alternatives for dismissal must be sought. The employer should ascertain the possibility of alternative employment or the adoption of duties or work circumstances to accommodate the person in order to enable him/her to perform the job. Christianson suggests that the enquiry as to whether dismissal is appropriate will also depend on the safety of co-workers or the public and the circumstances of the employee.[726] She states further that in some instances it may be necessary to engage the services of an independent expert such as a doctor or psychologist in order to determine whether the employee is in fact capable of doing the job or not.

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[722] *Hapwood v Spanjaard Lrd* (1996) 2 BLLR 187 (IC).
[723] *Hansen v University of Natal* (1989) 10 *ILJ* 1176 (IC).
[724] *Mazibuko & Others v Mooi RiverTextiles Ltd* (1989) 10 *ILJ* 875 (IC).
[725] The TAG Item 12.1.
[726] Christianson ' Dismissal for Incapacity' *op cit* at 201.

The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in cases where the employee is injured at work or incapacitated by work-related illness.[727] In *NEHAWU obo Lucas and Department of Health*[728] the arbitrator found that, in addition to items 10 and 11 of the Dismissal Code, the provisions of the Disability Code and the TAG should be applied before the services of an employee, who becomes disabled as a result of a work related injury, are terminated.

As has been noted in chapter 2 the increase of mental health problems in the workplace means that employers will have to develop policies in order to combat the effects of work related stress. Christianson submits that the levels of stress in South African workplace are likely to result in many more stress-related cases of incapacity coming before the CCMA and Labour Court.[729] In the case of *X v Elvey International (Pty) Ltd*[730] it was held that not only physical ill health or injury is relevant, but mental illness or stress may also result in an employee's incapacity for a period of time. The CCMA award in *Bennett and Mondipak*[731] breaks new ground with regard to the employer's obligations when an employee suffers a nervous breakdown as a result of work-related stress.[732] In this case it was stated that the employer had a duty to identify the stressors, address them, and reasonably have created an environment within which the employee could perform.[733]

A further point of interest is that Item 10(3) of the Dismissal Code suggests that in cases of drug or alcohol abuse the employer should consider counselling and rehabilitation before dismissing an employee.[734] Obviously the resources and size of the business will have to be considered and where the

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[727] *Tshaka and Vodacom (Pty) Ltd* (2005) 26 *ILJ* 568 (CCMA).
[728] (2004) 25 *ILJ* 2091 (PSBC).
[729] Christianson 'Dismissal for Incapacity' *op cit* at 217. See also *NEHAWU & Another* v *SA Institute for Medical Research* (1997) 2 BLLR 146 (IC).
[730] (1995) 16 *ILJ* 1210 (IC).
[731] (2004) 25 *ILJ* 583 (CCMA).
[732] Bennett was dismissed for incapacity as a result of a nervous breakdown that had meant a substantial absence from work, therapy sessions and brief hospitalisation. Meetings were held between the parties to address the matter. However the proposed alternatives (severance package or lower level positions) were unsuitable and he was thus dismissed for incapacity. Bennett challenged his dismissal, arguing that his breakdown was work-induced and, furthermore, that, at the time of his dismissal, he had recovered sufficiently to resume his duties. He also claimed that the employer had not attempted to address the stressors in the work environment that would have enabled him to work more effectively. Bennett's dismissal was found to have been unfair and he was reinstated.
[733] *Bennett supra* at 995I-J.
[734] This is interesting in light of the public policy exclusions contained in the Disability Code that will be discussed under the definition of disability in the EEA. Drug and alcohol abuse is specifically excluded as a disability unless the person is in rehabilitation programme. See further *Naik v Telkom SA* (2000) 21 *ILJ* 1266 (CCMA) where alcoholism was accepted as disease, thus the dismissal should have been one for incapacity and discipline for misconduct was inappropriate. *Salstaff/Aiwu obo Govender v SA Airways* (2001) 22 *ILJ* 2366 (ARB) Govender was dependent on crack cocaine. He was

provision of counselling would not be feasible, and the assessment of fairness should not be too strict.[735] Schedule 11 of the Dismissal Code stipulates that in determining whether a dismissal arising from ill health or injury is unfair, the following must be considered: Is the employee capable of performing the work; and if the employee is not capable, the extent to which the employee is able to perform the work; the extent to which the employee's work circumstances might be adapted to accommodate disability or the extent to which the employee's duties might be adapted; and the availability of any suitable alternative work.[736]

In *Eskom and National Union of Mineworkers obo Fillisen*[737] Raubenheimer A noted that as the employee is not at fault in the case of an dismissal for incapacity a special procedure must be followed. Raubenheimer A stated that the process to be followed is not of a disciplinary nature, but is an all-encompassing enquiry including counselling and medical assessment.[738] The Arbitrator commented further that procedural fairness dictates that the employer is bound, through an empathetic approach, to use its resources to ascertain a full prognosis, to consult with the employee, and to attempt to accommodate the person's incapacity.[739]

Firstly, in ascertaining whether the employee is capable of doing his job, the employer is obliged to determine the severity and nature of the incapacity and the employee's prognosis. Employers must both inform themselves of the true medical position and consult with the employee. The employee must

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attending a recognised programme however his other conduct, particularly his dishonesty, rendered his dismissal by SAA fair.

[735] *Philander/Eco Car Hire CC* (2001) 6 BALR 631 (CCMA).

[736] Dismissal Code Item 11(a) and (b).

[737] (2002) 23 ILJ 1666 (ARB).

[738] It was found in *Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne* (1999) 4 LLD 766 (LAC) that there is no obligation on employer to retain services of an employee or to find alternative employment for an employee who has been totally permanently disabled. It was held further in this case that the obligation to consult with employee and consider alternatives to dismissal is greater when the injury or incapacity was caused by work-related incident. See also *E C Lennings Ltd t/a Besaans Du Plessis Foundries v Engelbrecht* (1999) 4 LLD 676 (LAC). In *Buthelezi v Amalgamated Beverage Industries* (1999) 4 LLD 620 (LC) the Labour Court it was held that the fairness of a dismissal is to be determined by weighing employment justice against efficient operation of business. It was held that mere lip-service to counselling session will not constitute employment justice. To give effect to counselling process employer must give employee fair chance at succeeding, failure to do so renders the process meaningless.

[739] In *Human and Santam Ltd* (2005) 26 *ILJ* 363 Christie C stated that the enquiry into work performance for the purposes of determining incapacity is not a fault finding procedure and thus it should not be confused with an enquiry into misconduct. See further B Jordaan 'Managing Poor Performers & Absentees' (2005) in *Juta's Annual Labour Law Update* at 101; *Duff v McGregor BFA (Pty) Ltd* (2002) 13 12 *SALLR* (CCMA); *Robinson v Sun Couriers* (2002) 13 (6) *SALLR* 15 (CCMA); *MEWUSA obo Nazo v DLP Manufacturing (Pty) Ltd t/a Prism Products* (2005) 16(3) *SALLR* (BC) and C Rudd *South African Labour Law Reports (SALLR) 21st Biannual Seminar 2005* (2005).

submit himself to a full medical examination.[740] It was found in the *Eskom* arbitration that the overriding principle in this enquiry is reasonableness. The employer should take reasonable steps to accommodate the employee and the employee should take reasonable steps to treat his illness and attempt to fulfil any alternative or adapted post that the employer is able to provide.[741]

6.3.1.4. Dismissal for Operational Reasons

Dismissal for operational reasons or 'reasons connected with economic, technological, structural or similar requirements' as it is described in the LRA[742] may be necessitated by a diverse range of factors, including redundancy, transfer of a business, introduction of new technology, and poor economic performance of a business. It can also serve as a 'catch-all' category for borderline cases which do not comfortably fit into either of the other two reasons for dismissal, namely, misconduct and incompetence/incapacity.

Item 12.2 of the TAG states that the selection criteria used in dismissing employees for operational reasons must be examined to ensure that it does not unfairly discriminate against people with disabilities and further that where possible, every attempt should be made to retain people with disabilities. This guideline would relate mostly to cases when the operational requirements of the business require restructuring or downsizing thus one or more employees must be dismissed.[743] Sometimes the conduct of an individual employee can justify a dismissal for operational reasons. This would ordinarily fall under the requirements based on 'similar needs' of the employer. This term is not defined by the Act and is rather broad but Strydom contends that categories of similar needs can be identified from a consideration of the similar reasons that have come before the courts over the

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[740] It is important the medical testing of an employee should be conducted in a manner consistent with s7 of the EEA. This is discussed in detail under the EEA.

[741] In *Rikhotso v MEC for Education* (2004) 25 *ILJ* 2385 (LC) the applicant was diagnosed with major depression and PTSD. He had been granted sick leave by the Gauteng Department of Education on several occasions until, finally, he was granted sick leave until 31 March 2001 pending approval of his application for discharge for medical reasons. His application was unsuccessful and despite repeated notices he failed to report for duty. The court found that the applicant's behaviour had been unreasonable He was not willing to resolve his problem or cooperate with the MEC and was only interested in being discharged. This case illustrates once again that there is a duty on the employee to co-operate with the employer in attempting to secure alternative placement for the employee. An employer cannot be expected to accommodate an unwilling employee whose only interest is to be boarded. See also *Public Servants Association of SA & Another v Premier of Gauteng & Others* (1999) 20 *ILJ* 2106 (LC) where a an employee with mental health difficulties was dismissed by operation of law due to absenteeism for an extended period without permission.

[742] LRA Section 213.

[743] The procedure for such dismissals is regulated by s189(1) of the LRA. It would probably also be wise for an employer to take this advice in heed when transferring a going concern in terms of s197 of the LRA.

years.[744] The three that would be most relevant for people with mental health problems are as follows. Firstly, the special operational needs of the business may require something that the employee is not able to do. For example, the livelihood of the business may depend on an employee's ability to work overtime. If a disabled employee is unable to do so, and accommodating such an employee would create an undue hardship on the employer, then it is likely that a dismissal for operational reasons could be justifiable.

Secondly, as discussed above, the employee's actions or presence affects the business negatively. This relates to 'incompatibility' of the employee. If for example a person with an auditory delusional disorder, one uncontrollable by medication responds very loudly to voices he hears and he sits in an open-plan office. His behaviour, though not his fault, is exceptionally disruptive to his co-workers. If there is no closed office available for him to work in, or if other accommodation would cause an undue hardship then it is submitted that such a situation could constitute a valid operational reason.

The third category of 'similar need' that is apposite is when the employee's conduct has lead to a breakdown of trust. The difficulty that frequently arises in employing people with mental health problems is that many disorders manifest in mendacity and exaggeration by the affected person. It may be exceptionally trying for an employer who knows that he cannot trust his employee to tell the truth. It is submitted once again that if the employee's conduct cannot reasonably be accommodated, such as amending the person's duties so that they have limited responsibility, then such conduct could provide a valid operational reason for the employee's dismissal.

6.3.2. Enforcement of the LRA

In all cases the employee should be given an opportunity to be heard, and to be represented by a trade union representative or fellow employee.[745] Disputes that involve people with disabilities will normally be disputes of rights, where the disabled person will claim that the other party is infringing or denying some existing legal right or entitlement. This will include the alleged breach of collective agreements, the failure to comply with the provisions of legislation, and unfair labour practices, and these may be either individual or collective in nature. Most disputes are first referred to the Commission for

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[744] Strydom 'Dismissal for Operational Reasons' *op cit* at 226.
[745] This is necessary in order for a dismissal to be procedurally fair.

Conciliation, Mediation and Arbitration (CCMA)[746] or, where there is a bargaining council[747] with jurisdiction in respect of the dispute, to such bargaining council for conciliation. If the dispute is not resolved at that level, the matter is then referred for arbitration[748] by the CCMA in respect of certain disputes, and to the Labour Court[749] for adjudication in respect of other disputes.[750] Where the parties have their own collective agreement setting out a dispute resolution procedure, such procedure shall be followed.[751]

6.3.3. Evaluation of the Act

The Act has established a model combining the CCMA, the use of private procedures and the Labour Court. The main function is to attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation.[752] This makes the enforcement of rights more accessible and less expensive for disabled employees.[753] As has been illustrated above, the LRA emphasizes that the decision to dismiss an employee is not one that should be taken lightly. The employer should ensure the fairness of the procedure and the dismissal must be substantively fair. The weakness of the Act lies, however, in the fact that the Disability Code is not enforceable, but rather provides employers and the courts with guidelines for appropriate practice.[754]

6.4.The Employment Equity Act (EEA)

The EEA is the principal parliamentary legislation for protecting and promoting constitutional values in the workplace. Its primary aim is to provide for employment equity. Its objects, as professed in its preamble, are designed to overcome the disadvantages that have been endured by historically marginalised groups such a people with disabilities. It will be argued that while some sectors of the disabled community may benefit immensely from the EEA, it has left many, especially those with

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[746] LRA Section 115.
[747] LRA Section 28. Where the parties fall within the ambit of a bargaining council, the dispute resolution procedures of such council are to be followed.
[748] LRA Section 138.
[749] LRA Section 158. For example automatically unfair dismissals are under the sole jurisdiction of the Labour Court. M Christianson 'Automatically unfair dismissals' in M Christianson, C Mischke, EML Strydom (eds) (2002) *Essential Labour Law Volume 1: Individual Labour Law* 3rd ed 168.
[750] See further T Ngcukaitobi 'Sidestepping the Commission For Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court' (2004) 25 *ILJ* 1.
[751] LRA Section 24.
[752] LRA Chapter 7.
[753] Reyneke and Oosthuizen 2004 *op cit* at 92.
[754] White Paper 1997 Chapter 3.

mental health problems, without remedy. What follows is an overview of the EEA provisions relating to disability and the enforcement thereof. There are a few aspects that are particularly contentious and will require further unpacking such as the definition of disability, reasonable accommodation and the defences against unfair discrimination.

6.4.1. The Act's Objectives

The EEA seeks to promote the constitutional right to equality, eliminate unfair discrimination in employment, ensure the implementation of employment equity to redress the effects of discrimination and to achieve a diverse workforce broadly representative of the people of South Africa

The EEA ensures equality in the workplace in two ways: Firstly, by promoting equal opportunities and fair treatment in employment by elimination of unfair discrimination. The second method to be employed in the achievement of workplace equality will be the implementation of affirmative action measures to redress disadvantages in employment. Three categories of people have been identified as having been particularly disadvantaged, namely black people, women and people with disabilities.[755] It is the stated purpose of the Act to ensure the equitable representation of these three categories of people in all occupational categories and levels in the workforce.[756] An important feature of the EEA that challenges the perception that affirmative action results in unqualified people filling positions merely because of they form part of designated group is that for someone to benefit from the affirmative action measures, they must be suitably qualified. Subsection 20(3) of the Act states that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's - (a) formal qualification; (b) prior learning; (c) relevant experience, or (d) *capacity to acquire, within a reasonable time, the ability to do the job.* Subsection 20(4) provides that when determining whether a person is suitably qualified for a job, an employer must - (a) review all the factors listed in subsection (3); and (b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors. Subsection 20 (5) In making a determination under subsection (4), (Emphasis added).

Subsection 20(5) is particularly innovative. It states that when an employer is making a determination under subsec 20(4) an employer may not unfairly discriminate against a person solely on the grounds of

[755] EEA Section 1.
[756] Preamble of the EEA.

that person's lack of relevant experience. Although obviously designed to combat the lasting effects of Apartheid on the lack of education and employment opportunity of designated groups, the fact that a person's lack of experience cannot be grounds for discrimination is exceptionally beneficial for people with mental health problems. This is especially relevant for people who were institutionalized as a result of their mental illness.

6.4.2. Interpretation of the Act

Section 3 of the EEA states:

> 'This Act must be interpreted-
> (a) in compliance with the Constitution;
> (b) so as to give effect to its purpose;
> (c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
> (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.'

Thus the Act should be interpreted so as to extend to people with disabilities the full promise of the Constitution, including the protection of equality. It is submitted that as an anti-discrimination statute, the EEA should be interpreted broadly and purposively in order to give effect to its goals.

6.4.3.The EEA and People with Disabilities

The inclusion of people with disabilities as a designated group acknowledges the extent to which disabled persons have been and still are disadvantaged. Unemployment and poverty are more accentuated for people with disabilities than any other historically disadvantaged group. This is poignantly illustrated by the extremely high rate of unemployment (over 80%) among people with disabilities in South Africa.[757] In line with international statistics[758] it can be assumed that the position of people with mental health problems is even worse. The insidious nature of the discrimination experienced by people with disabilities is demonstrated by the paucity of representation of this group in the South African workforce. According to the Department of Labour only 0.53% of the workforce in

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[757] Mail & Guardian-10 February 2000: 'SA Disabled Face Crippling Unemployment'. Underrepresentation of people with disabilities in the labour market and overrepresentation among the poor is not only a feature of low income countries but also high income countries: A H Neufeldt & R Mathieson 'Empirical Dimensions of Discrimination Against Disabled People' (1995) 1(2) *Health and Human Rights* 172 at 179.

[758] See Barnois and Gabriel 2000.

companies with more than 150 employees, have disabilities. Only 0.3% of professionals and 0.4% of technicians and associated professionals are people with disabilities.[759] It is essential that people with disabilities become better represented in the workforce.

It is accepted that the nature and severity of disability may, perforce, exclude the affected persons from meaningful participation in the labour market.[760] Lack of necessary skills and qualifications is another barrier. People with disabilities have relatively less education and are likely to leave school with fewer qualifications.[761] Structural and institutional barriers have systematically discriminated against people with disabilities in respect of access to education and vocational training.[762] In addition, unfair discrimination by employers as well as an indifferent workplace environment adds substantially to workplace barriers.[763] Ngwena and Pretorius submit that the above factors as well as the attitudes of employers rooted in stereotypical views based on ignorance, fear and prejudice have resulted in jobs and the workplace environment being structured on the assumption that every job applicant or employee is 'able-bodied' and 'able-minded'.[764] As a result, workplace policies and practices, job descriptions, employers' expectations and the physical environment of the workplace often implicitly exclude those that are disabled.[765] Apart from conflict with constitutional and statutory imperatives, such an indifferent workplace environment runs counter to government policy on disability which is to treat people with disabilities as an economically productive class that is integral to, rather than separate from, mainstream society.[766]

In recognising the complexity of disability discrimination as opposed to the more 'cut and dried' arena of race and sex discrimination, additional guidelines have been published by the Department of Labour to flesh out the provisions of the EEA with regards people with disabilities.

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[759] Paragraph 1 of the Disability Code acknowledges that, if they are employed at all, people with disabilities tend to remain at the lower end of the job market or earn lower than average remuneration.
[760] P Abberly 'Work, Utopia and Impairment' (1996) in LBarton (ed) *Disability and Society: Emerging Issues and Insights* 61- 71.
[761] Neufeldt & Mathieson *op cit* at 179.
[762] Neufeldt & Mathieson *op cit* at 178-9.
[763] C Ngwena and L Pretorius 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 at 1818.
[764] *Ibid.*
[765] See further A Thomas and MA Hlahla 'Factors that influence the employment of people with disabilities in South Africa' (2002) Summer *SAJLR* 4.
[766] Deputy President's Office White Paper on an Integrated National Disability Strategy (1997).

6.4.4.1. The Code of Good Practice on Key Aspects of Disability in the Workplace.[767]

The aim of the Code of Good Practice on Key Aspects of Disability in the Workplace (The Disability Code)[768] is intended to help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.[769]

Ngwena and Pretorius state that if it is to succeed, the Disability Code should have the capacity to assist employers in understanding better the concept of disability, the nature and extent of their obligations, and the practical steps that they should take to discharge their constitutional and statutory obligations.[770] It is equally important that the Disability Code should have a capacity to create awareness about disability and the contributions that people with disabilities can make in the workplace and the general economy. [771]

The Disability Code is not enforceable, nor will abiding by its provisions immunise an employer from a claim of unfair discrimination. It must however be taken into consideration by Commissioners and the court when interpreting the EEA.

The Disability Code is 'intentionally general' rather than comprehensive.[772] Despite this being the intention of the code, Ngwena and Pretorius opine that given the novelty of disability jurisprudence in South Africa, the Disability Code offers insufficient guidance.[773] However the code is not the last word by way of furnishing guidance to employers, employees and trade unions on the interpretation and application of the disability related provisions of the EEA.

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[767] Department of Labour *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (2003) Gazette 23702 of 19 August 2002.
[768] This Disability Code is a sequel to a draft code that was published for public comment in 2001.
[769] The Code is issued in terms of section 54(1)(a) of the Act 55/1998 and is based on the Constitutional principle that no one may unfairly discriminate against a person on the ground of disability.
[770] Ngwena and Pretorius 2003 *op cit* at 1817. See also Disability Code Paragraph 2.1.3. Also refer to J Grogan 'Protecting the disabled: The new code' (2002) 18(5) *EL* 13 for a 'pro-employer' overview of the Disability Code.
[771] Disability Code Paragraph 2.3.
[772] Disability Code Paragraph 3.3.
[773] Ngwena and Pretorius *loc cit.*

6.4.4.2. The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)[774]

The TAG is intended to complement the Disability Code to assist with the practical implementation of aspects of the Act relating to the employment of people with disabilities. It attempts to build on the Code by setting out practical guidelines and examples for employers, employees and trade unions on how to promote equality, diversity and fair treatment in employment through the elimination of unfair discrimination. In the foreword to the TAG, Mdladlana states that disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market.

The TAG is definitely more comprehensive than the Disability Code, however, it lacks some of the depth noticeable in the British Code of Good Practice 2004 or the regulations and guidelines accompanying the ADA issued by the American Equal Employment Opportunity Commission (EEOC). Despite this, additional guidelines are certainly welcome as the complex issues involved required explanation. It will be argued that certain aspects of the Disability Code are inconsistent with the Constitution and government policy. Thus it is submitted, expounding upon guidelines that are already bad in law does not serve much purpose.

6.4.5.The Definition of Disability under the EEA

The government's commitment to the advancement of disabled persons has been demonstrated, in part, by the inclusion of people with disabilities as a designated group for the purposes of affirmative action. However the efficacy of this move towards fulfilling the goals set out in the policy paper (as well as the protection afforded to disabled persons in terms of the Constitution) is stymied by the unduly restrictive definition of disability contained in the EEA. Ngwena describes the definition as 'something of a paradox as it does not sit well with a constitutional jurisprudence that subscribes to substantive equality'.[775]

The EEA defines people with disabilities as people who have a 'long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in,

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[774] Department of Labour 2003.
[775] Ngwena 2004 *op cit* at 23.

employment'.[776] The EEA does not elaborate further on the meaning of disability. It has been left to the Disability Code and the TAG to give meaning to the content of the statutory definition.

It is immediately apparent that this definition is very similar to that contained in the British DDA and the ADA in the United States. Unfortunately the drafters of the EEA seem to have adopted from these Acts the definitional aspects that have resulted in the most litigation and difficulty for disabled persons and none of the more positive attributes have been similarly imported. Furthermore the Disability Code introduces a list of automatic exclusions from the definition of disability that is broader than similar exclusions contained in any other disability discrimination legislation. It will be argued in this section that the adoption of a definition based on functional limitation, is not only inconsistent with government's alleged adhesion to the social approach to disability but constitutional principles too.

This discussion will commence with an analysis of the three requirements set out in the EEA for qualifying as disabled under the Act. To this end the Disability Code and the TAG will be considered. Furthermore, the experience of Americans with mental health problems under the similar requirements of the ADA will be examined. Thereafter attention will be turned to the exclusions contained in the Disability Code. This will include an analysis of both the approach to the use of mitigating measures and the exclusions based on public policy. American jurisprudence and academic opinion will be particularly useful in discussing this aspect. Furthermore, an argument will be put forward for the inclusion of past and perceived psychiatric disabilities. Throughout this section the focus will be on mental illness and the relevance of the prongs of the definition for people with mental health problems.

6.4.5.1. A Clinically well recognised mental impairment

Paragraph 5.1 of the Disability Code creates the false impression that the definition of disability in the EEA is based on a social approach to disability. It states 'the scope of protection for people with disabilities in employment focuses on the *effect* of the disability on the person in relation to the working environment, and not on the *diagnosis* or the impairment'.[777] This impression is however short lived. The Disability Code elaborates on the term 'impairment' by stating that it may be mental or physical or a combination thereof[778] and that a mental impairment is a 'clinically recognised condition

[776] EEA Section 1.
[777] Disability Code Paragraph 5.1. (Emphasis added).
[778] Disability Code Paragraph 5.1.1.(i).

or illness that affects a person's thought processes, judgment or emotions'.[779] The TAG indicates that this will include conditions such as intellectual, emotional and learning disabilities.[780] It is clear that the definition in the EEA has been based on *ILO Convention 158*. However the position postulated in Chapter 3 is confirmed. This definition is based on outdated ideology with no recognition of the role that social barriers play in disabling an individual.

6.4.5.1.1. Reconciling 'impairment' with the social model of disability

Ngwena and Pretorius state that the notion of impairment is the crux of disability as disability is an outcome or consequence of impairment.[781] It is submitted that whilst the presence of an impairment often a necessary concomitant to disability, such an approach does not account for people who are erroneously perceived as disabled or who were disabled in the past and still subject to extreme discrimination. Nor in the case of an associate of a disabled person being harassed at work, is an impairment the basis of the treatment. It is important that whilst the necessity of determining the protected class is realised, that the social causes of disability are not forgotten. Ngwena and Pretorius state that confining impairment to physical and mental impairments has the advantage of certainty. It narrows the protected class to ensure that the benefits of statutory protection are targeted rather than distributed over a potentially limitless class of persons.[782]

Whittle, in commenting on the ideal definition of disability for the European Union, suggests two important considerations for the inclusion of 'impairment' in a definition.[783] Firstly, he states that whilst it will be necessary to base the definition of disability on the concept of 'impairment' (so that the discriminatory act or omission can itself be located within the protected ground) it is crucial that the legislative concept of impairment does not (a) incorporate phraseology that will encourage an assessment as to the extent of an individual's functional limitations and (b) ignore the social dimension to disability. Whittle is of the opinion that such a construction would result in the judiciary striving to identify a 'deserving class' of disabled people and, by so doing, excluding from protective remit of the

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[779] Disability Code Paragraph 5.1.1 (iii).
[780] TAG Item 5.1.1. It is submitted that the wording in the TAG is misleading because as will be seen by the rest of the discussion, the mere fact that one has a diagnosed intellectual, emotional or learning disorder does not qualify such a disorder as a disability. Other criteria must be satisfied before such a label may be attached.
[781] Ngwena and Pretorius *op cit* at 1822.
[782] Ngwena and Pretorius *loc cit.*
[783] R Whittle 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective' (2002) 27(3) *European Law Review* 303 at 316.

law a large number of the disabled population intended to come within its scope.[784] It is submitted that South Africa should consider this advice quite seriously. Argument throughout this section will demonstrate that the South African definition is very clearly centred around establishing a 'deserving class' of disabled persons and it certainly ignores the social dimension of disability.

6.4.5.1.2.The effect not the diagnosis or impairment

Despite the assertion that the focus of the EEA is on the effect and not the diagnosis or impairment, one would have to, in seeking the EEA's protection, verify that one has a clinically recognised disorder. Thus it is unclear what is meant by Paragraph 5.1, does it mean that once one can prove that one has a diagnosed impairment, it doesn't matter what the impairment is, what matters in the effect thereof on the person in the employment environment? If so, it is again contradicted by the specific public policy exclusions that depend very much on the type of impairment the person has.

6.4.5.1.3.What is 'clinically well recognised'?

The second issue that arises is that it is not stated by whom the impairment must be recognised. Christianson submits that an employer would apparently be advised to seek the opinion of a psychiatrist or psychologist to determine whether the particular condition qualified as 'clinically well recognised'.[785] Christianson suggests that the British and American definitions should assist in interpreting mental impairment in our Disability Code[786] until such time as adjudication by the CCMA and courts has given the necessary content to this aspect of the definition.[787] However as this has not

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[784] *Ibid.*
[785] Christianson 2004 *op cit* at 166.
[786] Christianson 2004 *op cit* at 167.
[787] The requirement that a psychological disorder be a 'recognised' one is also a requirement in delictual claims for psychiatric injuries. In *Media 24 Ltd and Samuels v Grobler* (2005) 16(4) ***SALLR*** (SCA) Grobler claimed damages for psychological injury (in the form of Post Traumatic Stress Disorder (PTSD)) resulting from sexual harassment by Samuels. In the court *a quo* it was held that the issue for consideration was whether Samuels was responsible for Grobler's condition and not how her condition would be classified by the APA's DSM IV and subsequently gave judgment in her favour. On appeal Media 24 argued that as PTSD had not been established, Grobler had not shown that she had suffered from a 'recognised psychological injury' as envisaged in *Barnard v Santam BPK* 1999 (1) SA 202 (SCA). The SCA held on the balance of evidence from the expert testimony that Grobler did have PTSD and was thus entitled to recover damages. This case is a very useful demonstration of the way in which the courts deal with expert psychiatric evidence. It is however disappointing that at no time did the court consider what constituted a 'recognised psychiatric injury' nor whether it was necessary for such a condition to be listed in the DSM IV and if it was, did it automatically constitute a psychiatric injury. This question was not covered in *Barnard's* case either. However in that case it was held that 'nervous shock' constituted a recognised injury whereas 'grief' did not. (*Barnard supra).* It is submitted that the approach adopted by the court *a quo* in *Grobler's* case is preferred. Although an exact and recognised diagnosis can be useful for the determination of the quantum

yet occurred, guidance will have to be gleaned from the experience in foreign jurisdictions as well as from the psychological profession in South Africa.

6.4.5.1.4.The British experience

As was noted in the chapter on Britain, the requirement that a mental illness be 'clinically well recognised' was removed from the definition by the implementation of the DDA 2005. It will be remembered that this move by the British Government was an attempt to move away from the medically based definition in the DDA 1995. Further, it was deemed necessary in light of the difficulties surrounding the identification of whom the impairment should be recognised by and that by their very nature mental illnesses may take a form that is not clinically diagnosable but nonetheless substantially impairing for the person concerned. A further consideration was of course the fluctuating nature and diversity of opinion regarding what is clinically well recognised as a disorder.[788] It is submitted that South Africa should takes these points into consideration and should think about amending the Disability Code so that 'clinically well recognised' is removed. However without such amendment, the British Code of Good Practice (2004) can be of assistance. It suggests that 'clinically well recognised' means that the disorder or impairment should be recognised by a respected body of medical opinion.[789]

6.4.5.1.5. The American interpretation of 'mental impairment'

In 1994 in the US Congress Office of Technology Assessment released a report entitled 'Psychiatric Disabilities, Employment and the Americans with Disabilities Act Background Paper'.[790] The aim of this report was to investigate the applicability of the ADA to psychiatric disabilities. It was stated in the report that more than one in five American adults experience some diagnosable mental disorder in a

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of damages, it is not essential for the establishment of psychological harm. It is suggested that although these cases relate to delictual claims they are demonstrative of the dominance of the psychiatric profession in the understanding of mental health problems. Furthermore, *Grobler's* case illustrates the extreme damage that can result from workplace sexual harassment. It is encouraging that Media 24 was held to be vicariously liable for the harm caused to Grobler. It shows that the Court's take the duty upon the employer to provide a safe working environment quite seriously. See further the commentary on *Grobler's* case in Rudd (2005) *op cit* at 383- 447.

[788] An example given in chapter 4 was that homosexuality was only recently removed as a mental disorder from the DSM.

[789] 2004 Code Annex 1 'The meaning of disability'.

790 CJ Behney, LL Hall and JT Keller 'Psychiatric Disabilities, Employment, and the Americans with Disabilities Act Background Paper.' (1996) Office of Technology Assessment at http://earthops.org/ada_ota.html accessed 1 March 2005. (Hereinafter Behney *et al*).

given year.[791] Despite the prevalence of psychiatric disabilities it was found in the report that there was a serious lack of understanding about the actual disorders as well as the protection offered by the ADA. Furthermore it concluded that the lack of understanding, inadequate guidelines and stigmatizing attitudes had contributed to the ADA being mostly an ineffective source of protection for people with psychiatric disabilities in the workplace.[792]

In response to the OTA report the EEOC issued a publication titled 'EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities' in 1997.[793] The guidelines set out by the EEOC may offer some assistance in the interpretation of the Disability Code's 'clinically well recognised' mental impairment.

The publication of the guidelines sparked a 'firestorm of controversy'.[794] A particularly contested aspect of the Psychiatric Enforcement Guidance was the way in which a mental impairment was defined. The ADA defines psychiatric disability as a 'mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of impairment; or being regarded as having such an impairment.' The EEOC's regulations define 'mental impairment' to include 'any mental or psychological disorder, such as . . . emotional or mental illness.' The examples of impairments in the Psychiatric Enforcement Guidance include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.[795]

The Psychiatric Enforcement Guidance states that the current edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders' (DSM-IV) 'is relevant for identifying these disorders'.[796] However it noted that a disorder does not have to be in the DSM-IV in order to qualify as a mental impairment. The DSM-IV contains 374 psychiatric disorders but the Psychiatric Enforcement Guidance provides that not all conditions listed in the DSM-IV are

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[791] Behney *et al op cit* at 51-52. The data showed that approximately 9 percent of American adults have mood disorders (bipolar disorder, major depression, dysthmia), approximately 12 percent have anxiety disorders (phobic, panic, or obsessive-compulsive disorders), and approximately 1 percent have schizophrenia.
[792] Behney *et al op cit* at 67.
[793] Equal Employment Opportunity Commission 'EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities' (1997) at www.eeoc.gov accessed 1 March 2005. (Psychiatric Enforcement Guidance).
[794] 'Sharing the Dream: Is the ADA Accommodating All?' in *Psychiatric Disabilities and the ADA* (date published and author unknown) at http://www.usccr.gov/pubs/ada/ch5.htm accessed 1 March 2005 at 5. (Sharing the Dream).
[795] Psychiatric Enforcement Guidance.
[796] Psychiatric Enforcement Guidance Question 1.

disabilities, or even impairments, for purposes of the ADA.[797] Thus an employer cannot be sure if someone qualifies for protection if their disorder appears in the ADA or if it doesn't. Thus it is apparent that these recommendations have done little to clarify whom the ADA protects, in fact they seem to create even more confusion.

A point of concern expressed by McDonald is one that is probably shared by many employers. He believes that personality disorders, which are listed in the DSM-IV, should be excluded from ADA coverage as the inclusion 'provides a plethora of new opportunities for problem employees to disguise their misconduct as disease'.[798] Personality disorders are characterized more by aberrant behaviour—that many employers would find objectionable—than by disordered thought or mood.[799]

Although there may be merit in McDonald's argument, as it may very well be difficult to work with a person with a personality disorder, it is submitted that the argument is certainly not strong enough for the automatic exclusion of personality disorders. The obnoxious or troubling behaviour associated with personality disorders accompanies a number of disabilities including organic brain damage[800] and multiple sclerosis.[801] Stefan submits that to centre this behavioural concern on personality disorders is 'in itself a manifestation of discrimination against a particular set of diagnoses'.[802] This submission is further supported by the fact that personality disorders are subjected to stereotypes more harmful, than those associated with other diagnoses such as depression or schizophrenia.[803] A diagnosis of a personality disorder, particularly borderline personality disorder, often reflects little more than the

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[797] Psychiatric Enforcement Guidance, Question 1. The Psychiatric Enforcement Guidance further states that DSM-IV also includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child). As these conditions are not considered disorders, they are not impairments under the ADA.

[798] JJ McDonald and JP Rosman 'EEOC Guidance on Psychiatric Disabilities: Many Problems, Few Workable Solutions' (1997) 23 *Employee Relations Law Journal* 5 at 8.

[799] *Ibid.* McDonald and Rosman identify seven personality disorders (PD) that raise significant questions as to how these disorders might be accommodated in the workplace: paranoid PD is a pattern of distrust and suspiciousness such that others' motives are interpreted as malevolent; antisocial PD is a pattern of disregard for, and violation of, the rights of others; borderline PD is a pattern of instability in personal relationships and self-image, and marked impulsivity; histrionic PD is a pattern of excessive emotionality and attention-seeking; narcissistic PD is a pattern of grandiosity, need for admiration, and lack of empathy.

[800] In *Gasper v Perry* 155 F.3d 558 (4th Cir. July 2 1998) it was stated that organic brain damage led a man to be impulsive and disinhibited with difficulty reading social cues. This included an episode where the subject took a co-worker's umbrella with duck head and holding the head close to her face, made quacking noises at her. This case demonstrates the difficulties illustrated under the discussion of dismissal for misconduct. It involves a careful balancing act of competing interests in order to determine to what extent employers and co-workers should accommodate aberrant behaviour.

[801] In *Bussey v West* 86 F.3d 1149 (4th Cir. June 4, 1996) it was stated that an employee's multiple sclerosis made her 'irritable' and 'lose her temper'.

[802] Stefan 2000 *op cit* at 278.

[803] *Ibid.*

diagnoser's intense dislike of the person diagnosed.[804] Stefan notes that there is a distinct scarcity of claims based on personality disorders.[805]

Mancuso expressed further concerns about using the DSM-IV as the basis for identifying psychiatric impairments.[806] Firstly, she stated that DSM is essentially a political document, as is demonstrated by the previous inclusion of homosexuality as a disorder. She commented further that this made her nervous because '[We could] be in a position where the federal government and civil rights laws are dependent in some way on the deliberations of a group of psychiatrists who are responding [not only] to scientific knowledge, but also societal pressures and norms.'[807] Mancuso's second concern was that as our knowledge and understanding of mental disorder is constantly changing and improving, a version of the DSM which has not been revised for 5 to 10 years would be out of date and would not accurately reflect the current understanding of mental disorders. This is however overcome by the approach taken by the EEOC, it states that the DSM may be useful and it is a starting point not the be all and end all of determining whether someone has a mental impairment. By adopting this standpoint the EEOC leaves latitude for changes in both societal attitudes and scientific assessments of what constitutes a psychiatric disability.

It should be remembered that identifying the mental impairment, whether or not it is in the DSM, is just the first step in determining whether an individual meets the requirements for disability under the statute.[808] Under the ADA, the disability must also substantially limit one or more of the major life activities of the individual.

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[804] Stefan 2000 *loc cit.* See also J Dvoskin 'Sticks and Stones: The Abuse of Psychiatric Diagnosis in Prison' (1997) *The J of The Cal Alliance for the Mentally Ill* 20. Dvoskin writes '[T]here are some diagnoses that hurt people very much. All too often, the result of a psychiatric diagnosis is to stigmatise certain people as dishonest, unlikable, and worst of all hopeless... no diagnosis hurts more that that of a personality disorder.'.

[805] Stefan comments that in researching a book she read over 800 cases relating to psychiatric impairments and employment discrimination. Of those 800 only 67 involved personality disorders. Stefan 2000 *op cit* at fn 46. She submits further the few claims by people with personality disorders, or even the more commonly accepted diagnoses such as post traumatic stress disorder or obsessive-compulsive disorder, are likely to be treated with scepticism as to whether they constitute disabilities under the ADA or whether they even exist. (Stefan 2000 *op cit* at 280).

[806] L Mancuso Transcript of hearing before the US Commission on Civil Rights (1998) at 222-3 as cited in 'Sharing the Dream' *loc cit.*

[807] *Ibid.*

[808] Sharing the Dream *op cit* at 9.

6.4.5.1.6. The SASOP Guidelines

The South African Society of Psychiatrists (SASOP) has issued guidelines regarding the management of insurance and disability claims on the basis of psychiatric disability.[809] These guidelines were designed to provide consistency of diagnoses and the prevention of premature findings of permanent disability. It is stated in the introduction to the SASOP Guidelines that the second largest group of claims in South Africa, after back problems, are due to psychiatric diagnoses.[810] Among these, depression, anxiety and post-traumatic stress disorders are the most prevalent. Work-related stress is almost inevitably cited as a major contributing factor. The assistance obtained from these guidelines is reasonably minimal for the current purposes because they are specifically designed for the purpose of claiming disability benefits, either because of partial or permanent disability. Thus the enquiry is almost entirely medical and focused on functional impairment, with no thought to the stigmatising effects of psychiatric disability. However the SASOP Guidelines are particularly useful from the point of view that they demonstrate quite clearly that in order to be diagnosed with a psychiatric impairment the impairment must substantially limit the person in some way. In fact disability is defined in the Guidelines as 'the alteration of capability to meet personal, social or occupational demands due to an impairment.'[811]

In assessing the degree of impairment, the Guidelines suggest that four areas of functioning should be gauged, they are 1) activities of daily living such as self-care and communication; 2) social functioning which includes the ability to get on with others, participation in group activities and so on (impairment of social functioning could manifest in many ways for instance aggressive outbursts or social withdrawal); 3) concentration, persistence and pace, this relates to the persons ability to sustain concentration in order to complete a task; 4) ability to adapt to stressful situations, a person so impaired might react to stress by withdrawing from the situation or other symptoms will be exacerbated.[812]

The SASOP Guidelines suggest that a psychiatrist should make a diagnosis based on DSM IV criteria. Further it is recommended that psychiatrists take heed of the following considerations. There are no specific psychiatric disorders that will necessarily result in permanent disability. Degrees of functional

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[809] South African Society of Psychiatrists *Guidelines to the Management of Disability Claims on Psychiatric Grounds* 2nd ed (2002) at http://www.sasop.co.za/A_aboutus_Guidelines.asp accessed 21 April 2005. (SASOP Guidelines).
[810] SASOP Guidelines *op cit* at 3.
[811] SASOP Guidelines *op cit* at 8. It is noted that this does not take any account of the social causes of disability.
[812] SASOP Guidelines *op cit* at 16.

impairment vary widely among individuals suffering from the same psychiatric disorder and many other factors interact to determine the functional capacity of an individual in a specific work-situation.

The severity of the psychiatric disorder does not necessarily indicate the severity of impairment.[813] Also attention must be given to the effects of medication on signs and symptoms and ability to function (for example benzodiazepines may be responsible for such symptoms as drowsiness, lethargy, impaired concentration and memory and impulsivity). It is clear from these considerations that an assessment of a person with a mental health problem must be conducted individually and without any preconceptions of the impact a particular disorder would have on a person's functionality. Thus it is submitted that if one is disabled, either by societal barriers or physical/mental impairments, the fact that one's symptoms do not comply with a specific diagnosis should not detract from the reality of one's situation.

6.4.5.1.7. Motivating the removal of 'clinically well recognised'

Additional difficulties surrounding the use of 'clinically well-recognised' bear mention. Firstly, as has been mentioned above the requirement is completely contrary to the assertion in the Disability Code that the focus is on the effect of the impairment and not the diagnosis. Secondly, it causes unnecessary medicalisation of the problem, expensive medical experts will be required for litigation and this places an undue burden on an already impoverished minority group. Disability is a status that is initially identified, named or conferred, not by the individual, but by 'experts', usually medical experts, although the ramifications of disability are significantly social and political.[814] Stefan submits that the this process- of permitting experts and the judiciary to determine whether an individual fits into a protected class- would be unthinkable in the case of race, gender, age, religion, or sexual orientation.[815]

Thirdly, diagnoses themselves can be stigmatizing. For example schizophrenia and many personality disorders carry terrible connotations. Many people labelled as mentally ill feel as if they lose their identity. Stefan quotes a response to a survey she conducted in researching a book, 'you're never the same- mental health diagnosis is an opinion and attitude. You cannot cure or have remission from

[813] SASOP Guidelines *op cit* at 14.
[814] Stefan 2003 *op cit* at 1343.
[815] *Ibid.*

others' attitudes of rejection.' [816] By reiterating the importance of the diagnosis, the 'otherness' of the individual is emphasized.

The fourth consideration, which is peculiar to South Africa, is that the phrase 'clinically well recognised' is biased towards allopathic medicine.[817] As a result, suggest Ngwena and Pretorius, a significant section of the African population who often consult traditional healers that link mental illness to impairments that are not diagnosable in terms of the DSM IV are automatically excluded. The authors submit further that in theory the constitutional mandate to respect cultural diversity should include the art of traditional healers. However they concede that administrative expediency and a lack of regulation, registration and standard training of traditional healers may well justify a limitation in terms of s36 of the Constitution.[818]

6.4.5.1.8. How should clinically well recognised be interpreted in South Africa

The use of the DSM IV is recommended by SASOP to diagnose a mental impairment, the American EEOC suggests the same diagnostic manual[819]and the American Psychological Association is certainly a respected body of medical opinion so the British suggestion would also be satisfied. Thus it is submitted that if a condition or illness resulted in a diagnosis of a disorder found in the DSM IV that the requirement that it be 'clinically well recognised' would be fulfilled. It is reiterated that the addition of this requirement is unnecessary in light of the other two requirements of the definition. As can be seen from the SASOP Guidelines, in making a diagnosis the duration and severity of limitation on the person are factors that are considered. Miller suggests, in the American context, that diagnosis of a major mental disorder by a trained health professional should be all that is necessary for a plaintiff to make a *prima facie* case showing that she meets the ADA definition of disabled.[820]

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[816] S Stefan '"Discredited" and "Discreditable": The Search for Political Identity by People With Psychiatric Diagnoses' (2003) 44 *WM & Mary L Rev* 1341 at 1341.
[817] Ngwena and Pretorius 2003 *op cit* at 1823.
[818] Ngwena and Pretorius 2003 *op cit* at 1824.
[819] The definition of disability in the EEA and ADA are substantially similar enough that the American Guidelines can quite easily be applied in South Africa.
[820] SP Miller 'Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability' (1997) 85 *California L Rev* 701 at 719.

6.4.5.1.9. Recommendation

Therefore in summary, it is suggested that the requirement that a mental impairment be 'clinically well recognised' should be removed from the Disability Code. It should be sufficient for someone to have a long-term impairment that is substantially limiting. Alternatively, a clinical diagnosis of a mental disorder should provide a claimant under the EEA with *prima facie* proof of their disability. The inclusion of the requirement runs counter to the ideology of the social approach to disability. Thus it is submitted that the removal of the requirement would be the best solution in light of the challenges surrounding traditional healers, the expense of medical experts and the stigmatising effect that a diagnosis can have on an individual.

6.4.5.2 Long- term or recurring

The section of the Disability Code relating to long-term, recurring and progressive conditions is virtually identical to that contained in the British DDA 2005.

Paragraph 5.1.2 of the Disability Code states:

> '(i) "Long-term" means the impairment has or is likely to last for at least 12 months.
> (ii) "Recurring impairment" is one that is likely to happen again and to be substantially limiting. It includes a constant chronic condition, even if its effect on a person fluctuates.
> (iii) "Progressive conditions" are those that are likely to develop or change or recur, people living with progressive conditions or illnesses are considers as people with disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.'

Ngwena and Pretorius submit that 'the target of disability related legislation should be to provide cover only for those who are experiencing or are likely to experience significant, real or substantial hurdles in entering into, or advancing in employment on account of disability.'[821] Thus they argue that by requiring that an impairment be long term or recurring, temporary impairments and short term illnesses are rightly excluded from the definition.[822] It is understandable that it is not appropriate for people who are temporarily ill to be protected against discrimination on the basis of disability. However it should be borne in mind that a discriminator does not stop to consider whether a person's mental health problem will last more than 12 month or whether it is substantially limiting. The mere fact that one has

[821] Ngwena and Pretorius 2003 *op cit* at 1824.
[822] *Ibid.*

a mental health issue can easily result in the same degree of discrimination as that experienced by someone with a long-term and functionally limiting problem. Burgdorf is of the opinion that the exclusion of 'temporary disabilities' by the EEOC Psychiatric Guidance and the courts is one of the aspects that has contributed to the ADA definition being ineffective as an anti-discrimination statute.[823]

Ngwena and Pretorious state that the requirement that an impairment be long-term or recurring interacts well with 'substantially limiting', the third aspect of the definition. Under 'substantially limiting' the duration of the impairment is one of the factors that should be considered. Thus it is submitted that the inclusion of 'long-term or recurring' as a requirement is slightly tautologous. A better option would be to suggest that an impairment should be long-term or recurring when considering whether the effects thereof are substantially limiting. Thus rather than including the duration as a requirement, it would be an interpretative aid to the substantial limitation enquiry. This would provide flexibility and allow for expansive interpretations.

The patent similarities between the British and South African description of 'long-term or recurring' creates a situation where it is suitable to apply interpretations of the terms in the UK to South Africa.[824] Ngwena and Pretorius, taking their lead from Britain, suggest that due to the fact that medical diagnoses, especially when predicting a prognosis, are likely to be based on probability rather than certainty that 12 months should not be seen as an inflexible period rather as a useful starting point.[825] Medical experts will have to play a crucial role in the determination of whether a particular impairment will fall within the ambit of definition. South African courts should take heed of the British experience where many unjust decisions resulted from medical experts having differing opinions as to the likelihood of reoccurrence of a condition.[826]

The inclusion of recurring conditions is of benefit to people with mental health difficulties, the episodic nature of which is well documented.[827] However as there are significant variations in the course of illness, particularly in cases of major depression, bipolar disorder and schizophrenia, it is very difficult, even for an expert, to predict what the course the condition will take. During the first episode of mental

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[823] RL Burgdorf Jr '"Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability' (1997) 42 *Vill L Rev* 409 at 575.
[824] See further Chapter 4.
[825] Ngwena and Pretorius 2003 *op cit* at 1825.
[826] See further the arguments put forward for the amendment of the DDA 1995 due to the unfair impact that the 12 month requirement had had on people with depression.
[827] Miller *op cit* at 718.

illness, it is almost impossible to determine whether the condition will become chronic, episodic or whether it is a discrete episode.[828] However in order to be diagnosed with a mental disorder contained in the DSM-IV there are specific requirements regarding duration and although it may not be 12 months, the duration is normally significant.[829] This aspect reiterates the proposal that once a person has been properly diagnosed with a psychiatric disorder that there should be a rebuttable presumption that the person is disabled for the purposes of the EEA.

Ngwena and Pretorius argue that the EEA is designed to protect people with *actual* disabilities.[830] It is clear that the authors' submission is based on a medical understanding of the term disability. It is respectfully submitted this comment is derogatory and in itself discriminatory towards people who have an equally challenging, if not more so, experience in trying to overcome negative attitudes and perceptions about their personalities as well as their abilities. The most problematic aspect of the definition for people with mental health difficulties is the requirement that an impairment be substantially limiting as will be demonstrated by the ensuing discussion.

6.4.5.3. Substantially Limiting

The third requirement of the definition of disability as set out in the EEA is that an impairment must be substantially limiting. The TAG states, if the effects of the impairment are not substantially limiting, even if they are physical and/or mental, and long-term or recurring, then the person is not covered under the Act.[831] In order to claim under the ADA, DDA 2005 or, it will be argued, the EEA, a person will have to prove they are significantly disabled and thus by doing so they often find themselves unable to prove that they are 'suitably qualified'.[832] Thus a catch-22 situation is created in which one is too disabled to work but not disabled enough to be protected by the appropriate statute.[833] This difficulty is exacerbated by the inclusion of the effects of mitigating measures in the analysis of

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[828] *Ibid.*
[829] See further the SASOP Guidelines *loc cit.*
[830] Ngwena and Pretorius 2003 *op cit* at 1826.
[831] TAG Item 5.1.3.
[832] Behney *et al op cit* at 4.
[833] This has been noted by many authors but see specifically M Lynk 'A Dream Deferred: The Americans With Disabilities Act Trilogy' (1999) 15(3) *The International Journal of Comparative Labour Law and Industrial Relations* 329 at 334.

whether or not someone is substantially limited.[834] It is also suggested that for people with mental health problems the requirement that an impairment be substantially limiting often inappropriate.

South Africa is in the fortunate position that it may consider where poor interpretations of corresponding Acts in other jurisdictions have resulted in miscarriages of justice and ensure that a repeat of others' mistakes is thus avoided. Similar provisions relating to substantial limitation in America and Britain and the judicial interpretation thereof have been the cause of much debate and dissatisfaction. Burgdorf, who drafted the first version of the ADA presented to Congress, believes that the entirely judge-made restrictions to the definition disability have done an egregious disservice to those the Statute was designed to protect.[835] It is submitted that the success or failure of the EEA in protecting people with mental health difficulties depends heavily on the judiciary adopting an expansive interpretation of the definition of disability. However it is submitted that the EEA definition contains some aspects that, by their very nature, are likely to incur unfair results.

6.4.5.3.1.The meaning of 'substantial'

The definition states that the impairment must limit at person's 'prospects of entry into, or advancement in, employment'.[836] Ngwena and Pretorius suggest that the purpose of requiring an impairment to be substantially limiting is to 'weed out disabilities that have a minor or less than substantial effect on prospects of entry into or advancement in employment.'[837] It reiterates that simply having an impairment-any impairment-does not equal having a disability. The authors state further that while substantial at least connotes something more than minor or trivial, it is a relative term. Thus varying reasonable interpretations may be attached to the term depending on the level of the threshold used by the interpreter. This submission correlates with the assertion in the Disability Code that the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Thus it is important that the 'substantial limitation' enquiry be done on a case-by-case basis.

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[834] In Britain the effects of mitigating measures are specifically excluded which, as will be advocated below, is a more appropriate approach to the requirement. In the US the EEOC regulations intended mitigating measures to be ignored, however a series of Supreme Court decisions (as will be discussed below) have altered the position.
[835] Burgdorf 1997 *op cit* at 572.
[836] EEA Section 1.
[837] Ngwena and Pretorious *op cit* at 1827.

6.4.5.3.2.The origins of 'substantial limitation'

The 'substantial limitation in major life activities' requirement in the ADA has its roots in the ADA's predecessor, s504 of the Rehabilitation Act.[838] This statute was designed to provide vocational rehabilitation to persons with 'handicaps'. Its initial definition a person with a handicap was someone who experienced 'substantial handicap to employment'.[839] Within a year of its promulgation, it was realised that this definition was out of sync with the anti-discrimination provisions of the Rehabilitation Act. Thus the definition was revised, the amended definition mirrors the current definition contained in the ADA.[840] Stefan suggests that the 'substantial limitation' language was useful in limiting eligibility for government vocational rehabilitation services. Further that it was a logical way of delineating the class of people who may be entitled to reasonable accommodation.[841] It is submitted that it is these reasons that motivated the adoption of 'substantially limiting' for the definition in the EEA. It is not the government's intention that people, who are not actually functionally limited, receive the benefits of affirmative action programmes or reasonable accommodation.[842] However, as will be argued below, this approach is inconsistent with the constitutional mandate of substantive equality. Furthermore it ignores the fact that people with disabilities are not a historically disadvantaged group solely because of their functional limitations, societal barriers have been instrumental to their under-representation in the workforce.

6.4.5.3.3. Substantial limitation in employment only

Consistent with the purpose of the EEA the Disability Code states 'an impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered'.[843] This formulation is appropriate for a statute dealing solely with employment and it is thus likely to eliminate some of the difficulties in Britain and the United States where the definition of disability must be appropriate for other areas such as transport, the provision of facilities, education and so on. As was noted in the chapter on Britain, the

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[838] Rehabilitation Act of 1973.
[839] It will be noted that this is very similar to the current definition contained in the EEA.
[840] L Eichhorn 'Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990' (1999) 77 *NC L Rev* 1405 at 1427. She notes that the drafters of the ADA 'found the previous definition in the Rehabilitation Act to be unworkable.'
[841] Stefan 2000 *op cit* at 298.
[842] This will be discussed in more detail at a later stage.
[843] Disability Code Paragraph 5.1.3.(i).

description of 'normal day to day' activities was exceptionally problematic for people with mental health problems attempting to prove that they were disabled. This was because work is not included as a day to day activity and furthermore, the listed activities are biased in favour of physical, sensorial and learning disabilities.

In America, the EEOC's regulations state:

> 'The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity...'[844]

The regulations specify further that the nature and severity, duration or expected duration and the actual or expected permanent or long term impact of the impairment should be considered when determining whether an individual is substantially limited in a major life activity. The EEOC interpretive guidelines describe major life activities as 'those basic activities that the average person in the general population can perform with little or no difficulty.' The listed activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[845]

The list of major life activities provided by the EEOC is not meant to be exhaustive, however many mental health advocates and experts have criticised it, asserting that none of the examples is especially relevant to mental health difficulties.[846] In fact the activity most likely to be applicable to people with psychological impairments is 'working'. It has been noted by the EEOC in addition that assessment of functioning in mental disorders is not an easy or validated technique this is mostly due to the unpredictable nature of the effects and progression of such disorders. Thus it demonstrates, as was the case in Britain, that the ADA's protection is biased in favour of physical and developmental disabilities.

As a result of failure of the listed activities to cater for people with mental disorders the EEOC's Guidelines on Psychiatric Disabilities has extended the listed major life activities to include interacting with others, sleeping and concentrating. However Stefan notes that a number of courts have refused to

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[844] EEOC Regulations 56 FR 35735.
[845] EEOC Psychiatric Guidelines.
[846] Behney *et al op cit* at 30.

adopt the EEOC's suggestions regarding what activities constitute major life activities, especially those likely to be affected by mental health problems.[847] Furthermore when the courts have accepted the recommended activities, they have set extremely high thresholds. For example in *Innes v Mechatronics*[848] it was held that sleeping would only be a major life activity if it limits a person's ability to work. Additional difficulties have arisen as a result of interpretations relating to a person being 'otherwise qualified'. In order to be qualified, the person must be able to, as is the case in South Africa, perform the essential functions of the job. Essential functions of the job have been deemed to include the 'ability to get on with others'.[849] Which is ironic in light of the fact that courts have failed to recognise the same function as a 'major life activity'.[850]

In light of these decisions, the only real option open to most Americans with mental health issues attempting to prove that they are disabled is to show that they are substantially limited in the major life activity of working. 'Working' is a very general term and so persons with mental health problems will be put in the difficult and possibly untenable position of having to prove they are qualified to work but at the same time show they are substantially limited in their ability to work in order to be covered by the ADA.[851]

The case of *Forrisi v Bowen,*[852] decided under the Rehabilitation Act shows that while courts have been expansive in defining mental impairment *per se*, substantially limiting psychiatric impairments have been defined more restrictively.[853] In *Forrisi's* case, the court held that because a utility systems repairman with acrophobia(fear of heights)was not substantially limited in other jobs that did not require climbing or exposure to heights he did not have a disability under the law. As a result of this decision an additional burden is placed on persons relying on the activity of work, they must show that their disability prevents them from performing a class of jobs. This point was reiterated by the landmark Supreme Court decision of *Sutton v United Air Lines Inc.*[854] It was held in this case that 'when the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.' It

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[847] Stefan 2000 *op cit* at 283.
[848] (1997) US App No. 96-35515.
[849] *Baker v City of New York* (1999) US Dist No. 97-CV-5829.
[850] *Soileau v Guilford of ME Inc* (1997) 105 F3d 12 at 15.
[851] Behney *et al op cit* at 31. See also MW Turner 'Psychiatric Disabilities in the Federal Workplace: Employment Law Considerations' (2004) 55 *AFL Rev* 313 at 316.
[852] (1986) 794 F2d 931(4th Cir).
[853] Behney *et al loc cit.*
[854] (1999) 527 US 471 at 491.

is interesting to note that in South Africa the draft Disability Code stated that the impairment had to be substantially limiting on the person's ability to perform the essential functions of a class of jobs,[855] rather than the specific job for which the person is being considered. The adjustment of the final Disability Code reflects a preferable approach. As was demonstrated above a paradoxical situation is created by having to prove that one is unable to perform a class of jobs as it may eliminate one's chance of being a qualified individual.

Limiting the enquiry to the essential functions of a particular job is very restrictive. A person with only one leg could be considered non-disabled because nothing in the job description requires him to use his legs. However as the Disability Code states that the focus is on the effect of an impairment it is likely that the overall effect of the individual's impairment will be considered. This is preferable to a consideration of the limitation on separate 'normal' functions. One possible interpretation of substantial limitation in the South African context would be to include the attitudes of an employer as limiting the ability of the person to fulfil the functions of the job. This would accord with the social approach to disability. However it is submitted that, in light of the medical focus in both the Disability Code and the TAG, that only those impairments that are *actually* functionally disabling should be included in the definition. This is supported by the suggestion in the TAG that a qualified expert (who would presumably be a psychiatrist or doctor- it is unlikely that an expert exists that could demonstrate the limiting effects of an employer's attitudes) may be used to assist in determining whether someone is substantially limited. It is also stated that an employee may provide sufficient information to document this- again this implies that a doctor's note or similar documentation is necessary.

6.4.5.4. Mitigating Measures

It is stated very clearly both in the Disability Code and the TAG that when determining whether the effect of an impairment is substantially limiting, consideration should be given to the effect of mitigating measures. With regard to easily correctable impairments, South Africa takes its lead from Britain by excluding from the definition, impairments, which are so easily controlled, corrected or lessened, that they have no limiting effects. The TAG explains this with the following example, a person who wears spectacles or contact lenses does not have a disability unless, even with spectacles or

[855] Draft Disability Code Paragraph 5.1.3 stated 'An impairment is substantially limiting if, in the absence of reasonable accommodation by the employer, a person would be either totally unable to do a class of jobs or would be significantly limited in doing the particular class of jobs. This should be determined by considering the nature, extent, duration and impact of the impairment as well as the essential functions of the class of jobs in question.'.

contact lenses, the person's vision is substantially impaired.[856] This example is perfectly understandable as there is not social stigma attached to easily correctable visual impairment, as it is so very common.

It is difficult for people with mental health difficulties to show that they are substantially limited without medication or therapy, and nearly impossible if the effects thereof are considered. This aspect of the definition is clearly aimed at protecting only those persons who can show that their impairment has a significant impact on their daily functioning in the workplace.

This provision reiterates the medical or individual orientation of the EEA and Disability Code. The promise of a social model, besides the mention of the 'effect of the impairment' in the Disability Code, appears to be an empty one. Ngwena and Pretorius submit, that the Disability Code correctly focuses on the crucial consideration which is, 'not whether the job applicant or employee has a disability, but whether the disability is substantially limiting taking into account medical treatment and/or corrective devices.'[857] It is respectfully submitted that the authors have erred in this statement as the three prongs of the definition are very much focused on whether or not a person has an impairment severe enough to classify as a disability. The authors also note that this approach is adopted from the British one, however what the authors have, respectfully, failed to notice is that the British Act adopts a much more social approach. As one of the special categories, relating to whether an impairment has a substantial adverse effect, the effect of mitigating measures is ignored. Thus in Britain the substantial adverse effect is considered without mitigating measures- besides the use of glasses or contact lenses- being taken into account.[858]

It is clear from the EEOC Regulations and Guidelines that the approach adopted in Britain was also the intended interpretation of the ADA. However a series of Supreme Court judgments, contrary to the intention of the EEOC and America's legislative history have resulted in a change in approach. The TAG states that an assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed. This reflects the present position in the United

[856] TAG Item 5.1.3.1.
[857] Ngwena and Pretorius 2003 *op cit* at 1828.
[858] See Chapter 4 for elaboration on this concept.

States. For this reason it is useful to consider how the use of mitigating measures has been dealt with in that jurisdiction.

Wenbourne submits that, prior to the 1999 Supreme Court decisions, the district courts tended to follow the EEOC Guidelines and thus did not take mitigating measures into account when determining whether someone was substantially limited in a major life activity.[859] However there was disagreement amongst academics as to whether mitigating measures should be considered or not.[860]

Until 1999, the United States Supreme Court had yet to offer a substantive ruling on the workplace rights of employees with disabilities under the ADA. The Court's first opportunity came in April 1999, when it heard arguments on the same day respecting three separate disability employment cases. These were *Sutton v United Airlines,*[861] *Murphy v United Parcel Service*[862] and *Albertsons v Kirkingburg.*[863] The immediate question posed by these three cases was the meaning of disability in the ADA: could employees with correctable impairments seek the protection of the legislation when the employer refused to hire, retain or promote them? The broader question was whether the Court would read the ADA in an expansive manner, as disability advocates urged, or would endorse the restrictive trend of the lower courts.[864]

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[859] Wenbourne 1999 *op cit* at 159.

[860] Compare: MJ Puma 'Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities' (1998) 67 *Geo Wash L Rev* 123 at 145-7. Advocating an amendment to the ADA which would explicitly account for the effects of mitigating measures in the disability determination. *With* JG Frierson 'Heads You Lose, Tails You Lose: A Disturbing Judicial Trend in Defining Disability' (1997) 48 *Lab LJ* 419 at 429. Advocating an amendment to the ADA or an EEOC Regulation that would require courts to disregard the effects of mitigating measures.

[861] *Sutton supra.*

[862] (1999) 527 US 516. Thus, A mechanic and driver with high blood pressure that exceeded Department of Transportation requirements was found to have no disability because when medicated, he functioned normally in daily activities. The Court further found that the petitioner was not protected under the 'regarded as' prong of the definition of disability because he was perceived as unable to perform only the unique job of a mechanic with driving responsibilities for United Parcel Service and was otherwise employable as a mechanic.

[863] (1999) 527 US 555. The plaintiff was a truck driver who drove commercial vehicles for a supermarket chain. Despite an impeccable driving record, he was dismissed after it was discovered he had monocular vision during a routine health examination, resulting in monocular vision. This condition meant that he was initially unable to satisfy the Department of Transportation's road requirements for truck drivers. After his dismissal, the driver was able to obtain a Department waiver allowing him back on the road, but his former employer refused to rehire him. The Supreme Court unanimously dismissed his *ADA* suit, ruling that the driver's eye impairment was not a substantial limitation, since his body had compensated for how he perceived depth and peripheral objects. There was no difference, it reasoned, between natural and artificial corrective measures. The Court then reiterated its decision in *Sutton*, stating that whether an individual has a disability as per the *ADA* must be assessed only *after* the corrective measures have been applied, not before. It is submitted that of the three decisions taken that day this has to be the most patently ridiculous.

[864] Lynk *op cit* at 331.

The leading case in the ADA trilogy is *Sutton v United Air Lines Inc.*[865] The crux of the Sutton decision revolved around the ADA's definition of disability. The Supreme Court majority in *Sutton* ruled that a determination of whether an individual meets the definition of disability must take into account the effect of the impairment only after the application of corrective measures, such as eye lenses or a prosthesis.

To use the majority's own example, a person with a prosthetic limb or wheelchair does not *per se* have a disability, but only in the context of whether the existing impairment actually causes a substantial limitation. This is regardless of whether the person was refused employment precisely because of the impairment. The minority argued that Congress intended the ADA to be read broadly, and employees with correctable impairments should be protected by the legislation. The National Chamber of Commerce Litigation Center called the decision 'an incredibly significant victory for the business community.'[866] It is an equally significant loss for disabled employees. It is decisions like Sutton that gives cause for Mayerson to characterise ADA case law as 'hyper technical, often illogical interpretations of the ADA' which have generated a 'disturbing trend' of court precedents.[867] In the ADA trilogy, the Supreme Court majority has provided a problematic and ungenerous reading of disability discrimination in the American workplace. By denying the coverage of the ADA to employees who have correctable impairments, but who have been refused employment explicitly because their impairment the Court has, according to Lynk, 'misread the direction of the legislation's drafters and stripped the statute of much of its anti -discrimination bite'.[868] According to the logic of the majority ruling, a prospective employee's impairment may be the very reason why she or he was disqualified from the position, but if the employee is healthy enough to perform the position with a corrective devise, then she or he is not disabled for the purposes of the ADA, and so cannot force the employer to justify the rationality of its rule or practice.

This was not the intention of the ADA's drafters. Rothstein submits that whilst Congress probably did not intend to cover individuals who wear spectacles, there is certainly an indication that conditions such as epilepsy and mental illness were included in Congress's intended coverage.[869] Rothstein states that

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[865] *Sutton supra.*
[866] M Russell 'Backlash, the Political Economy, and Structural Exclusion' (2000) 21 *Berkeley J Emp & Lab L* 1 at 21.
[867] AB Mayerson 'Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent' (1997) 42 *Vill L Rev* 587 at 612.
[868] Lynk *op cit* at 335.
[869] LF Rothstein 'Reflections on Disability Discrimination Policy- 25 Years' (2000) 22 *UALR Law Review* 147 at 148.

in this instance the old saying 'bad facts make bad law' was unfortunately the case in the *Sutton* decision.[870]

The EEOC's Interpretative Guidance, which covers the ADA's implementation in the workplace, stated that 'the determination of whether an individual limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.[871] The majority of the Court concluded that whether a person is considered disabled for the purposes of the statute is an 'individualized inquiry' and the EEOC mandate that an individual automatically be considered in an unmitigated state contradicted this requirement of an individualized inquiry. In its decision to reject the EEOC's position on mitigating measures, the Court ironically reversed the procedure[872] it had used 1 year earlier in *Bragdon v Abbott.*[873]

Lynk submits that the principle that persons with disabilities should be covered by the ADA without attention to whatever corrective measures they may rely upon is integral to the effectiveness of a disability discrimination statute.[874] Russel describes the impact of the Sutton decision as creating 'a catch-22 for ADA plaintiffs: if one is disabled enough to sue, one is too disabled to work. The employer can fire the worker with a disability and the ADA is effectively withdrawn from those left under its auspices since if one is able to work, one has no grounds to sue.'[875]

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[870] Rothstein 2000 *op cit* at 148.

[871] An addendum has subsequently been added to the EEOC Psychiatric Guidelines, it states that since the Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities was published in 1997, the Supreme Court has ruled that the determination of whether a person has an ADA 'disability' must take into consideration whether the person is substantially limited in performing a major life activity when using a mitigating measure. This means that if a person has little or no difficulty performing any major life activity because s/he uses a mitigating measure, then that person will not meet the ADA's first definition of 'disability'. As a result of the Supreme Court's ruling, this document's guidance on mitigating measures is superseded. Following the Supreme Court's ruling, whether a person has an ADA 'disability' is determined by taking into account the positive and negative effects of mitigating measures used by the individual. At www.eoc.gov accessed 24 July 2005.

[872] JA Mello 'The Rights of Employees With Disabilities: Supreme Court Interpretations of the Americans With Disabilities Act and Their Implications for Human Resource Management' (2002) 13(4) *Employee Responsibilities and Rights Journal* 175 at 182.

[873] (1998) 118 SCt 2196. In this case the court interpreted the definition of disability to include asymptomatic HIV. The decision was based on the assumption that reproduction is a major life activity (this is a generalised assumption about the limiting effects of HIV, rather than an individualise enquiry into whether or not the plaintiff was actually limited in the major life activity of reproduction). This case recognised that some impairments are inherently limiting by the stigma attached thereto. See further VL Limas 'Significant Employment Law Decisions in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability' (1999) 34 *Tulsa LJ* 307at 327.

[874] Lynk *loc cit.*

[875] Russel 2000 *loc cit.*

The Court's approach would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb. This approach is completely contrary to the stated purpose of the ADA that is to 'dismantle employment barriers based on society's accumulated myths and fears'. Lynk submits that the Sutton trilogy is a major setback for disability rights in the American workplace. The rulings have 'solidified the federal judiciary's impoverished approach towards the ADA'. [876]

6.4.5.4.1. Mitigating Measures and Mental Health Problems

Emens comments that of all the doctrinal interpretations of the ADA's core language, the most noteworthy in the context of mental illness concerns the treatment of a plaintiff's efforts to 'mitigate' his disability.[877] A plaintiff who has successfully mitigated her severe depression with medication, such that her depression no longer substantially limits her in any major life activity, would probably not qualify as actually disabled under the ADA unless her medication causes side effects that substantially limit her in a major life activity.[878] Nor would the Act cover, as actually disabled, a plaintiff with obsessive-compulsive disorder[879] who has learned through ongoing cognitive-behavioural therapy to manage her repetitive thoughts and behaviours so that they no longer substantially limit her in any major life activity. [880] According to Stefan, the term 'self-accommodation' has been coined to describe the efforts people make privately to deal with their disabilities.[881] The use of 'self-accommodation' is particularly troublesome for people with mental illnesses as their impairments are already invisible and the fact that they are coping so admirably makes it even more so.[882] For a 'managed' invisible disability

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[876] Lynk *op cit* at 337. See also IS Greaney 'The Practical Impossibility of Considering the Effect of Mitigating Measures under the Americans with Disabilities Act of 1990'(1999) 26 *Fordham Urb LJ* 1267.

[877] Emens 2004 *op cit* at 85.

[878] JE Hasday 'Mitigation and the Americans with Disabilities Act' (2004) 103 *Mich L Rev* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573521 accessed 25 June 2005.

[879] Obsessive-compulsive disorder is characterized by 'recurrent obsessions or compulsions . . . that are severe enough to be time consuming (ie they take more than 1 hour a day) or cause marked distress or significant impairment.' DSM-IV-TR *op cit* at 456.

[880] Emens 2004 *loc cit.*

[881] *Ibid.*

[882] Stefan quotes the experience of a young man with atypical psychosis who works as a part-time courier, it is apposite to include this quote. The experience of this man demonstrates the extreme lengths that people go to in order to hide their psychiatric conditions, they are afraid of ridicule and discrimination and will thus privately struggle with the most excruciating circumstances rather than risking the scorn of others. 'The voices are talking to me almost all the time at work. The medicine only makes them softer, but they never go away completely... And when I try to ignore them, they get softer, and I can hear them whispering, "He's not listening to us... He pretends he can't hear us." If I pay attention, they get louder, and start callin' me names... saying I'm bad and God's gonna punish me for what I did... I have to concentrate all the time so they don't get loud so I can't hear.' This man's employers are not aware of his condition nor the accommodations he makes in order to do his job. He is

one gets neither the credit for successfully coping with limitations, nor protection from discrimination. The sometimes gruelling effort of self-accommodation is often rewarded by the courts concluding that the person is not disabled at all.[883]

A subsidiary question that arises is whether employees are obliged to take medication. It seems unjust that a more conscientious person who strictly follows medical advice might fall outside the scope of the statute yet a less disciplined individual may well be covered.[884] Furthermore one person who can afford treatment may be excluded from coverage and another who is less fortunate would be covered. Goldstein states that in order to overcome this backlash, courts have consistently held that disabled employee must do his part. One should not receive accommodation unless one first takes reasonable steps to improve the impairment oneself.[885]

Stefan states that a troubling development has been an increasing tendency by courts to find that plaintiffs with mental health difficulties are not 'otherwise qualified' for employment if they do not seek or remain in psychiatric treatment, including taking psychotropic medication.[886] However, she notes further, an employer is not required to suggest, compel or force and individual into treatment as a reasonable accommodation.[887] She comments further that in the past courts have held that plaintiff's with psychiatric conditions who refuse to take medication or to seek treatment are in essence 'creating their handicap'.[888] Stefan submits that while in most cases people with mental health problems are encouraged and sometimes even forced to take medication for their conditions, some cases have arisen in which people are precluded from employment because they are taking such medication, or they are

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ashamed about hearing the voices and his attempts to keep them under control often leave him exhausting after 2-3 hours at work. As quoted in Stefan 2000 *op cit* at 308.

[883] In *Clark v Virginia Bd. Of Bar Exam'r*, No 94-211-A 1994 WL 364443, vacated, 861 F.Supp 512, 519 (ED Va. 1994) the district court judge concluded (however this opinion was later withdrawn) that the plaintiff could not possibly be psychiatrically disabled because she had successfully managed to complete law school and 'no one with a psychiatric disability could do this'. (at 519) Also in *Olson v General Electric Astrospace* 101 F.3d 947 (3d Cir. 1996) it was held that plaintiff's ability to function despite 'what appear to be serious psychological and emotional problems defeats [his claim that he is disabled under the ADA]'(at 953).

[884] Goldstein *loc cit.*

[885] Goldstein *op cit* at 954 see also the discussion under the LRA on dismissal for incapacity.

[886] Stefan 2000 *op cit* at 284. See for example *Phillips v Union Pac R R* 216 F.3d 703 at 707 (8th Cir. 2000).

[887] Stefan 2000 *op cit* at 294. See also Greaney *op cit* at 1291-6 for a discussion on the various practical implications of the use of medication.

[888] *Franklin v United States Postal Serv.* 687 F. Supp. 1214 at 1218 (S.D. Ohio 1988), a case decided under the Rehabilitation Act.

subjected to extreme surveillance and monitoring, even if their job-related conduct has been problem free.[889]

Goldstein notes that the most significant loophole in the aftermath of the *Sutton*[890]decision is the court's declaration that positive and negative effects of mitigating measures must be considered.[891] This is often advantageous for people with mental health problems because the side-effects of the medication taken can often be as debilitating as the disorder itself.[892] There have been cases decided after *Sutton* that have found that plaintiffs were not disabled because their medication allowed them to function.[893] In others the courts have begun to emphasize the factual sensitivities of cases concerning the effects of psychotropic medication and the need for jury deliberation on the issue.[894]

The extreme difficulty for people with mental health problems created by the definitional requirements in the ADA and it is submitted, in the EEA, is that when one's efforts to conceal one's disability are reasonably successful then the court finds that one is not disabled. When one is less successful in concealment, or when one reveals one's disability in the mistaken belief that one's employer will be sympathetic, one will also lose one's case because one is considered unable to fulfil the essential functions of the job.[895]

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[889] For example in *Krocka v City Of Chicago* 203 F.3d 507 at 511 (7th Cir. 2000) the Chicago police force required any police officer who was taking Prozac (an anti-depressant), even those with consistently good performance to participate in the Department's 'Personnel Concerns Program' (PCP). This programme was usually reserved for officers with disciplinary problems. However the Chicago Police Department's policy was to put all officers who are one psychotropic medication in PCP because they are deemed to have 'significant deviations from an officer's normal behaviour'. (at 511).

[890] *Sutton supra* at 462.

[891] RI Goldstein 'Mental Illness in the Workplace After *Sutton v United Air Lines*' (2001) 86 *Cornell L Rev* 927 at 950.

[892] *Taylor v Phoenixville Sch Dist* 184 F.3d 296 at 308-09 (3d Cir. 1999). It was held in this case that a mental illness, although partially controlled by medication, could still be substantially limiting as the combination of remaining symptoms and the medication's adverse side effects, such as nausea, substantially limited the plaintiff's thought process, memory and concentration.[892] Accordingly the court held that the plaintiff had to 'contend with a serious, very much ongoing condition'.(at 309).

[893] In *Robb v Horizon Credit Union* 66 F.Supp 2d 913 (C.D. III. 1999) the plaintiff had returned to work following hospitalisation for depression and suicidal tendencies. Upon her return the company president monitored her phone calls, refused to allow her leave to attend medical appointments, a privilege that was routinely granted to all other employees (at 913-5) and then dismissed her without a warning citing a personality conflict despite her supervisors protestations against the dismissal. Despite this, the court held that as plaintiff's medication allowed her to 'function' and work without restriction she was not disabled. (at 917-8). In *Spades v City of Walnut Ridge* 186 F.3d 897 at 900 (8th Cir. 1999) a police officer who had attempted suicide was denied reinstatement after a leave of absence based on the city's fear that his continued employment would increase the city's liability. (at 899) The court did not get to question whether the city's decision had been consistent with business necessity as it was held that Spades was not disabled as his ability to function meant that his depression was corrected. (at 900).

[894] Goldstein *loc cit.*

[895] *Ibid.*

6.4.5.5. The public policy exclusions

Another way in which the Disability Code emulates the American and British[896] approach to disability is by the so-called 'public policy exclusions'. Certain disorders will not be considered substantially limiting for reasons of public policy. These include but are not limited to:

- sexual behaviour disorders that are against public policy[897]
- self-imposed body adornments such as tattoos and body piercing
- compulsive gambling, tendency to steal or light fires
- disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognised programme of treatment
- normal deviations in height, weight[898] and strength; and conventional physical and mental characteristics and common personality traits.[899]

Ngwena and Pretorius note that under both the American and British Disability legislation (and it is apparent that South Africa has followed this trend too) that it is the political desire exclude certain conditions that are perceived to be anti-social rather than informed legal considerations that has played a significant role in shaping the excluded categories.[900] Whittle submits that the question for the judiciary is more to do with whether an individual has been discriminated against on grounds of disability, rather than whether the individual's past, present, future or perceived impairment constitutes an appropriate disability for the purposes of the law.[901] The public policy exclusions are particularly demonstrative of a desire to protect only worthy or appropriate disabilities.

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[896] The 1996 Regulations to the DDA 1995 contains certain exclusions, similar to the American and South African provisions. See further Chapter 4.

[897] In line with the exclusions in the DDA 1995 and the ADA it is likely that that such disorders would include paedophilia, voyeurism and exhibitionism. As sexual orientation is a listed ground in s9 of the Constitution, bisexuality and homosexuality would obviously not be included in this category. In any event it is unlikely that such sexual orientation would be considered as a disability anyway.

[898] This exclusion creates some difficulty. There has been some debate, particularly in America and Australia, regarding the inclusion of obesity as a disability. Whether this exclusion would include obesity or not depends, it is submitted, on whether obesity would be considered a 'normal' deviation in weight. As such a large proportion of the population is obese, it may well be the case. If obesity were excluded from the definition by virtue of Para 5.1.3 of the Disability Code then there is an additional difficulty. What if an obese person requires a large office chair in order to do his or her job? Would failure to provide such a chair be justifiable because normal deviation in weight does not constitute a disability and thus the employer is not required to provide reasonable accommodation? Further analysis of this question is beyond the scope of this thesis but see further: A Lynch 'Is Obesity a disability- actual or perceived- under the *Disability Discrimination Act* 1992?' (1996) 3 *Deakin Law Review* 161.

[899] Disability Code Paragraph 5.1.3. The inclusion of common personality traits may serve to exclude some personality disorders.

[900] Ngwena and Pretorius 2004 *op cit* at 1829.

[901] Whittle 2002 *op cit* at 316.

Emens comments that despite the congressional mandate to include mental health difficulties in the protection of the ADA, little specific mention is made of mental illness except for the enumerated exclusions of certain conditions 'apparently deemed morally unworthy of protection'.[902] These include gender-identity disorder, paedophilia, compulsive gambling, and drug addiction in those who are currently using illegal drugs.[903] In the ADA such exclusions are the remnants of an effort by Senator Helms and others to remove serious mental illnesses- such as bipolar disorder and schizophrenia-from the Act's protection.[904] It is interesting that, as a result of the specific exclusions, many mental disorders that were classified as disabilities under the Rehabilitation Act are excluded. According to Haggard, 'the impairments to qualify for protection under the Rehabilitation Act [have included]: paranoid schizophrenia, manic-depression, depression, post-traumatic stress disorder, borderline personality disorder, schizoid personality disorder, passive aggressive personality disorder, kleptomania, apraxia, transsexual disorder,[905] and mental retardation'.[906] Parry[907] describes the exclusions as stigmatising and Jones[908] believes that they are detrimental to treatment. Whilst it is clear that which exact conditions to be included in the exclusions was a political decision, the restrictions do reflect the contentious issues surrounding substance abuse and various DSM diagnoses.[909]

It is submitted that the categorical exclusion of certain conditions is inconsistent with the Disability Code's alleged commitment to the social approach to disability. Excluding people automatically on the basis of their diagnosis without further consideration of the effect their condition has on their entry and advancement in employment is, it is submitted, tantamount to unfair discrimination. It is understandable, for example that an employer would be reluctant to employ someone with paedophilia to work with children. However if that person, a diagnosed paedophile who is receiving treatment, works as a chartered accountant for example, then it is hard to see how his disorder will impact on his

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[902] Emens 2004 *op cit* at 9.
[903] See further ML Perlin 'The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?' (1994) 8 *JL & Health* 15 at 28-29.
[904] RL Burgdorf Jr 'The Americans with Disabilities Act: Analysis and Implications of a second generation civil rights statute' (1991) 26 *Harvard Civil Rights- Civil Liberties Law Review* 413 at 451. Helms's effort failed to exclude all mental illnesses however the offensive by the conservative senators did result in the current exclusions.
[905] In *Blackwell v United States Department of Treasury* 830 F2d 1183 (DC Cir 1987), a pre-ADA case, it was held that homosexuals were not covered by the Rehabilitation Act, but transvestites were.
[906] LK Haggard 'Reasonable Accommodation of Individuals With Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans With Disabilities Act' (1993) 43 *Journal of Urban and Contemporary Law* 343 at 390.
[907] JW Parry 'Mental Disabilities Under the ADA: A Difficult Path to Follow' (1993) *Mental and Physical Disability Law Reporter* 17 at 100-112.
[908] NL Jones 'The Alcohol and Drug Provisions of the ADA: Implications for Employers and Employees' 45 *Consulting Psychology Journal: Practice and Research* 3 at 9.
[909] Behney *et al op cit* at 29.

work. The only explanation would be that the person's presence would make people uncomfortable. Therefore because people find his particular mental illness distasteful, he has no remedy even though he is subjected to degrading treatment that serves to further exclude him from 'normal' society and possibly cause regression in his rehabilitation. Thus the effect of the exclusion is to allow employers to discriminate against a person with an excluded condition. Some may argue that a paedophile does not deserve the same rights as others because of the nature of his disorder. However this is dreadfully unfair because people diagnosed with paedophilia are victims of their compulsions, they do not choose to be 'perverted'.

Ngwena and Pretorius argue that it is doubtful whether this type of categorical exclusion contained in the Disability Code is compatible with the Constitutional Court's endorsement of the notion of substantive equality and the test for unfair discrimination that it has developed to give effect to this notion.[910] The authors provide three arguments against the inclusion of a list of public policy exclusions. It is apposite at this juncture to consider their line of reasoning.

Firstly, the authors apply the *Harksen v Lane* test.[911] They submit that most mental and physical impairments would satisfy the test for *prima facie* discrimination, as it would be differentiation on a the basis of the listed ground of disability.[912] Thus once the *prima facie* discrimination has been established, the onus rests on the alleged discriminator to establish the fairness of its conduct.[913] Therefore, submit Ngwena and Pretorius, any employment decision based on the assumption that persons with specific mental or physical impairments are categorically excluded from protection against discrimination, would ultimately have to be justified.[914]

Their argument continues that the Disability Code, by declaring certain impairments outside the scope of the EEA, has created 'the false impression that in their case this obligation does not apply at all, or that a finding of fairness/justification would follow as a matter of course.'[915] The authors acknowledge

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[910] Ngwena and Pretorius 2003 *op cit* at 1830.
[911] *Harksen v Lane supra.* It was in this case that the Constitutional Court formulated the test for unfair discrimination, the test is commonly referred to as the *Harksen* test.
[912] Ngwena and Pretorius 2003 *loc cit.*
[913] Constitution Section 9(5).
[914] Ngwena and Pretorius 2003 *loc cit.*
[915] *Ibid.*

that some conditions may render a person unsuitable for most occupations.[916] However they warn that it must be borne in mind that it the constitutional prohibition of discrimination is designed to guard against the inherent dangers of generalisation and stereotyping.[917] They state further that 'the burden of justification imposed by the constitutional equality and limitation clauses cannot be rendered inoperative by means of definitional exclusions.'[918]

The second argument advanced by Ngwena and Pretorius regarding the categorical exclusion of certain conditions is that it is incompatible with the case-by-case approach adopted by the Constitutional Court in the fairness and proportionality enquiries.[919] They state that, in accordance with the Constitutional Court's adoption of the notion of substantive equality, the primary focus of the fairness enquiry is on impact of the discrimination on the complainant.[920] The fairness and proportionality enquiries presuppose a case-by-case individualised assessment of the nature of a condition and the possibility and extent of reasonable accommodation. Ngwena and Pretorius rightly contend that the situation sensitive approach required in discrimination enquiries is inconsistent with the unqualified exclusions of specific conditions from the protective ambit of the EEA.[921] Burgdorf has levelled similar criticism at the ADA. He states that '[t]hese exclusions seem wholly inconsistent with the overall tenor of the Americans with Disabilities Act, which encourages participation and decision-making based upon individualised determinations of actual ability and not preconceived assumptions and stereotypes.'[922]

Ngwena and Pretorius contend that as the emphasis is supposed to be on the effects of the impairment in a particular employment setting and not in *abstracto*, 'operating on the basis of a laundry list of exceptions therefore frustrates the clear intention of the Act in this regard.'[923]

The third obstacle created by the public policy exclusions, argue Ngwena and Pretorius, is that adopting a 'public policy' exception to fundamental rights has the potential to undermine a notion of constitutionalism based on reasonableness and justifiability in a open and democratic society founded

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[916] It is assumed that in this instance they refer to compulsive gamblers, drug addicts and alcoholics who are not is rehabilitation programmes, kleptomaniacs and so on because it is very unlikely that a person's tattoo or piercings would have any impact on their ability to perform the essential functions of the job.
[917] Ngwena and Pretorius 2003 *op cit* at 1831.
[918] *Ibid.*
[919] *Ibid.*
[920] *Harksen supra* at 1510E.
[921] Ngwena and Pretorius *loc cit.*
[922] Burgdorf 1991 *op cit* at 452.
[923] Ngwena and Pretorius *loc cit.*

on human dignity, equality and freedom.[924] Public policy considerations are often too closely related to fluctuating public opinion and thus public policy restrictions on fundamental rights lack the standard of normative predictability. The limitations clause sets out strict requirements for the any restriction on human rights. Fundamental rights cannot be restricted merely by public opinion.[925]

Ngwena and Pretorius conclude their argument by stating that the enquiry into whether and to what extent a specific condition qualifies as a disability in terms of the EEA should be included under the examination of rationality, fairness and proportionality in applying the constitutional test for unfair discrimination.[926]

6.4.5.6. Substantially limiting and mental health problems

In the United States many of the cases brought by plaintiffs with mental illnesses are dismissed on summary judgment because the courts find that the plaintiff's diagnosed impairment, such as depression or obsessive-compulsive disorder, does not substantially limit him in a major life activity (or is not regarded as such or on record as such).[927] Stefan submits that this is because of a lack of understanding regarding the nature of the discrimination experienced by people with psychiatric disabilities.[928] Disability discrimination has long been equated with a kind of 'benign neglect'. It is equated with the maintenance of ignorant and false beliefs about the impact of the functional limitations on a person's ability to be productively employed. Stefan states that people with mental health problems are not primarily discriminated against because of mistaken beliefs about their abilities. She states further

> 'The public is afraid of people with psychiatric disabilities. Families are ashamed of them. Friends are uneasy or vanish when they hear of a diagnosis. Children taunt them. They are assaulted and killed by strangers. The depth of discomfort caused by the revelation that an individual has a mental illness is not related to any perception that the individual is substantially limited in major life activities.'[929]

Stefan states '[t]he requirement that a disability "substantially limit one or more life activities" has done more to vitiate the protections of the ADA in employment situations that any other single factor'.

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[924] Ngwena and Pretorius *op cit* at 1832.
[925] For the role of public opinion in constitutional policy see *S v Makwanyane supra* at para 87-89.
[926] Ngwena and Pretorius *loc cit.*
[927] See generally Stefan 2000 and Emens 2004. Both authors give extensive examples of cases in which this has occurred.
[928] Stefan 2000 *op cit* at 298.
[929] Stefan 2000 *op cit* at 273.

It appears to be puzzling and unnecessary in light of the other elements a plaintiff must prove under the ADA. Stefan adds that 'if the plaintiff proves that he or she is impaired or regarded as impaired, and that he or she can perform the essential functions of the job, and that the employer took adverse and unjustified action against the employee on the basis of the impairment, what does the "substantial limitation" provision add?'[930]

Stefan contends, and it is submitted, correctly so, that when an employer is not requesting reasonable accommodation but is merely asking to be treated like every other employee, the 'substantial limitation' definition of disability defeats the purpose of the ADA.[931] Perversely, the requirement that a disability be substantially limiting can have the effect of immunising an employer who discriminates out of deep antipathy for the diagnosis rather than any mistaken perception of its effects on a person's abilities.[932] Furthermore, the enquiry inappropriately focuses on the nature and duration of an impairment whereas discrimination often occurs on the basis of a perception that took minutes to form. A discriminatory attitude is not caused by the person's disability but rather it is something that the discriminator brings into an interaction.[933]

6.4.5.7. The inclusion of perceived disabilities

Every other jurisdiction that has some form of anti-discrimination law for people with disabilities has some provision for past, future or perceived impairments.[934] South Africa, with its medically orientated definition, does not easily accommodate a person who either does not have an actual physical or mental impairment but is, nevertheless treated as such by others, or a person who has a latent or asymptomatic impairment.[935]The rationale for including individuals who are regarded as disabled within the ADA's definition of 'disability' was articulated by the American Supreme Court in *School Board of Nassau County v Arline*, a case decided under the Rehabilitation Act of 1973:

> 'By amending the definition of "handicapped individuals" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and

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[930] Stefan 2000 *op cit* at 311.
[931] Stefan 2000 *op cit* at 299.
[932] *Ibid.*
[933] Stefan 2000 *loc cit.*
[934] Australia has the most comprehensive coverage of disability but Britain, America, Canada and the European Union all make provision in for perceived disabilities.
[935] Ngwena and Pretorius 2003 *loc cit.*

> disease are as handicapping as are the physical limitations that flow from actual impairment.'[936]

The definition of disability in the ADA includes people who have a record of disability[937] or who are regarded[938] as disabled. Bagenstos states that because both the 'regarded as' and 'record' prongs are tied to the existence of a (perceived or past) substantially limiting impairment, these aspects of the medical model creep into analysis under those two prongs as well.[939]

Although 'substantially limits' could be given content in a way that looks to society's disabling responses to impairments, courts have generally read that term as referring to serious physical or mental limitations that flow directly from an individual's diagnosis.[940] Bagenstos submits that an individual will not be covered simply because someone regards her as 'disabled' in general; she must be regarded as having an impairment that satisfies the law's substantial limitation criteria. For that reason, the (social approach) 'regarded as' and 'record' prongs cover far less ground in practice than one might initially think, and the (medical approach) 'actual disability' prong remains the most important.[941] Mayerson submits that if a person has an actual or perceived mental or physical condition and was disqualified on that basis and the employer can articulate no legitimate job-related reason for the rejections, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test.[942]

In the EEOC Regulations it states that one of three ways in which one will be perceived as having a disability, for the purposes of the ADA, is if one's impairment is substantially limiting 'only as a result of the attitudes of others toward such impairment'. Emens submits that the use of the word 'only' is confusing. She suggests that the idea must be to capture within 'regarded-as' only those plaintiffs

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[936] *School Board of Nassau County v. Arline* (1987) 480 US 273 at 284.

[937] 'A record of such an impairment': An individual will be able to show that they have a 'record of impairment' in two ways: (i) by being an individual who *no longer* has a substantially limiting impairment but has had such an impairment previously, or (ii) by having been *misclassified* as having a substantially limiting impairment.

[938] According to the EEOC, an individual might be 'regarded as having such an impairment' where s/he 1) has an impairment that is *not* substantially limiting but is treated as if it were by a covered entity 2) has an impairment that is only substantially limiting because of the attitudes of others, or 3) has no impairment whatsoever, but is regarded by a covered entity as having an impairment that substantially limits them. It is this final part of the classification of disability that offers protection from discriminatory attitudes and would include, for example, those whose facial disfigurement is perceived as being 'upsetting' for other employees or customers.

[939] Bagenstos 2003 *op cit* at 658.

[940] This possibility will be considered further under 'substantially limiting'.

[941] Bagenstos 2003 *loc cit.*

[942] AB Mayerson 'Restoring Regard for the 'Regarded As' Prong: Giving Effect to Congressional Intent' (1997) 42 *Vill L Rev* 587 at 597.

whose impairments labour under substantial stigma. [943] This may well describe most mental illnesses. Unfortunately the efficacy of this provision has once again been limited by judicial interpretation and it is generally held by the courts that unless the perceived disability is one that would be substantially limiting on a major life activity, the person is still not disabled.[944]

Moberly suggests that as the primary purpose of laws prohibiting disability discrimination is to insure that the 'truly disabled' are free from discrimination based on unfair stereotypes or prejudice.[945] For this reason, legislatures and courts generally conclude that individuals are not entitled to protection unless they suffer from impairments that 'significantly decrease their general ability to obtain satisfactory employment elsewhere'.[946] Since employers presumably do not discriminate against individuals they do not perceive to be disabled, a particular employer's mistaken perception will seldom limit an individual's general ability to secure employment elsewhere unless the individual has some actual impairment or history of impairment about which other employers might form a similar (albeit mistaken) impression. If this is the case, suggests Moberly, many of the problems associated with perceived disability discrimination can be addressed simply by expanding the protection afforded to persons with a history of disability or by interpreting the terms 'disability' or 'impairment somewhat more broadly, than has traditionally been the case.[947] A legislature may decline to extend protection to individuals who are erroneously perceived to be disabled on the ground that only those persons who, because of a disability, have substantial difficulty finding work are truly in need of protection.'[948] Moberly submits that there is nothing inherently illogical or unfair in this policy. However it is submitted that an employment discrimination statute should proscribe discriminatory conduct regardless of whether it is based on an accurate perception of an individuals condition or not. This view is supported in the case of *Sanchez v Lagoudakis*[949] where it was noted that the proper focus in a perceived handicap case is on 'the employer's conduct, the employer's belief or intent, and not on the employee's condition.'[950] Further it was stated in this case that 'it is inconsequential whether the

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[943] Emens 2004 *op cit* at 74.
[944] See for example *Steele v Thiokol Corp* (2001) 241 F3d 1248 at 1256 (10th Cir). In this case a rocket test technician with depression and OCD, who was called 'Psycho Bob' and 'crazy' by his co-workers, but whom the court concluded was not regarded as disabled because he presented insufficient evidence that he was 'regarded by his employer as being substantially limited in his ability to sleep, walk, or interact with others as a result' although the third EEOC prong refers only to 'others' attitudes' not specifically those of the employer.
[945] Moberly *op cit* at 363.
[946] Moberly *loc cit.*
[947] Moberly *op cit* at 364. This appears to be the view taken by the drafters of the Disability Code.
[948] Moberly *op cit* at 365.
[949] (1992) 486 NW 2d 657.
[950] *Sanchez Supra* at 660.

employee actually has the handicap because, in either hypothesis, the employer has undertaken the kind of discriminatory action that the law prohibits.'[951]

It is interesting to note that the reality of discrimination against people with perceived disabilities was acknowledged in the Draft Code of Good Practice on Disability in the Workplace where a much more social approach was adopted. Paragraph 5 of the Draft stated:

> 'Employers may not unfairly discriminate against employees or applicant for employment, because the employer *suspects or believes*, whether the belief or suspicion is *correct* or not, that the applicant or employee has an impairment that amounts to a disability, or that they *have* been disabled or they are, or have been, *associated* with other people who are, or have been, disabled. People in a relationship, or association with, or those who have responsibility for, a person with a disability, have, under the Act, Chapter II's rights to protection against unfair discrimination but not Chapter III's affirmative action protections.'[952]

One can only speculate as to the reason that this provision was removed from the final Disability Code. Christianson suggests that a possible reason for excluding perceived disability from the EEA definition is to avoid including asymptomatic disorders or diseases within the definition.[953] The inclusion of this item would have made the Government's adherence to a social model of disability more credibility. It is worth noting that the draft code not only prohibited discrimination against people with past or perceived disabilities but but discrimination against associates of disabled persons was also prohibited. The very progressive Australian DDA 1992 is the only other statute that makes provision for discrimination against associates. It is also important to note how associates of people with disabilities were only entitled to Chapter II protection. It is unlikely that association with a disabled person would affect the likelihood of obtaining, retaining or advancing in employment thus it would be inappropriate to provide affirmative action measures for an associate of a disabled person. It is argued however that such status could require protection against harassment or result in a valid request for reasonable accommodation. For example someone who has a child with a mental health problem may require time off to take to child to therapy. However this is mere speculation because not only are associates not included in the final Disability Code but also as will be argued below, reasonable accommodation is incorporated as an affirmative action measure by its inclusion in Chapter III of the EEA only.

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[951] *Ibid.*
[952] Draft Code of Good Practice on Disability in the Workplace Paragraph 5. (emphasis added).
[953] Christianson 2004 *op cit* at 172.

Due to the fact that in South Africa perceived and past disabilities are excluded, for a person to qualify as having a psychiatric disability in terms of the EEA, they must have an actual clinically well recognised impairment that is long-term or recurring, not controlled by mitigating measures, not excluded for reasons of public policy and substantially limiting on their prospects of entry or advancement into employment. The EEA definition, as has been demonstrated above, makes little or no provision for people who are discriminated against because of stereotypical attitudes. It is submitted that an appropriate way in which discriminatory attitudes can be provided for in a definition of disability is the inclusion of a 'perceived as disabled' prong in the definition. Of particular importance to people who are mental health system users or survivors is a provision for people who were disabled in the past. As has been illustrated in Chapter 2, it is exceptionally difficult for a person to obtain employment when an employer is aware that they were in 'mental institution' in the past.

Despite the obvious advantages of extending protection to people who were disabled in the past and people perceived as disabled (correctly or not) it is submitted that when considered in light of the other criteria in the EEA definition that the beneficial impact would be minimal. It would only be effective if the South African courts are prepared to interpret such a provision in a manner consistent with its intention rather than allowing inherent prejudices and reliance on medical evidence to dictate the protection extended to people with non-functionally limiting disabilities. This submission relies on the American experience as discussed above.

6.4.5.8.How should the protected class be defined under the EEA

Moberly states that precisely who should constitute the class protected by disability discrimination legislation is ultimately a policy question to be answered by legislative resolution.[954] He adds that the intrinsic appeal of employment discrimination laws may create pressure for constantly expanding protections.[955] Whilst it may be a valid concern that the net of protection may be too broadly cast, the South African legislature appears to have been overly cautious in this respect.

It has been seen in the context of the ADA that although Congress intended to have a more social approach to defining disability, the interpretations by the courts has resulted in the originally expansive

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[954] MD Moberly 'Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes' (1996) 13(2) *Hofstra Lab LJ* 345 at 378.
[955] Moberly *loc cit.*

definition being rather limited. Despite the additional legs of the ADA definition which cover people whom were disabled in the past or whom are regarded as disabled, people with mental health problems have received 'minimal benefit from the ADA's protections against employment discrimination.'[956] There is some discord among academics about whether it is the ambiguity of the Act or the judicial interpretation thereof that has resulted in the restriction of the definition.[957] The impression gleaned from the ADA is that the definition has been designed to cover persons who are physically and developmentally disabled but mental health problems are included almost as an afterthought. Unfortunately the lack of regard for psychiatric disabilities has been exacerbated by the court's interpretations. It is submitted that, partially responsible for these interpretations is the inherent prejudice against people with mental health difficulties.

Goldstein and other commentators advocate a full overhaul of the definition of disability in the ADA so that ADA litigation can focus on the employer's actions and motivation rather than on whether the individual has an actual disability.[958] Burgdorf and Eichorn in particular argue that the courts treat the disabled as a 'specific protected class'.[959] They contend that this is incorrect because in actuality, disability is a social creation, a group that has been 'singled out' and 'treated differently'. [960] They suggest as an alternative, a statutory ban on employment decisions that are based on mental and physical impairments that are not supported by business necessity.[961] Although these recommendations may alter the focus of the ADA enquiry, they do not answer the question of which limitations should be accommodated. Eichorn responds to this criticism by stating that reasonable accommodation is not a form of special treatment but rather a means of achieving an equal opportunity for disabled persons.[962]

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[956] Stefan 2000 *op cit* at 273.

[957] Compare: CJ Lanctot 'Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA' (1997) 42 *Vill L Rev* 327 at 328. Lanctot argues that the 'failure of the ADA to provide comprehensive protection against discrimination can be attributed to judicial narrowing of its provisions' With SS Locke 'The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act' (1997) 68 *U Colo L Rev* 107 at 108. Locke contends that the statute's ambiguity has caused the courts to raise the standard to be met by claimants.

[958] See Burgdorf 1998 *op cit* at 568-72; Eichhorn *op cit* at 1473-4 and Friedland *op cit* at 173.

[959] Burgdorf 1998 *op cit* at 571-2 and Eichorn *op cit* at 1472-3.

[960] Burgdorf 1998 *op cit* at 528.

[961] R Bales 'Once is Enough: Evaluating When a Person is Substantially Limited in Her Ability to Work' (1993) 11 *Hofstra Lab LJ* 203 at 245; Eichhorn *op cit* at 1473-4.

[962] Eichhorn *op cit* at 1476. See also M Diller 'Judicial Backlash, the ADA and the Civil Rights Model' (2000) 21 *Berkeley J Emp & Lab* 19 at 23. Diller notes that courts should not view the ADA as social welfare or a subsidy programme, but as a 'mandate for equality'. He also compares the ADA's use of a form of differential treatment with that of traditional affirmative action plans. (at 40).

This statement is consistent with the substantive approach to equality advocated by the Constitutional Court. It is challenging to reconcile the concept of substantive equality with a clearly individualised and medical approach to defining disability. The adherence to a social approach to disability, as enumerated in the South African government's White Paper is much more consistent with substantive equality. Ngwena and Pretorius describe the social model of disability as appealing to 'substantive equality as the transformative principle'.[963] As was noted in Chapter 2, mental health problems do not really fit in well with the social construction of disability. It was however further noted that there is currently no other suitable approach to understanding mental health difficulties. It is thus submitted that although it is not the ideal way to understand mental health problems, the social approach to disability offers a context in which the disabling impact of negative attitudes and stigmatisation is taken into consideration and from which a suitable understanding of mental health difficulties can be developed.

It is submitted that there are three possibilities to improve the position of people with mental health problems under the EEA. Firstly, the definition of disability could be reformulated to embrace a social approach. This would be consistent with government policy and would also sit comfortably with the constitutional imperative to promote substantive equality. The difficulty that arises with this option is that it is almost impossible to identify a 'protected class' for the purposes of affirmative action. The governmental desire to prevent people with minor disabilities being employed to fulfil the targets of employment equity plans is a reasonable one. Also it is clear that government did not want to impose too onerous a burden on employers by requiring that everyone with an impairment be accommodated.

Another important consideration with a definition for the purposes of affirmative action is that it should not be so broad that it is difficult for employers to identify who should be included as part of their employment equity policies. Some kind of measure is required so that the progression in terms of the representation of disabled persons at all levels of the workforce can be quantitatively evaluated. Despite understanding the above needs economic interests and administrative ease should not, it is submitted, trump over the fulfilment of basic human rights for all. The reason that people with disabilities were included as beneficiaries of employment equity is because they have consistently and systematically been the targets of systemic discrimination. Affirmative action is a tool designed to achieve equality, substantive equality. As noted above substantive equality and the social approach to disability are complementary concepts. Thus it is submitted that an equitable reformulation of the

[963] Ngwena and Pretorius *op cit* at 1821.

definition of disability could be achieved that is broad enough to encompass disabilities that are not the result of functional limitations but consistent with the definitional requirements necessitated by employment equity. It is submitted that the definition and approach adopted in Australia is ideal as a template for a socially orientated definition. Drafters would also be wise, it is suggested, to consult the definition of person with a disability in the Canadian EEA. This definition, by relying on the self-identification as a person with a disability, manages to overcome many of the interpretative difficulties experienced in other jurisdictions. It has also been used successfully for the purposes of quantifying who is disabled for the purposes of employment equity.[964]

It is submitted that although South African employers may have concerns about a broad definition of disability that embraces the social approach, many of these concerns are already adequately addressed in the other provisions of the EEA. It should be borne in mind that the fact that discrimination occurred still has to be proved. Furthermore the defences available for employers are more than adequate and the courts are unlikely to tolerate a discrimination claim based on spurious grounds. Another consideration is that a request for reasonable accommodation that is not really necessary would be unreasonable and thus an employer would not be obliged to fulfil such a request.

The second option would be to include mental health problems or health statusas an additional listed ground protected from discrimination by the EEA. In terms of this option unfair discrimination on the basis of mental health problems would be prohibited. Thus a person with a mental health problem that does not amount to a disability would not be entitled to chapter III protection, that is affirmative action, but would be protected against discrimination in the workplace.[965] As an alternative to actually amending the listed grounds in the EEA, people with mental health problems who have been unfairly discriminated against as a result thereof could claim that they had been discriminated against on the basis of an analogous ground. This means that the discrimination infringes the inherent dignity of the person.

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[964] See further the discussion in chapter 2.

[965] It will be argued later in this chapter that the provision of reasonable accommodation should be applicable to all those in need of it to facilitate their right to equality. It should not only apply to designated groups. If this is the case then a person with a mental health problem that does not amount to a disability could request flexible hours, to attend counselling for example, in accordance with the prohibition on discrimination and mandate to ensure the achievement of equality that form part of the aims of the EEA.

This was the approach adopted in the Cape Labour Court in the recent case of *IMATU v City of Cape Town.*[966] In this case a person with insulin controlled diabetes (who had for many years been a reserve fire fighter) applied to the City of Cape Town for a permanent position as a fire fighter. The City rejected his application on the basis that his diabetes created an unacceptable health and safety risk for his potential co-workers and third parties. He claimed that he had been discriminated against on the basis of his disability. It was held by Murphy AJ that as his diabetes was controlled by insulin he could not be considered disabled for the purposes of the EEA. However the court held that the refusal of his application had still been unfairly discriminatory as there was no evidence that his health condition would create an unacceptable risk. Further, the court concluded that although he had not been unfairly discriminated against on the basis of a disability, discrimination on the basis of diabetes could be considered an analogous ground. The approach adopted by Murphy AJ in this case is demonstrative of how the third option might operate.

The third option for bettering the position of people with mental health problems in the workplace is to rely on the courts interpreting the EEA in a manner consistent with Constitution and the achievement of substantive equality.[967] South Africa, like Canada, has adopted an approach to disability that respects the extent of past and current discrimination experienced by people with disabilities by providing affirmative action measures. The aim of both the Canadian and South African approach is to ensure through a process of equalization that all sectors of the population are represented in the workforce. Thus it is apposite to consider how the Supreme Court of Canada has approached medical conditions that do not amount to a functional limitation. In *Mercier*,[968] a case arising in Quebec, the Supreme Court made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations.

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[966] *IMATU v City of Cape Town supra.*

[967] It is submitted that even if the vigilance of the courts is relied upon that the requirement that an impairment be clinically well recognised as well as the public policy exclusions be struck from the Disability Code. As argued above these aspects are particularly offensive and demonstrate a retrograde step in the achievement of substantive equality. It is recommended that legislative intervention is necessary because the general socio-economic status of people with mental health problems renders it unlikely that these features of the Disability Code will be constitutionally challenged through litigation soon enough to benefit people with mental health difficulties.

[968] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* 2000 SCC 27 at http://www.lexum.umontreal.ca/csc-scc/en/index.html accessed 25 July 2005. (Known as 'Mercier').

In *Mercier*, the complainants were denied employment or dismissed when it was discovered that they had medical conditions. However, their conditions did not result in any functional limitations. The employers argued that since the conditions did not give rise to any functional limitations, they could not be 'disabilities' under Quebec's human rights law. The Supreme Court of Canada disagreed.

The Court chose not to create an exhaustive definition of disability. Instead, it opted for an equality-based framework that takes into account evolving biomedical, social and technological developments. This includes a socio-political dimension that emphasizes human dignity, respect and the right to equality. Thus, a disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment. Another Supreme Court of Canada decision, *Granosky v Canada (Minister of Employment and Immigration)*[969] has since confirmed that 'social handicapping', society's response to a real or perceived disability, should be the focus of the discrimination analysis.

The South African courts and in particular, the Constitutional Court, has often turned to Canadian jurisprudence for guidance. It is submitted that it would be wise to do so again by following the approach adopted in *Mercier* and *Granosky*. The courts should interpret the EEA definition in a manner that is consistent with the quest for substantive equality without allowing the inherent prejudice against people with mental illnesses to colour their decisions. As has been illustrated extensively above the decisions in America have resulted in very little justice for people with mental health problems. The large body of American case law described above demonstrates that justice has frequently been denied to mentally ill persons due to the court's own prejudice and lack of understanding. It is important that South African courts do not fall into the same trap.

Thus it is submitted that even if the definition of disability under the EEA, as expounded upon by the Disability Code and the TAG remains unchanged, courts and CCMA commissioners must attempt to interpret the EEA in a manner consistent with its purposes. Furthermore, in keeping with s3 of the EEA, the Act must be interpreted so that its international law obligations are met. Thus it should be noted that the UN *Disability Convention* (when it is completed) will have to be taken into consideration

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[969] *Granovsky v. Canada (Minister of Employment and Immigration)* 2000 SCC 28 at http://www.lexum.umontreal.ca/csc-scc/en/index.html accessed 25 July 2005.

in the interpretation of the EEA.[970] Furthermore, the obligations imposed upon member states by such a convention may require an amendment to the EEA in any case.

There is little clarity on how the protection and promotion of people with mental health problems in the workplace should be approached. What is clear however is that the definition of a 'person with a disability' in the EEA and corresponding Disability Code is grossly inadequate and inappropriate. The Disability Code and the TAG are clearly biased towards physical, sensory and developmental disabilities. It is difficult to determine whether the ineffective way in which the rights of people with mental health difficulties is as a result of indifference, sanism or a lack of understanding on how best to handle the situation. Regardless of the reasoning, as people with mental health problems are the most underemployed group in the world, the time has come to acknowledge and deal with mental health issues in the workplace as a reality. The starting point, it is submitted, is a more suitable definition of disability.

6.4.6. Unfair discrimination

6.4.6.1.Elimination of unfair discrimination

Chapter 2 of the EEA, which applies to all employers and employees, is concerned with the achievement of substantive equality by eliminating unfair discrimination. Section 5 requires the employer to take positive steps to promote equal opportunity through eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits the employer from unfairly discriminating against employees on certain grounds. The extent of the positive measures envisaged in s5 is the subject of some controversy. The Labour Court (LC) in *Harmse v City of Cape Town*[971] has held that the positive steps include affirmative action, as the provision addresses both current and past discrimination. By contrast, the court in *Dudley v City of Cape Town* [972] has found that the aim of s5 is to eliminate formal and not substantive inequality, and therefore excludes affirmative action measures. Cooper submits that the court in *Dudley* erred by finding that the provision does not deal with substantive equality.[973]

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[970] See further Chapter 3 on international instruments. All indications are that the Disability Convention will adopt a social and broad approach to defining disability.
[971] (2003) 24 *ILJ* 1130 (LC).
[972] (2004) 25 *ILJ* 305 (LC).
[973] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813 at 823. ('Equality in Labour Law').

As noted above, in line with the constitutional equality provision, the EEA gives expression to a substantive notion of equality and that notion suffuses the entire Act. Substantive equality is concerned with assessing whether a particular context calls for identical or different treatment in order to achieve true equality and it is relevant to both chapters 2 and 3 of the EEA. The meaning of s5 is discussed in the section on the right to affirmative action below where the cases are dealt with in more detail.

Section 6(1) of the EEA which is concerned with the prohibition of unfair discrimination states:

> 'No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language and birth.' The provision protects 'employees',[974] which includes applicants for employment, and applies to employment policies or practices which are broadly defined.[975]

The EEA renders unfair any act or omission involving the 'unfair discrimination, either directly or indirectly' against any employee on various grounds. This could embrace any employment practice that has the effect of unfairly discriminating in any way, for whatever motive. The impact of the discriminatory practice is the decisive factor.[976] If an employee alleges unfair discrimination, the onus of proving that it has not acted unfairly rests on the employer.[977] However, the employee must prove the alleged discrimination. The Labour Court has deplored the tendency of people to cry 'discrimination' when there is no logical basis for such a claim.[978] Whether an act is discriminatory is a relative question: it does not necessarily involve actual prejudice to the individual concerned.[979] Discrimination may be said to exist where others are granted benefits the victim is denied, even though the discrimination entails no actual prejudice to the victim. Thus employees' denied a promotion lose

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[974] 'Employee' is defined widely and includes: any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer (EEA Section 1). This definition is utilised in the LRA as well.

[975] EEA Section 1 defines 'employment policy or practice' 'includes, but is not limited to- (a) recruitment procedures, advertising and selection criteria; (b) appointments and the appointment process; (c) job classification and grading; (d) remuneration, employment benefits and terms and conditions of employment; (e) job assignments; (f) the working environment and facilities; (g) training and development; (h) performance evaluation systems; (i) promotion; (j) transfer; (k) demotion; (l) disciplinary measures other than dismissal; and (m) dismissal.

[976] *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 at 551; *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 *ILJ* 1048 (IC) at 1089-90.

[977] EEA Section 11.

[978] Mahlanyana v Cadbury (Pty) Ltd (2000) 21 ILJ 2274 (LC).

[979] Grogan *Workplace Law* 2005 *op cit* at 281.

nothing in an objective sense; they are merely denied benefits accorded to those who are promoted.[980] The relative disadvantage becomes unfair only where there is no objective justification for distinguishing the allocation of benefits. The distinction may then be said to be 'arbitrary' or based on some irrelevant criterion. Although section 6 of the EEA indicates that the prohibited grounds are not exclusive, the question remains whether the criterion relied upon must be akin to the grounds listed in the definition, or whether the criterion need merely be arbitrary and unjustifiable.

So, for example, the Labour Court has held that discrimination is unfair if it is purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or employee, or if it is 'morally offensive'.[981] Grogan submits that the EEA has introduced a new form of unfair discrimination against applicants for employment.[982] When considering the suitability of their qualifications, employers are not permitted to discriminate against them solely on the basis of their 'lack of relevant experience'.[983] Before a claim of alleged unfair discrimination on any ground other than those specified in section 6 of the EEA is entertained, the court must be satisfied that the discrimination complained of is indeed proscribed.[984] It is submitted that, in light of the EEA's aim to promote equality, accepting that for a ground to be analogous it must merely be arbitrary and unjustifiable is simply inappropriate. It is suggested that the grounding of s6 of the EEA in the right to equality in s9 of the Constitution supports the conclusion that the approach adopted to analogous grounds by the Constitutional Court, as discussed below, is more in keeping with the goals of the Act. The distinction should rather be based on something that has the potential, when manipulated, to impair human dignity.[985]

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[980] Grogan *Workplace Law* 2005 *op cit* at 282.
[981] *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) at 384A-D.
[982] Grogan *Workplace Law* 2005 *loc cit.*
[983] EEA Section 20(5).
[984] The LC adopted this approach in several cases decided under the repealed item 2(1)(a) of Schedule 7 to the LRA, which prohibited discrimination, not only on the specified grounds, but also any 'arbitrary' ground. In *Ntai v SA Breweries* (2001) 22 *ILJ* 214 (LC), the court warned against the practice of simply alleging discrimination on 'arbitrary' conduct by the employer, without specifying the grounds for that allegation. See also *Middleton v Industrial Chemical Comets (Pty) Ltd* (2001) 22 *ILJ* 472 (LC).
[985] *Harksen v Lane supra* at para 48.

6.4.6.1.1.The importance of the analogous grounds for people with mental health problems

As was argued above, it may be possible to overcome some of the limitations of the EEA definition of disability by alleging that discrimination has occurred on an analogous ground. Thus a person who has a mental health problem, who is unable to prove that it is a disability,' may be able to claim that they were discriminated against on the basis of such a condition. In *Harksen v Lane* the Constitutional Court held that 'there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them in a comparably serious manner'.[986] In *Larbi-Odam v MEC Education (North West Province)* [987] the court found that an unlisted ground was a human attribute that was difficult to change or one over which one had little control. In light of these above comments it is suggested that someone who was discriminated against because of a mental health problem, or even, it is submitted, a perceived or past mental health problem or because of association with someone with a mental health problem may be protected by claiming that they were discriminated against on the basis of an analogous ground. It is submitted that a mental health problem is certainly a human attribute over which one has little control and certainly has the potential to impair one's fundamental dignity. As argued above this may well be the saving grace of the unduly restrictive definition of disability.[988]

6.4.6.2.The approach of the Labour Court to Unfair Discrimination

The Labour Court has accepted the constitutional approach that conduct will be discriminatory where there is differentiation of an adverse nature on a listed or unlisted ground. Thus in *Ntai & others v SA Breweries*[989] the court held that 'mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of discrimination is being perpetrated. It is only when such differentiation is based on or linked to an unacceptable ground that it becomes

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[986] *Harksen v Lane supra* at 322.
[987] 1997 (12) BCLR 1655 (CC) at 1666.
[988] Grogan *Workplace Law* 2005 *op cit* at 283. See further the discussion on the definition of disability.
[989] *Ntai supra* at 219. The court found the company's remuneration policy not to be racially discriminatory. Two black applicants had alleged, *inter alia*, that SAB's practice of paying them salaries lower than those paid to white counterparts was unfairly discriminatory on the basis of race as per item 2(1) (a) of schedule 7 to the LRA. The company, although admitting that the difference in pay was excessive, denied that it was caused by race, arguing that it was based on performance, experience and seniority.

discrimination within its pejorative meaning'. The absence of a causal link[990] between the differentiation and a ground of discrimination will lead to a dismissal of the claim. The court has set different standards for the degree of connection between the ground and the differentiation for a finding of discrimination. Cooper submits that the correct approach should be that adopted in *Ntai v SAB,*[991] where the court required that in the final analysis the inference of discrimination on the basis of race should be the most probable inference '(in the sense of the most plausible, acceptable, suitable or credible) inference to be drawn'.[992]

The enquiries into the fairness of the discrimination should be kept separate from the question of justification as they involve different enquiries. As indicated in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others*[993] it is only once the existence of discrimination has been established that the further enquiry into the fairness/unfairness (the justification) should take place. If the applicant cannot prove the existence of discrimination, the need to determine whether the conduct is justified falls away.[994]

6.4.6.3. Direct and indirect discrimination

Discrimination may be direct or indirect. In *Harmse v City of Cape Town*[995] Waglay J stated that as the concepts of direct and indirect discrimination were not defined in the Act, it was necessary for the court to develop meaning for the concepts. Direct discrimination occurs when a person is subject directly to unequal treatment on one of the prohibited listed or unlisted grounds. Indirect discrimination arises 'when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect

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[990] In *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) Zondo JP found against Ms Whitehead on the grounds that the 'respondent is unable to show that, but for her pregnancy, she would have been appointed to the position', while according to Willis JA, the main impression was that the applicant's pregnancy was 'not the sole reason for her not being offered the permanent position' but that there were other legitimate factors which the employer had taken into account. Secondly, the LC has held that the ground must be the principal or predominant reason for the differentiation (*Walters v Transitional Council of Port Elizabeth & another* (2000) 21 *ILJ* 2723 (LC)). Thirdly, it has held that that 'there will be unfair discrimination to the extent that the discrimination under investigation is caused by it' whereby the impermissible discrimination would be prohibited, leaving the permissible discrimination intact (referred to by the court in *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC) at 198 as unscrambling the omelette'). Fourthly, it has been argued that any contamination by an impermissible ground is sufficient for a finding that the act or omission complained of is caused or is attributable to it - see J Kentridge 'Measure for Measure: Weighing up the Costs of a Feminist Standard of Equality at Work' 1994 *Acta Juridica* 84 at 105, quoted in *Louw* at 197-8.

[991] *Ntaiv SAB supra.*

[992] *Ntai v SAB supra* at 220, quoting *Ocean Accident Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

[993] (1998) 19 *ILJ* 285 (LC) (*Dingler).*

[994] Cooper 'Equality and Labour Law' *op cit* at 825.

[995] (2003) 24 ILJ 1130 (LC).

a disproportionate number of a certain group' which has characteristics or attributes which are coterminous with one (or more) of the grounds.[996] This would refer to the situation where a disabled person is required to comply with a requirement, qualification, or condition which, although equally applied to everyone, has the effect of precluding full participation in the opportunity by the majority of disabled people.[997]

In Canadian jurisprudence, the Supreme Court of Canada[998] found that the standard required to pass an aerobic test, to determine access to employment as a fire fighter, to be indirectly discriminatory because it had an adverse effect on a disproportionate number of women as they were generally physically weaker than men. Cooper notes that to date, the Labour Court has avoided a restrictive statistical analysis which has marked indirect discrimination in cases in the United States.[999] In *Ntai v SAB* the court noted that the burden of proof in indirect discrimination cases is not easily met because of the requirement of evidence of a statistical nature. It did not require such precise statistical evidence in that instance, holding that in a country such as South Africa, the impact of the impugned practice is more self-evident as its past 'was riddled by discriminatory practices and measures'.[1000] Cooper submits that for the moment, at least, applicants will not have to produce detailed statistical evidence when raising a claim of indirect unfair discrimination.[1001]

In the chapters 4 and 5 it was shown that the determination of whether discrimination takes the form of direct or indirect discrimination is very important. This is because the defences available to employers in those countries vary according to the type of discrimination alleged. In South Africa the situation is somewhat different as the precise classification of a dispute as either direct or indirect discrimination is unimportant as far as justification is concerned. This is the result of the EEA providing the same grounds of justification for the employer regardless of the form the discrimination takes. This is consistent with the idea that it is the effect of the discrimination on the individual or group that is relevant and not the employer's motive for doing so.

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[996] *Dingler supra* at 292.
[997] Reyneke and Oosthuizen 2004 *op cit* at 94.
[998] *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3 SCC, commonly known as the Meiorin case.
[999] Cooper 'Equality and Labour Law' *op cit* at 827.
[1000] *Ntai v SAB supra* at 229.
[1001] Cooper 'Equality and Labour Law' *loc cit.*

6.4.6.3.1. Motive or intent

In line with constitutional jurisprudence, the LC has found that the motive or intent of the discriminator is irrelevant when determining the existence of either direct or indirect discrimination.[1002] What is of import is the effect of the impugned conduct on the complainant.[1003] This aspect is particularly important for people with mental illness as people often discriminate against people with mental health problems without realising it.

6.4.6.4. Harassment

For purposes of the EEA, discrimination includes 'harassment' of an employee.[1004] However, to be covered by the Act, the harassment must be related to one of the grounds listed in section 6(1). The Disability Code states that people with disabilities may not be harassed, teased, ridiculed or be the object of offensive remarks. It further states that the Code of Good Practice on the Handling of Sexual Harassment Cases should be applied in such instances. In *Ntsabo v Real Security CC*,[1005] the Labour Court held that sexual harassment constituted discrimination for purposes of the EEA. Subsequent to the sexual harassment *Ntsabo* developed severe depression, an anxiety disorder and suffered from post-traumatic stress disorder (PTSD). Thus this case is also illustrative of the danger of a hostile workplace on the mental health of employees.[1006]

The inclusion of harassment as a form of discrimination is consistent with what has been done in other jurisdictions. It is particularly important for people with mental health problems who are likely to find themselves in a hostile working environment due to discriminatory attitudes of employers and co-workers. Grogan states that we have become reasonably familiar through the case law with the sexual

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[1002] This is not the case in the United States. See further the chapter on Australia where the advantages of excluding the requirement of intention are discussed.

[1003] As was stated in *Louw v Golden Arrow supra* at 13: '[T]he definition of an unfair labour practice and its successor, the residual unfair labour practice, is not based on delict which would require *culpa*. The [LRA] creates, in my view, a form of strict liability. An applicant need not prove *culpa* although the act in question may, in the ordinary course of events, be accompanied by intention, negligence and motive.' See also *Dingler supra* at 292; *Ntai v SAB supra* at 219. There is no reason to conclude that a different approach should be adopted under the EEA. Motive or intent may be relevant as far as the determination of the appropriate remedy is concerned - see *Dingler supra* at 292.

[1004] EEA Section 7(3).

[1005] (2003) 24 *ILJ* 2341 (LC).

[1006] See also *Grobler v Naspers Bpk & 'n Ander* (2004) 25 *ILJ* 1907; B Whitcher 'Two Roads to an Employer's Vicarious Liability for Sexual Harassment: *Grobler v Naspers Bpk en 'n Ander* and *Ntsabo v Real Security Cc*' (2004) 25 *ILJ* 1907 for an extensive discussion of this case as well as further explanation on the jurisdictional issues and P Maserumule 'Sexual Harassment in the Workplace' in *Juta's Annual Labour Law Update* (2005) at 128-133.

form, but other types will presumably consist of practices other than unwanted advances.[1007] Applied in racial and other contexts, harassment is probably little more than a synonym for any humiliating or degrading treatment of a person because of their personal characteristics. He submits further that this widens the reach of the notion of discrimination because harassment does not require more favourable treatment of another person.[1008] It is submitted that the inclusion of a 'vilification' provision, as has been recommended in Australia, would be ideal for the protection of people with mental health problems in the workplace.[1009]

6.4.6.5. Determination of fairness/unfairness

Once discrimination has been established, the enquiry moves to the second stage of examining whether it is fair or unfair.[1010] In contrast to constitutional jurisprudence which has been consistent in the way it has approached the concept of unfair discrimination, labour law, particularly under the LRA, has at times been inconsistent and unclear.[1011] Cooper argues that there are two reasons for this.[1012] Firstly, this is attributable in part to the casting of discrimination as an unfair labour practice under the LRA provision: the LC thus had to marry constitutional notions of discrimination[1013] with the well-established notion of the unfair labour practice. Secondly, the use of the term 'arbitrary' both as a means of describing the grounds of discrimination and as a test for fairness, led to an introduction of the test into the existence of discrimination and the separate enquiry into whether the conduct was unfair or not.[1014]

The test for unfairness in labour law is similar to that in constitutional jurisprudence, with one main difference. The weighing up of the unfairness against the justification for the conduct has taken place

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[1007] J Grogan 'Fair discrimination: A question of numbers' (2002) 18(5) *EL* 16.
[1008] *Ibid.*
[1009] See chapter 5.
[1010] *Harksen v Lane supra* at 322; *Dingler supra* at 297-9.
[1011] See also OC Dupper 'Old wine in a new bottle? Indirect discrimination and its application in the South African workplace' (2002) 14 *SAMLJ* 189; C Cooper 'A Constitutional reading of the test for unfair discrimination in labour law' in Jagwanth and Kalula (eds) *Equality Law: Reflections from South Africa and Elsewhere* (2001); OC Dupper 'Justifying unfair discrimination: the development of a 'general fairness defence' in South African (labour) law' in Jagwanth and Kalula (eds) *Equality Law: Reflections from South Africa and Elsewhere* (2001).
[1012] Cooper 'Equality and Labour Law' *op cit* at 828.
[1013] See, for instance, *Dingler supra* at 294; *Kadiaka supra* at 377-8; *Louw supra* at 195; and *Botha v A Import Export International CC* (1999) 20 *ILJ* 2580 (LC) at 2587.
[1014] Cooper 'Equality and Labour Law' *loc cit.* See for instance, *Dingler supra* for an approach reflective of constitutional law. By contrast, see *Woolworths (Pty) Ltd v Whitehead* (LAC) *supra.*

within a single enquiry, a reflection of the heritage of the unfair labour practice.[1015] As a result the court examined the effect of the impugned conduct on the complainant together with the justification for the conduct in order to decide finally whether there is unfair discrimination. The LC has accepted that, the role played by unfairness is to distinguish between permissible and impermissible discrimination.[1016] This approach is consistent with the notion of substantive equality. In other words, although certain measures may be discriminatory, they might nevertheless be justified because they are designed to redress inequality. The court in *Dingler* stated: 'The provision sorts permissible from impermissible discrimination. By this mechanism the legislature recognizes that discriminatory measures are not always unfair.'[1017] In this case the court followed constitutional jurisprudence and when deciding whether the discrimination is fair or unfair, relied on the context of the discrimination. Thus consideration is given to the position of the applicant's group in society, the impact of the conduct on the individual as part of the group; and the power in terms of which it was effected. The court in *Dingler* held that

> '[t]he case by case approach to equality, emphasizing the actual context in which each dispute arises seems as appropriate to unfair labour practice disputes as to cases testing the constitutionality of legislation. With this in mind, testing the legitimacy of discrimination requires more than an enquiry into the group that suffered the discrimination. The effect of the discrimination on the group must be considered and also the power in terms of which the discrimination was effected.'[1018]

6.4.6.5.1. Burden of proof

The LRA was silent on the burden of proof in relation to the establishment of both discrimination and fairness/unfairness. Under that Act, the LC chose to follow the constitutional regime whereby the onus of establishing the discrimination on both a listed and unlisted ground fell to the applicant.[1019] In *Ntai v SAB* it was held, bearing in mind the difficulties placed on a complainant wishing to prove the existence of discrimination, that initially the complainant need only establish a *prima facie* case of discrimination, after which the respondent would be required to offer an explanation. Thereafter, the

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[1015] The EEA does not cast unfair discrimination as part of the unfair labour practice thus an approach similar to that used in constitutional jurisprudence could be appropriate whereby the establishment of fairness would depend on an examination of the impact of the impugned conduct on the individual and the context, to be followed by an assessment of the justification.

[1016] Thus *Dingler supra* at 294: 'The notion of permissible discrimination is in keeping with a substantive, rather than formal approach to equality that permeates the Constitution and from which item 2(1) (a) draws its inspiration.'.

[1017] *Dingler supra* at 294.

[1018] *Dingler supra* at 295.

[1019] *Dingler supra* at 296-9; *Ntai supra* at 217-18.

onus shifted back to the complainant to show that the ground was the most probable cause of the discrimination. However mere allegation would not suffice for the proof of a *prima facie* case of discrimination.[1020]

In relation to 'unfairness', the LC under the LRA, following constitutional jurisprudence, found that where discrimination was on a listed ground it was presumed to be unfair, but could be rebutted with reference to the impact of the conduct on the applicant, the purpose of the conduct, and the position of the applicant in society (ie whether he or she was part of a vulnerable group or not). Where discrimination was on an unlisted ground, the unfairness would have to be established by the applicant, relying on these factors.[1021]

Cooper states that in the EEA, the requisite level of proof for an establishment of the existence of discrimination, as well as the question of who bears the onus of proving or rebutting unfairness are not altogether clear.[1022] Section 11 states: 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.' This wording is suggestive that a mere allegation would suffice at the initial stages of proving the existence of discrimination. However Cooper contends that that there must be at least some facts from which an inference of discrimination may be made.[1023]

The Act states that the employer must prove that the discrimination is not unfair.[1024] Thus under the EEA the burden falls on the employer in instances of discrimination on both listed and unlisted grounds, unlike in constitutional jurisprudence where the applicant bears the burden of proving unfairness on the unlisted grounds.[1025]

[1020] *Ntai supra* at 218-20 and 229. The court held, following *Transport & General Workers Union & another v Bayete Security Holdings* (1999) 20 *ILJ* 1117 (LC) that a mere allegation would not suffice to establish a prima facie case of discrimination.
[1021] *Ntai supra.*
[1022] Cooper 'Equality and Labour Law' *op cit* at 829.
[1023] *Ibid.*
[1024] See further J Grogan 'Fair discrimination: A question of numbers' (2002) 18(5) *EL* 16; A Landman 'Tweaking the scales - Reflections on the burden of proof in SA labour discrimination law' (2002) 23 *ILJ* 1133; M McGregor 'An overview of employment discrimination case law' (2002) 14 *SAMLJ* 157; M McGregor 'Elements of an employment discrimination case' (2002a) 10(2) *JBL* 98; O Dupper 'Affirmative action and substantive equality: The South African experience' (2002) 14 *SAMLJ* 275. See A Rycroft 'Preventing and Proving Work-Place Discrimination' (1991) 12 *ILJ* 722 for the procedure prior to the LRA and EEA.
[1025] PEPUDA also places the burden on the employer regarding both the listed and unlisted grounds.

6.4.6.6. Defences to unfair discrimination

It seems paradoxical that one is able to justify unfair discrimination. This, Dupper submits, is however what the law invites one to do. That is to take a claim of unfair discrimination that is in all other respects valid and allow it to be overridden by some competing interest.[1026] For this reason issues of justification reflect the debate of what kinds of discrimination society will tolerate. In the *Dingler* case the court stated that 'discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not the society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational'.[1027]

Smit states that discrimination in the employment sphere is an area of law where 'tensions are high between commercial efficiency and human rights, generalized assumptions, discrimination and ignorance and operational requirements, freedom of choice and protective labour legislation'.[1028] She notes further that with the decision in *Hoffman v SAA*[1029] the Constitutional Court, as the highest court in this country, has indicated clearly to other courts, organs of state and the private sector that the values of human dignity and equality entrenched in our Constitution cannot be weakened on grounds of profitability, economic reasons or customer preference.[1030] Rather, the human dignity of each person should be considered without making use of generalisations or stereotyping.[1031] Smit states that the cost of such a non-discriminatory society may be high but the costs to a society that does not value these fundamental rights will be even higher.[1032] This is a laudable statement, however, unfortunately in the labour sector, commercial interests do often prevail over the equality and dignity of an individual. It is for this reason that Dupper submits that the standard set for determining 'fair' discrimination should be an exacting one. He states that 'the law should allow other considerations to trump the equality principle only in the narrowest of circumstances.'[1033]

[1026] Dupper 'Justifying unfair discrimination' (2001) *op cit* at 147.
[1027] *Dingler supra* at 295.
[1028] N Smit 'Equity Legislation in South Africa with Specific Reference to HIV/Aids and Disability' (2002) 18(1) *The International Journal of Comparative Labour Law and Industrial Relations* 47 at 50.
[1029] *Hoffman supra.*
[1030] Smit *op cit* at 65.
[1031] *Hoffman supra* at para 37. The Court held that we must guard against 'allowing stereotyping and prejudice to creep in under the guise of commercial interests'. The Court stated that the greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination.
[1032] Smit *loc cit.*
[1033] Dupper 'Justifying unfair discrimination' (2001) *op cit* at 147.

In constitutional law the factors relevant to assessing the justification for the impugned measure relate to an examination of the nature of the right, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.[1034] In labour law there are two statutory defences to a claim of unfair discrimination. Section 6(2) of the EEA states:

> 'It is not unfair discrimination to -
> (a) take affirmative action measures consistent with the purpose of this Act; or
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.'

Dupper states that to date the pronouncements of the LC and arbitrators on what constitutes 'fair' discrimination have often been 'contradictory and unsupported'. As a result, he comments that our law has been left in a state of uncertainty.[1035] Once instance of such uncertainty is the issue of whether these are the only possible defences to a claim of unfair discrimination or whether, as set out in the *Dingler* case, there exists what Dupper calls a 'general fairness defence' alongside the specified defences. The court in *Dingler* found that as the two specified defences were 'not raised by the facts of this case' they needed no further consideration.[1036] It then went on to postulate a more general defence that has elements are similar in some respects to the factors to be considered under the constitutional justification provision.[1037]

A number of difficulties accompany the notion of a general unfairness defence. The main difficulty is that if such a defence were open to an employer alongside the specific defences, there would be no reason for the employer to rely on the specific defences as these present more difficult hurdles to surmount than a general defence.[1038] Cooper suggests that prohibiting an employer from relying on the general and specific defences in the alternative would not remedy the situation as again, unless employers were sure they could meet the requirement of the set defences, they would choose to rely on the general defence, thereby rendering the set defences redundant.[1039]

[1034] Constitution Section 36.
[1035] Dupper 'Justifying unfair discrimination' (2001) *loc cit.*
[1036] *Dingler supra* at 295.
[1037] Cooper 'Equality and Labour Law' *op cit* at 830.
[1038] *Ibid.*
[1039] *Ibid*

6.4.6.6.1. Affirmative Action

Section 6(2)(a) seeks to insulate affirmative action appointments against attack on the basis of unfair discrimination. However, employers are not given complete carte blanche in this regard; the provision sets certain limits. To escape being branded unfair an affirmative appointment must be 'consistent with the purposes' of the EEA. All this suggests that the benefits granted must be proportional to the goal of achieving equality. Grogan submits that the granting of extravagant benefits that disproportionately enhance the positions of members of formerly disadvantaged groups at the expense of others could conceivably go beyond the goals of the EEA.[1040] For example, an employer that increased the wages of female employees above those of their male counterparts could not claim that this falls within the scheme of employment equity.[1041]

Section 9 of the Constitution permits legislative and other measures 'designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. This clearly shows that it is the aim of the Constitution to use affirmative action measures as a tool in the effort to achieve substantive equality. In *Stoman v Minister of Safety & Security & others*[1042] the High Court held that as the Constitution promotes substantive equality this includes affirmative action measures sanctioned by legislation such as the EEA and PEPUDA. The court in *Stoman* held that the pertinent issue was only whether the particular affirmative action was indeed 'designed to protect and advance' persons or categories of persons who were previously disadvantaged - there must, according to the Constitution, be 'a rational connection' between the affirmative measures and the aims which they are designed to achieve.[1043]

In *Public Servants Association of SA & others v Minister of Justice,*[1044] a decision under the Interim Constitution, the court held that a rational connection was lacking when affirmative action resulted in the appointment of applicants whose manifest unsuitability would compromise another constitutional imperative that rested on the public service: to promote efficiency. In *Stoman's* case, decided under the final Constitution, the High Court accepted the finding in *PSA* that affirmative action cannot justify the

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[1040] Grogan *Workplace Law* 2005 *op cit* at 287.
[1041] Although it was not the primary issue in *McInnes v Technikon Natal* (2000) 21 *ILJ* 1138 (LC), the court expressed its amazement at the fact that an affirmative action appointee to a post of lecturer was paid more than his head of department.
[1042] (2002) 23 ILJ 1020 (T).
[1043] *Stoman supra.*
[1044] (1997) 18 ILJ 241 (T).

appointment of an applicant who is incapable of doing the work attached to the post. However, the court was not prepared to accept that affirmative action can therefore be applied only in cases where applicants from previously disadvantaged groups have qualifications and attributes 'broadly' comparable to those of better qualified or more experienced white males. Such a restriction, said the court, would frustrate the goal of equality.[1045]

Apart from a fleeting reference to the promotion of economic development and the efficiency of the workforce in its preamble, the EEA does not expressly deal with how efficiency must be reconciled with representivity when employers strive to promote the latter goal. Nor does that Act indicate how much weight is to be accorded the two goals when they clash.[1046] Some guidance can be gleaned from *Stoman's* case where Van der Westhuizen J held that the ideal of representivity, or the ideal of the achievement of full equality, cannot necessarily be separated from the ideal of efficiency.[1047]

There is also a possibility that conflict may arise between designated groups as to who is the most deserving of affirmative treatment. Grogan submits that in such cases that it appears that black candidates may be preferred.[1048]

Thus if an employer intends to rely on affirmative action as a defence it must ensure that the affirmative action taken has a rational connection with the purpose it is designed to achieve. However affirmative action will not be an adequate defence for the appointment of unqualified persons or increased payment only to those people within a designated groups.

6.4.6.6.1.1.Is an employment equity plan necessary?

[1045] The court held further, as to the view expressed in the *PSA* case that representativity in the public service could not be pursued in *vacuo* but had to be balanced against efficiency, and that the appointment of a candidate from one race group above a candidate from another race group was acceptable only where the candidates all had broadly the same qualifications and merits: first, efficiency was not completely separate from and principally opposed to the requirement of representativity, and secondly, to allow consideration of representativity and affirmative action to play a role only where the candidates had the same qualifications and merits to such an extent that there was virtually nothing to choose between them would be too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality. (*Stoman supra*).

[1046] See in this regard *Stoman supra* and Grogan *Workplace Law* 2005 *op cit* at 288-90.

[1047] *Stoman supra* at 1034.

[1048] Grogan *Workplace Law* 2005 *op cit* at 391.

There is no question that affirmative action serves as a defence for an employer.[1049] However there has been some argument as to whether an employer requires an employment equity plan in order to rely on such a defence.[1050] In *Gordon v Dept of Health*[1051] where it was held, with reference to the provisions of the Interim Constitution, that it was not necessary for a plan to be in place before affirmative action could be applied. This was because the Constitution expressly authorized affirmative action. In *PSA obo Haschke v MEC for Agriculture & Others*[1052] the court held 'the Constitution provides an independent ground for implementing affirmative action. However, if there is a plan then it must be followed.'[1053] However, in *PSA of SA obo Helberg v Minister of Safety & Security & Another*[1054] it was stated that 'the respondent therefore could not implement any measures under affirmative action when no plan existed.'[1055] Jordaan argues that the line of reasoning adopted in *Gordon* fits better with the substantive approach to equality. Thus would appear that an affirmative action plan is not necessary for reliance on affirmative action as a justification in unfair discrimination claims, provided the decision to give preference is rational and justifiable. However, if a plan is in existence, it should be followed.

6.4.6.6.2.Inherent requirements of the job

Section 6(2)(b) of the EEA provides that it is not unfair to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job'. The legislature has left it to the labour courts to develop a test for establishing when the various 'arbitrary grounds' listed in section 6(1) can be said to be related to an inherent requirement of a job.[1056]

The word 'inherent' suggests that possession of a particular personal characteristic (for example, being male or female, speaking a particular language, or being free of a disability) must be necessary for effectively executing the duties attached to a particular position.[1057] The test must of necessity be relative. The English courts have held that discrimination employment criteria are defensible if they correlate on objectively determinable grounds with a 'real need of the enterprise' and if they are

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[1049] See further B Jordaan 'Employment Equity' in J Grogan, B Jordaan, P Maserumule and S Stelzner *Juta's Annual Labour Law Update* (2005) at 95-6.
[1050] See also J Grogan *Workplace Law* 2005 *op cit* at 297.
[1051] [2004] 7 BLLR 708 (LC).
[1052] [2004] 8 BLLR 822 (LC)
[1053] *Haschke supra* at par 52.
[1054] [2005] 2 BLLR 135 (LC)
[1055] *Helberg supra* at par 14.
[1056] Grogan *Workplace Law* 2005 *op cit* at 299.
[1057] *Ibid.*.

necessary to satisfy that need. In *Association of Professional Teachers v Minister of Education* it was stated, '[I]n the employment relationship, discrimination or differentiation on the basis of what an employee *is*, instead of what he or she *does*, should not be condoned.'[1058]

Grogan[1059] notes that the case of *Whitehead v Woolworth*[1060] illustrates the complexity of the argument that discrimination is related to the 'inherent requirements of the particular job'. Due to operational requirements Woolworths had to develop a new employment policy. People taking specific positions had to remain in the post for at least a year. After she had been offered such a position, Whitehead disclosed that she was unable to furnish such a guarantee because she was pregnant. The company then withdrew the offer of permanent employment, and instead offered her a fixed-term contract that would terminate at the time of her confinement. The LC concluded that a person could never be said to be unsuitable for a position because of the possibility, or in this case the certainty, of a future absence. The court held that an uninterrupted service as a condition of employment, or as an inherent requirement of the job was unreasonable because no employee can possibly guarantee that he or she will fulfil it. The court defined an 'inherent requirement of the job' as an 'indispensable attribute which must relate in an inescapable way to the performing of the job'.[1061] Woolworths' conscious decision to turn Whitehead down for the permanent position for the sole reason that she could not work continuously for the first 12 months was accordingly nothing other than discrimination against her because she was pregnant. Thus it was held that Woolworths' constitutional obligations precluded measuring the fairness of discrimination 'against the profitability or for that matter efficiency of a business enterprise'.

The *Woolworths* judgment was reversed on appeal, but the majority held in favour of Woolworths for different reasons.[1062] Zondo AJP, as he was then, decided that the real reason why Whitehead was not employed was simply that the company had found a better candidate. However, Willis JA considered the court *a quo's* view that continuity of employment did not in the circumstances amount to an inherent requirement of the job, and came to the opposite conclusion. According to Willis JA, considerations of profit might not be conclusive. But they nevertheless remained relevant. In Whitehead's case, they were relevant because she was in a highly paid position that required constant attention to the details of the job. At any rate, the consideration of continuity of employment was

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[1058] (1995) 16 *ILJ* 1048 (IC) at 1085G.
[1059] Grogan *Workplace Law* 2005 *op cit* at 300-5.
[1060] *Woolworths* (LC) *supra.*
[1061] *Woolworths* (LC) *supra* at para 34.
[1062] *Woolworths* (LAC) *supra.*

compelling enough to prove that Woolworths' overriding consideration was not an aversion to appointing pregnant women. It was accordingly not possible to make a finding that Whitehead's pregnancy was the dominant reason for the decision not to offer her a permanent position.

In cases where otherwise suitable applicants have been turned down for reasons that would otherwise amount to unfair discrimination, the employer must prove that the person was indeed incapable of performing the work for which or she had applied. This is well illustrated by *Hoffman v South African Airways*[1063] SAA argued that Hoffman was incapable of performing the work of a flight attendant because he was HIV positive. The High Court agreed. However, the Constitutional Court held on appeal that the airline had failed to prove that the appointment of Hoffmann as a cabin attendant would pose any significant threat to passengers. While conceding that the argument that the economic needs of the enterprise were important, the court held that the constitutional right of HIV-positive people to be protected against 'stigmatisation and prejudice' was of greater social value.

These cases illustrate that the economic interests of the employer must be weighed up the individual's right not to be discriminated against. It is important that the courts balance these contrasting interests very carefully. It is submitted that the approach adopted in *Hoffman's* case is a more appropriate reflection of the importance of individual human rights. It is likely that there will be many instances in which an employer can legitimately claim that despite the provision of reasonable accommodation, a person with a mental health problem is unable to perform the inherent requirements of the job. It must once again be reiterated that it is exceptionally important for an employer to know exactly what the essential functions of a job are, as an inability to perform a task that is not integral to the fulfilment of the position is unlikely to justify unfair discrimination. The definition adopted by the LC in the *Woolworths* case is, it is submitted, gives appropriate weight to the right not to be discriminated against.

6.4.7. Medical Testing

An employer would obviously prefer to have employees who are in good health as there are concerns relating to high medical costs, insurance and protracted absenteeism that invariably attach to serious illness.[1064] The use of medical testing in the pre-employment selection phase to determine an

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[1063] *Hoffman supra.*
[1064] AC Basson 'Employment Testing' in EML Strydom (ed) *Essential Employment Discrimination Law* (2004) 192.

individual's medical status raises complex social, ethical and legal questions.[1065] Ngwena and Pretorious state that medical testing 'opens the door to unwarranted invasions of privacy and stigmatisation.'[1066] The general rule is that an employer may not require a medical test unless such a test complies with s7 of the EEA which states:

> '(1) Medical testing[1067] of an employee is prohibited, unless-
>
> (a) legislation permits or requires the testing;[1068] or
> (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefit or the inherent requirements[1069] of the job.'

Basson submits that to determine the fairness or justification of a pre-employment (or post-employment) medical test, all the factors listed in s7(1)(b) should be considered individually and together.[1070]

6.4.7.1. Medical Testing and the Disabled Applicant

The position with regards disabled job applicants is somewhat different. The Disability Code specifies that 'subject to reasonable accommodation, employers should apply the same criteria to test the ability of people with disabilities as are applied to other applicants.'[1071] Despite this, it is understood that the medical test results are often used to discriminate against people with disabilities and further that the right of the disabled person to choose whether or not to disclose their disability should be respected. Thus the Disability Code proposes a two-stage approach to the selection of disabled employees. The first of these relates to whether the applicant is suitably qualified and the second concerns whether the person needs any accommodation in order to carry out the essential functions of the position.[1072]

When an employer identifies a disabled applicant who is suitably qualified for the specific job[1073] they must make a conditional job offer to applicant before any medical or similar assessment is

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[1065] *Ibid.*
[1066] Ngwena and Pretorius 2003 *op cit* at 1838.
[1067] Section 1 of the EEA defines 'medical testing' as 'any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.'
[1068] For example in terms of s45 of the Health Act 63 of 1977 the Minister of Health has the power to declare any medical condition a notifiable illness.
[1069] The specific mental or physical ability must be job-related and essential to the performance of the particular job.
[1070] AC Basson 'Pre-Employment Testing' (2002) 14 *SA Merc LJ* 305 at 309.
[1071] Disability Code Paragraph 7.2.1.
[1072] Disability Code Paragraph 7.2.2. (a) and (b).
[1073] See EEA Section 20.

permitted.[1074] Ngwena and Pretorius are in favour of this approach. They suggest that often, when medical testing is conducted early in the selection process, a disabled applicant, who is not selected for legitimate reasons, may be left with a nagging suspicion that the decision was motivated by disability-related prejudice.[1075]

6.4.7.2. Conditional Job Offers

By imposing a two-stage approach so that medical testing may only be required after a conditional job offer has been made, the Disability Code and the TAG emulate the approach adopted in the ADA.[1076] The difference between the approaches in the two jurisdictions is only apparent in the treatment of existing employees, as will be discussed below.

After a conditional offer is made, the employer may require a medical exam or ask disability-related questions. If the job offer is subsequently withdrawn because of medical information, the employer must show that the reason for doing so was relevant and appropriate to the kind of work for which the applicant or employee is being tested. A conditional job offer may only be made to one person at a time, and not to all applicants with disabilities that may have applied for the job.[1077]

Once the functional assessment is concluded, the employer may either hire the disabled applicant (but not on less favourable terms and conditions than an employee doing the same work, for reasons connected with that person's disability)[1078] or withdraw the offer. According to Paragraph 7.4.5 of the Disability Code,

> 'The employer may withdraw the job offer if the testing shows that:
> - Accommodation requirements would create unjustifiable hardship; or
> - There is an objective justification that relates to the inherent requirements of the job; or
> - There is an objective justification that relates to health and safety.'

[1074] Disability Code Paragraph 7.4.1.
[1075] Ngwena and Pretorius 2003 *loc cit.*
[1076] *Ibid.*
[1077] Christianson 2004 *op cit* at 183. It is important to note that it will not constitute indirect discrimination to assess or test applicants with disabilities for a specific job and not require all other applicants to undergo the same assessment or testing. TAG Item 7.5.2. and Disability Code Paragraph 7.4.3.
[1078] Disability Code Paragraph 7.5.

6.4.7.3. Testing Health Status versus Testing Functionality

Paragraph 8.1.3 of the Disability Code expressly states that tests to establish the health of a job applicant should be distinguished from tests that assess ability to perform the inherent requirements of the job.[1079] This point is reiterated in the TAG where it is stated that the purpose of a conditional job offer is to allow the employer to assess the ability of the applicant with a disability to perform the essential functions of a specific job, with or without reasonable accommodation, and not to assess medical condition nor the nature of the disability. Thus Christianson submits that tests to establish the health status of an employee (or admission to a medical aid scheme) should only be carried out once it is established that person is in fact a suitably qualified person in terms of the essential requirements of the position.[1080] This does not mean however that the employer is barred from conducting medical tests that relate to health status on a person with a disability. Item 8.1 of the TAG states that subject to the provisions of the Act, an employer may require a medical examination[1081] or make a disability-related inquiry of an employee as long as the inquiry or exam is relevant and appropriate[1082] to the kind of work for which the applicant or employee is being tested.

It is important to note that the Disability Code states that when assessing whether an applicant is suitably qualified, and employer may not request information about actual or perceived[1083] disability from a previous employer or third party unless with the written consent of the applicant.[1084] It is important to have this provision because it prevents a potential employer invading the privacy of a disabled applicant by speaking to a previous employer about their performance or even by consulting with the person's doctor or family. The TAG states that questions or examinations that illicit unnecessary information about the person's disability, even when information is requested from a third party (such as a previous employer), would be impermissible. [1085]

[1079] Basson 2004 *op cit* at 197.
[1080] Christianson 2004 *op cit* at 184.
[1081] Examples of medical examinations relevant to people with mental health problems listed in the TAG include nerve conduction tests, psychological tests designed to measure a mental disorder or impairment, diagnostic procedures such as x-rays, CAT scans, and MRIs (Magnetic Resonance Images).
[1082] Disability Code Paragraph 8.1.1. requires that tests must be 'relevant and appropriate'.
[1083] The anomaly of the occasional appearance of 'perceived disability' in the code is the remnant of the inclusion of perceived disability in the draft Disability Code.
[1084] Disability Code Paragraph 7.2.3.
[1085] TAG Item 8.1.

Assessments or tests should be job related. The focus should be on ascertaining whether the applicant has the ability to perform the job and, if necessary, the type of reasonable accommodation that would assist performance. Any assessment or testing must comply with the statutory requirements and should determine if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation.[1086]

6.4.7.4. Confidentiality

Employers must take note of the fact that any medical information obtained from a disability-related inquiry or exam, as well as any medical information voluntarily disclosed by an employee must be treated as a confidential medical record. Paragraph 14 of the Disability Code requires that employers or their health and medical services personnel may only gather private information about employees if it is necessary to achieve a legitimate purpose (such as establishing whether someone is competent to carry out the inherent requirements of the job) and then only with the written consent of the person. Furthermore, this type of information must be kept separate from general personnel records and should be destroyed when no longer required.[1087] It is important that these requirements are contained in the Disability Code as it not only respects the person's right to privacy and autonomy but also respects the person's discretion regarding the disclosure of their disability.

6.4.7.5. Testing for illegal drugs and alcohol

It is pointed out in the TAG that questions relating to illegal drug use or whether a person has been drinking are not considered disability-related inquiries.[1088] This raises an interesting question because although, as discussed earlier in this chapter, alcohol and illegal drug dependency is excluded from the definition of disability, it is not excluded if the person is in a rehabilitation programme. What if an employer wanted to verify a job applicant's participation in a rehabilitation programme by conducting a drug test? What would be the position when an employee is in a rehabilitation programme but the employer wishes to monitor their adherence to the programme by conducting monthly urine tests? Would the right to privacy[1089] trump over the employers desire to have a drug or alcohol free

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[1086] TAG Item 7.5.2.
[1087] Disability Code Paragraphs 14.1.2 and 14.1.3.
[1088] TAG Item 8.1.
[1089] Constitution Section 14.

workplace?[1090] It is submitted that the right to privacy and the prohibition on discrimination on the basis of a disability may well outweigh the employer's interests unless the employer could demonstrate, in line with s7 of the EEA, that it related to the inherent requirements of the job or that it was necessary for reasons of social policy. Basson submits that even in the case of non-disabled applicants there should be compelling reasons before a pre-employment drug test should be allowed.[1091] However this submission becomes irrelevant in the face of the strict requirements for the definition of disability. It is unlikely that a person with a substance abuse disorder would ever classify as disabled for the purposes of the EEA.

6.4.7.6. Assessment during employment

It is not only at the pre-employment stage that medical or similar assessments may be necessary. As mentioned above, an employer may utilise tests in order to make a decision regarding a promotion or dismissal of an employee. It may also be necessary in a situation where an existing employee develops a condition, either on-the-job or off-the-job, and the testing is needed to assist in the decision as to whether and how the individual should be accommodated, if necessary. Ngwena and Pretorius comment that the Disability Code's treatment of existing employees improves upon the approach adopted in the ADA.[1092] This is because the ADA requires a higher standard to prove the necessity of a test for an existing employee than it does a job-applicant. The employer must show that the test is job-related and consistent with business necessity in order to test an existing employer. The implication of this is that non job-related examinations may be requested of job applicants but not of current employees.[1093] The argument for the differing standards is that the best measure of the employee's capacity is their ability to carry out the functions of the job. Ngwena and Pretorius support the South African approach, as they believe it will prevent employers going on a 'fishing expedition' with prospective employees, who are, in their opinion more vulnerable than current employees.[1094]

Like pre-employment testing, the assessments used on existing employees must comply with the requirements of the Act and they should be relevant and appropriate. Stefan notes that when it comes to mental health problems the American courts have been particularly lenient on employers requiring an

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[1090] Basson 2004 *op cit* at 195.
[1091] *Ibid.*
[1092] Ngwena and Pretorius 2003 *op cit* at 1838.
[1093] Ngwena and Pretorius 2003 *op cit* at 1839.
[1094] *Ibid.*

employer to undergo psychiatric evaluations.[1095] She states that it has been held in various decisions that an employee who requests a leave of absence because of a psychiatric disability can be forced to submit to testing to evaluate his or her fitness to return to work and further may have to agree to take medication, undergo psychotherapy, or comply with 'any and all' treatment recommended before returning to work.[1096] South African courts should take heed of these decisions and ensure that any testing permitted does not unduly restrict the employees right to privacy and bodily integrity.

6.4.8. Psychological Assessment

International as well as local research has demonstrated the role that psychometric assessment can play in significantly improving the selection process for both new entrants and internal promotions. Effective psychometric assessment can also play a key role in staff development processes – an important challenge presently facing South Africa. Davis submits that the utility of psychometric tests is not limited to matching job applicants with the requirements of the job. They are also used to 'select employees who will develop "commitment" to the organisation and fit in with its "culture"...'[1097]

Psychometric tests are commonly employed as aids in occupational decisions, including the selection and classification of human resources..[1098] It is important that the psychometric tests are used to measure the suitability of the person for the job and not merely to measure the person in the abstract.[1099]

6.4.8.1. Challenges surrounding psychological assessment

In her article entitled 'Counting Flying Pigs: Psychometric Testing and the Law' Bonthuys states that her argument is not with 'psychometric methods of counting flying pigs, but with whether, legally speaking, they should be counted at all.'[1100] What she means by this, she elaborates, is whether concepts such as IQ, neuroticism or attitudes are entities worthy of understanding in their own right or

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[1095] Stefan 2000 *op cit* at 288.
[1096] *Ibid.*
[1097] Davis 'Employment Selection Tests and Indirect Discrimination: The American Experience and its Lessons for Australia' (1996) 9 *Australian J of Labour Law* 187 at 188.
[1098] Van der Merwe *op cit* at 77.
[1099] Basson 2004 *op cit* at 217.
[1100] E Bonthuys 'Counting Flying Pigs: Psychometric Testing and the Law' (2002) *ILJ* 1175 at 1181.

whether they are merely tested to satisfy the need to make decisions about people.[1101] In relation to this argument it is not the testing of existing practical skills, such as a 'work sample' test in which an applicant is assessed on their ability to perform a sample of the actual work involved in the job, that is problematic, it is tests that measure general abilities like intelligence or tests that measure personality traits. The problems of cultural and gender bias are particularly prevalent in psychological tests for personality traits such as the Minnesota Multiphasic Personality Inventory (MMPI)[1102] which measures emotional stability, conscientiousness, agreeability and neuroticism.[1103] There is disagreement among the psychological community as to the efficacy of these types of tests in predicting job success.[1104]

Bonthuys argues that, despite claims to the contrary, the formulation and application of psychometric tests involves a moral or social judgment. Attributes indicative of intelligence and personality traits that predict the ability to perform in a highly paid job are considered desirable.[1105] This has the effect of reinforcing discriminatory social norms by ranking people in society. Interpretative tests are also particularly susceptible to cultural bias. Tests such as the Rorscharch test, the results of which are dependent on a psychiatrist interpreting the subject's response to ambiguous stimuli will invariably be influenced by the cultural bias of both the subject and the interpreter.[1106]

It should be clear from the above that the challenges surrounding the use of psychometric testing in selection and other processes are quite extensive. In the United States the question of whether a psychometric test indirectly discriminates against a particular race group or gender has received comprehensive judicial consideration.[1107] The matter has not yet been challenged in the South African courts. It is submitted that if an employer abides by the requirements set down in the EEA as well as the extensive guidelines provided in the Codes and the TAG it is unlikely that a claim for unfair discrimination on the basis of the use of psychometric tests would be successful.

[1101] *Ibid.*

[1102] The original sample groups used for determining the normal response to this test were white, married, rural, blue-collar Americans. Although the sample groups for the MMPI-2 were more diverse, a diverse selection of the American population is not an accurate reflection of the diversity of South African society.

[1103] Basson 2004 *op cit* at 218.

[1104] Bonthuys *op cit* at 1186. Difficulties relating to objective personality inventories include: the unsuitability for predicting job performance because they are mostly based on measurements designed for clinical purposes (such as the MMPI); answers can easily be faked to provide a favourable impression and; this method assumes that all people are efficient in and ideally suited to their jobs.

[1105] *Ibid.*

[1106] Bonthuys *op cit* at 1185. There are additional problems, particularly in South Africa, relating to the translation of tests. The majority of tests are still only available in English and Afrikaans and meaning is often lost in the translation of tests.

[1107] Basson 2002 *op cit* at 333. See further Basson 2004 *loc cit* for a detailed discussion of the developments in the USA. As all American jurisprudence has focused on race and gender discrimination it is beyond the scope of this thesis.

6.4.8.2. Assessment under the EEA

Psychometric tests can contribute to the efficiency of selection and placement in industry, if used carefully and responsibly. As a result, the EEA could not ignore the issue of psychological testing. Section 8 of the EEA prohibits 'psychological testing[1108] and other similar assessments of an employee' unless 'the test or assessment being used (a) has been scientifically shown to be valid and reliable; (b) can be applied fairly to all employees; and (c) is not biased against any employee or group'.[1109] Furthermore the inclusion of ss 20(3) which specifies that individuals will be regarded as being suitably qualified on the basis of their 'capacity to acquire, within a reasonable time, the ability to do the job' indicates that some form of assessment is called for to determine whether job applicants have such potential. According to Eckstein[1110] s8 of the EEA highlights the importance of the validation of any instruments to be used for assessment and selection purposes.

It is clear that s8 recognises that the use of psychological testing in the employment sphere can result in unfair discrimination. Bonthuys submits that the requirements of validity, bias and fairness should be given a purposive interpretation.[1111] She submits further that any assessment instrument that does not advance the goal of substantive equality would not be sanctioned in terms of the EEA.[1112] Her contention is supported by the approach adopted in the Assessment Code. Paragraph 1.2 of this Code describes its purpose but also captures the reasoning behind the approach to psychological assessment in both the EEA and Assessment Code:

> 'To promote the use of psychological assessment methods as a means of identifying talent and promoting effective human resource development and personal growth. This reflects the intention to align psychological assessment with the drive to create opportunities for those previously denied access to development; to enhance South Africa's global competitiveness by promoting effective human resource development; and to prevent the use of testing for negative and unfair discriminatory purposes.'

[1108] 'Psychological assessment includes psychometric testing plus any other procedure used to assess human performance or potential.' Department of Labour 'Code of Practice for Psychological Assessment for the workplace in South Africa' (1998). (The Assessment Code)

[1109] '[b]ias is a technical issue relating to how assessment instruments are developed and researched, while fairness is a political or social issue pertaining to how assessment instruments are used.'(Assessment Code).

[1110] S Eckstein 'Testing Times' (1998) 17(6) *People Dynamics* 54.

[1111] Bonthuys *op cit* at 1191.

[1112] Bonthuys *op cit* at 1193.

Thus it is apparent that an enquiry relating to the validity, bias or fairness of a psychological assessment will have to be conducted against the backdrop of the broader purpose of promoting previously disadvantaged groups.

6.4.8.3. Overcoming invalidity, bias and unfairness

Despite the aspirant intentions of the EEA and the Assessment Code some practical difficulties remain. It is accepted that many of the instruments[1113] used for psychological testing are culturally biased or invalid. However at present there are few available alternatives. Thus the available measures will have to be modified or alternative methods of selection will have to be used until assessment measurements reflective of South Africa's diversity are developed. Huysamen[1114] suggests that that South African assessment practitioners, especially those in employment testing, may benefit immensely from familiarizing themselves with the developments and standards contained American Psychological Association's 'Standards for educational and psychological testing' (1999). He submits that the APA's Standards may serve as a manual for improving validity evidence, reducing predictive bias and ensuring fairness as mandated by the EEA.[1115]

Van der Merwe suggests that in order to overcome some difficulties with psychometric testing, such as cultural and educational bias, use of competency-based assessment, which is directly linked to job content and inherent job requirements would be very effective.[1116] One of the benefits of this approach is that it is job related rather than norm based. The use of competency-based assessment is heavily reliant on a thorough and accurate analysis of what the essential elements of a specific job are. By clarifying what the inherent requirements are, assessment of competency in each of the requirements could be conducted. Not only would this eliminate fairness, bias and validity issues but it would be more effective in gauging a person's ability to perform the required functions than a more general test. Cook is of the opinion that the difficulties relating to the use of personality tests in South Africa are currently insurmountable. He therefore recommends that personality tests should only be used for

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[1113] 'An assessment instrument is a measure based on a sample of behaviour attributes used for making decisions about people in the workplace.'(Assessment Code).

[1114] GK Huysamen 'The relevance of the new APA standards for educational and psychological testing for employment testing in South Africa' (2002) 32(6) *South African Journal of Psychology* 26 at 26.

[1115] Huysamen *op cit* at 31.

[1116] R P Van der Merwe 'Psychometric Testing and Human Resource Management' (2002) 28(2) *SA Journal of Industrial Psychology* 77 at 85.

selection purposes where the job requirements clearly indicate specific traits measured by the test, and then only in conjunction with other information.[1117]

A further recommendation for compliance with the requirements of s8 of the EEA can be gleaned from the American EEOC's Guidelines on Employment Testing Procedures.[1118] In terms of these guidelines only tests 'which fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks or to perform a particular job or class of jobs' are allowed. Basson submits that this implies that the test must be job-related and thus only the applicant's ability to do the job and not their general ability should be tested.[1119]

6.4.8.4. Psychological Assessment as 'vehicle' for discrimination

In the United States any test designed to reveal mental health problems or that would provide evidence that would lead to identifying a mental disorder or impairment is prohibited.[1120] Consistent with the American courts' tendency to ignore the EEOC Guidelines in relation to disability, in *Thompson v Borg-Warner*[1121] the court held that tests that elicit information about a person's 'emotional stability' and 'behavioural problems' were not contrary to the ADA's prohibition on pre-employment medical testing. Stefan submits that this finding has diminished the impact of the ADA's protection against pre-employment testing.[1122] The court's reasoning was partially based on the fact that such tests would probably expose that an individual had a personality disorder, which was unlikely to be considered a disability anyway. Menjoge submits that it is not too difficult for an employer to avoid the classification of most psychological and personality tests as medical tests.[1123] Even the tests that are most likely to be administered by health care professionals, like the Rorschach inkblot test or the Thematic Apperception Test, are not physically invasive, do not require medical equipment or medical settings for administration and they do not measure physiological responses.

[1117] J Cook 'Report on a survey of psychometric testing in South African companies' (1997) Unpublished report done for South African Breweries Beer Division as quoted in Van der Merwe *op cit* at 83.
[1118] The most recent of these was published in 1970 by the American Equal Employment Opportunities Commission (EEOC).
[1119] Basson 2004 *op cit* at 221.
[1120] EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (1995).
[1121] 16 ADD 344 ND Cal 1996.
[1122] Stefan 2000 *op cit* at 289.
[1123] SS Menjoge 'Testing the Limits of Anti-discrimination Law: How Employers' Use of Pre-employment Psychological and Personality Tests Can Circumvent Title VII and the ADA' (2004) 82 *N C L Rev* 326 at 350.

The difficulty lies in the fact that by their very nature, psychological and personality tests probe into applicants' psychological conditions and personality traits to detect abnormalities.[1124] In fact many of the tests used are identical to those used by clinicians when making their diagnoses. Thus when used during the hiring process, can operate to exclude from employment numerous applicants with depression, bipolar disorders, anxiety disorders, schizophrenia and a variety of other mood and psychiatric disorders. Menjoge submits that employers using personality and psychological tests may well be able to intentionally discriminate by selecting those applicants who appear to be in the most psychologically desirable condition, even if the tested characteristics are not necessary for the job at hand.[1125] Such tests can serve as a vehicle through which employers can intentionally discriminate against individuals with mental health difficulties, or can result disproportionate exclusion of individuals with mental health difficulties.[1126]

A further problem that Menjoge highlights is that even if personality tests were prohibited by the ADA, many applicants are deterred from challenging the use of such tests because they will not have standing to do so. Courts are generally of the opinion that in order to bring a claim under the ADA, one must prove that one is disabled in terms of the Act.[1127]

6.4.8.5. Psychological Assessment of People with Disabilities

The TAG states that due to the efficacy of the interview as a measurement tool being questioned, more employers are looking to psychometric or personality tests to measure key competencies for the job.[1128] Van der Merwe states that it is a well-known fact that well developed psychometric tests are much more valid and fair than many other selection methods, for example unstructured screening interviews.[1129] This however is only the case if an assessment instrument has been designed to cater for a diversity of subjects, including those with disabilities.

As has been discussed above many reservations have been expressed generally about the use of personality trait tests. However it is clear that the test will serve even less purpose if it will merely

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[1124] Menjoge *op cit* at 352.
[1125] Menjoge *op cit* at 353.
[1126] Menjoge *op cit* at 352.
[1127] Menjoge *op cit* at 350.
[1128] TAG Item 8.5.1.
[1129] Van der Merwe *op cit* at 84.

inform an employer that an employee with a severe mood disorder is emotionally unstable. This is where competency-based evaluations can be particularly useful. If the emotional instability of the person does not affect her ability to perform the essential functions of the job then the test results would certainly not justify any discriminatory conduct on the part of the employer.

Just as tests can be culturally biased, Menjoge submits that tests are often inherently biased against individuals with disabilities and further bias results from the manner in which they are administered. If a test screens out or tends to screen out an individual with a disability or a class of such individuals on the basis of disability, it must be job-related and consistent with business necessity.[1130]

Item 8.6 of the TAG sets out guidelines to be followed by employers when using psychometric tests to assess individuals with disabilities. The recommendations relate mostly to the ways in which tests and the evaluation of the results thereof can be modified to suit the test takers particular disability.[1131] It states further that due to diversity in disability, and the modifications that may be made to tests and testing procedures, professionals must consult relevant experts on that particular type of disability as well as adopt a case-by-case approach in reaching decisions on the particular modifications, which may be made in any particular case.[1132]

6.4.9. The Right to Positive Measures designed to achieve substantive equality

The EEA not only prohibits discrimination, *inter alia*, on the ground of disability,[1133] but it also requires that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy of practice.[1134] Thus the EEA requires designated employers to implement positive measures.[1135] These positive measures include affirmative action[1136] and reasonable accommodation. It will be argued below, in line with the quest for the

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[1130] *Ibid.*

[1131] In the appendix to the Assessment Code it is stated that ethical assessment includes making appropriate arrangements for assessing those with disabilities as and when necessary.

[1132] TAG Item 8.6.

[1133] EEA Section 6.

[1134] EEA Section 5.

[1135] An employer will have to identify possible employment barriers and ways to eliminate them. (s15) The Act requires employers to deal with the under-representation of people with disabilities in the workplace. In this regard an employment audit of the workplace must be done, (s9) and an employment equity plan drafted after consultation with employees. (s20) The plan must include *inter alia*, numerical goals to address under-representation. (s20(2)).

[1136] It is beyond the scope of this thesis to contemplate the merits of affirmative action. For further information see for example O Dupper 'Affirmative action and substantive equality: The South African experience' (2002) 14 *SAMLJ* 275; J

attainment of substantive equality, that it is not only designated employees[1137] of designated employers who are entitled to these positive measures. Thereafter the content of reasonable accommodation measures and the suggested means of implementing them with regards people with mental health problems will be outlined.

6.4.9.1. A 'right' to affirmative action

There is still no clarity from the courts over the question whether affirmative action may be used only by an employer as a defence against a claim of unfair discrimination, or whether someone belonging to the designated groups can use it as a cause of action to obtain an advantage.[1138] The decision of Waglay J in *Harmse v City of Cape Town*[1139] challenged the conventional position that being a member of a designated group does not provide a ground for claiming preferential treatment in terms of the EEA. The court in *Harmse,* gave rise to the possibility that affirmative action being used both as a 'shield' against claims of unfair discrimination and as a 'sword' by designated groups excluded from appointment or promotion.

In *Dudley v City of Cape Town*[1140] Tip AJ took a differing view. It was held, in distinguishing between Chapter II and Chapter III of the EEA that Chapter III, which relates to employment equity, cannot provide a cause of action for unfair discrimination. In essence the court held that there is no individual right to affirmative action; the enforcement of affirmative action is a matter for collective bargaining and regulation by the director-general of labour. Dudley has subsequently appealed to the Constitutional Court, but unsuccessfully so, with the court holding that her appeal lay to the Labour Appeal Court. An appeal before the latter court is still pending.[1141] In *Cupido v GlaxoSmithKline SA*

Grogan 'Affirmative action defused: The limits of employment equity' (2003) 19(2) *EL* 17; M McGregor 'Affirmative action in employment law: Trends emerging from the cases' (2001) 9(3) *JBL* 94; M McGregor 'Affirmative action: An account of the case law' (2002) 14 *SAMLJ* 253; JL Pretorius 'Legal Evaluation of Affirmative Action in South Africa' (2001) 26(3) *Journal for Juridicial Science* 12; and MH Rioux 'Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality' (1994) 7 *Can J L & Jurisprudence* 227.

[1137] It is important to note that the body of opinion supports affirmative action applying to all members of a designated group regardless of actual individual past disadvantage. This consistent with the motive of promoting previously disadvantaged groups and ensuring equitable representation at all levels in the workplace. See M Mcgregor ' "Disadvantage" in Affirmative Action: Developments in the concept of "disadvantage"' (2002) 10(3) *JBL* 141 for an excellent review of case law and academic opinion on this issue.

[1138] See Jordaan 2005 'Employment Equity' *op cit* at 83.

[1139] (2003) 24 *ILJ* 1130 (LC).

[1140] *Dudley supra.*

[1141] Jordaan 2005 'Employment Equity' *loc cit.*

(Pty) Ltd[1142] Murphy AJ expressed his preference for the approach adopted by Tip AJ in the *Dudley* matter. Murphy AJ summarized the issue as follows-

> 'In the main, the failure to comply with the requirements of chapter III of the Employment Equity Act dealing with employment equity plans and affirmative action will be a compliance issue enforceable by the director general and not an unfair discrimination case enforceable by litigation at the hands of an aggrieved individual.'

It is respectfully submitted that in both the *Cupido* and *Dudley* are inconsistent with the constitutional imperative to implement substantive equality. Although affirmative action measures are clearly framed within the EEA as a defence and not as a positive measure to eliminate unfair discrimination, this is perhaps a result of careless drafting. In last year's decision of the Constitutional Court in *Minister of Finance & Another v Van Heerden*[1143] the court confirmed that the Constitution's affirmative action provisions (and therefore also of the EEA) should not be regarded as an exception to the rule against unfair discrimination which has to be proved by the person relying on it as a justification. It is in fact part and parcel of the right to equality. Without it, the court contended, the right to equality is merely formal and meaningless. As the *Dudley* case is on appeal to the LAC it is hoped that the court will take into consideration the finding in *Van Heerden's* case. The inclusion of affirmative action as part of the right to equality is very relevant to the discussion of reasonable accommodation with respect to disabled people.

6.4.9.2. A 'right' to reasonable accommodation

Ngwena argues that the corollary of the right to equality of people with disabilities under s9 of the Constitution is to acknowledge difference and impose upon the state and persons (legal and natural) the duty to accommodate people with disabilities.[1144] He states further that accommodating people with disabilities should not be seen as something special or exceptional as such an approach has the tendency of making accommodation a privilege. Rather accommodation should be seen as an integral part of according equality and human dignity to people with disabilities. The Constitutional Court has yet to specifically apply substantive equality to reasonable accommodation but some guidance can be obtained from Canadian jurisprudence. In Canada, the duty to make reasonable accommodation for people with disabilities is in part derived from the construction of section 15 (the equality clause) of the

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[1142] (2005) 26 *ILJ* 868 (LC).
[1143] [2004] 12 BLLR 1181 (CC).
[1144] Ngwena 2004 *op cit* at 13.

Canadian Charter of Rights and Freedoms of 1982 and in part from Human Rights Codes, and the Canadian Employment Equity Act.[1145] The Supreme Court of Canada has developed reasonable accommodation into a principle for eliminating unfair discrimination with the object of achieving substantive equality.

The advantage of the substantive equality approach and its derivative principle – reasonable accommodation questions the assumption that difference is located solely in the person who is different. When a source of inequality is located in the individual rather than social arrangements, it tends to confer legitimacy to social inequality.[1146]

As has been noted, the government subscribes to a social model of disability and indeed seeks to comply with the imperative of substantive equality. As a designated group under the EEA, people with disabilities who are employees are entitled to a range of affirmative action measures, including reasonable accommodation. According to the Act, reasonable accommodation means 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or to participate or advance in employment.'[1147] Designated employers are under an obligation to take positive steps in this regard. The EEA appears to make a rigid distinction between designated and non-designated employers in respect of affirmative action obligations, including, reasonable accommodation.[1148] Reasonable accommodation is only explicitly provided for designated employees[1149] who apply for jobs with, or work for, employers that are classified as *designated* employers according to Chapter 3 of the EEA. Moreover, reasonable accommodation under the EEA appears to be conceived only as part of affirmative action measures in Chapter 3 of the Act.[1150] If section 4 were taken literally, it would mean that a person with a disability (if they fit within the definition) only has a right to reasonable accommodation if he or she is an employee of a designated employer. If the courts were to follow the *Dudley* approach when considering a 'right' to reasonable accommodation, it is submitted that the result would be terribly unfair. As submitted earlier, reasonable accommodation is not so limited. The doctrine of substantive equality that has been developed by the

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[1145] Employment Equity Act 1995 (Canada).
[1146] Ngwena 2004 *loc cit.*
[1147] EEA Section 1.
[1148] Ngwena 2004 *op cit* at 18.
[1149] The additional importance of this becomes apparent when one reflects on the definition of 'person with a disability' in the EEA. If one is not classified as disabled but does require some sort of accommodation in order equalize one's opportunity in employment, the failure to provide such would not found the basis of an action of unfair discrimination.
[1150] EEA Section 15(2)(c).

Constitutional Court and comparative jurisprudence, such as that emanating from the Canadian Supreme Court, does not support such a restrictive approach towards reasonable accommodation.[1151] As has been demonstrated throughout this thesis, the provision of reasonable accommodation is integral to the facilitation of the right to equality for disabled people. If reasonable accommodation is seen as preferential treatment then that right is undermined. It is further submitted that such an attitude is inconsistent with the substantive approach to equality that our courts have consistently and repeatedly endorsed.

According to the EEA, affirmative action measures are 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.'[1152] Affirmative action measures that ought to be implemented by a designated employer must include 'making reasonable accommodation for people from designated groups...'[1153] The TAG reinforces this position

> 'All designated employers under the Act and Code 'should reasonably accommodate the needs of people with disabilities.' This is both a non-discrimination and an affirmative action requirement. For employers who are recruited to develop employment equity plans, reasonable accommodation is an effective affirmative action measure.'[1154]

Ngwena submits that despite alluding to reasonable accommodation as also constituting a non-discrimination measure, the overall tenor of the TAG suggests that they are primarily addressing reasonable accommodation in the context of affirmative action measures and duties upon designated employers.[1155] He contends that such an approach is problematic and likely to confuse. It implies that reasonable accommodation is synonymous with affirmative action. Although reasonable accommodation and affirmative action share an association, they are, nonetheless, distinguishable concepts.[1156]

[1151] The restrictive approach to reasonable accommodation is also adopted in the Disability Code and the TAG. It is stated that in making an accommodation, employers should adopt the 'most cost-effective' means. (Paragraph 6.2 and item 6.2 respectively). Ngwena argues that while the Disability Code and TAG are correct in identifying cost as a factor to take into account when determining reasonable accommodation, the emphasis on 'cost-effectiveness' risks elevating cost-effectiveness as the sole determinative factor at the expense of other considerations. (Ngwena 2004 *op cit* at 19).

[1152] EEA Section 15(1).

[1153] EEA Section 15(2)(c).

[1154] TAG Item 6.1.

[1155] Ngwena 2004 *op cit* at 21.

[1156] See DJ Olenick 'Accommodating the handicapped: rehabilitating section 504 after Southeastern' (1980) 80 *Columbia Law Review* 171 at 185-186; Murphy 'Reasonable accommodation and employment discrimination under Title I of the Americans with Disabilities Act' (1991) 64 *Southern California Law Review* 1607.

The duty of reasonable accommodation should, submits Ngwena, in the South African context be seen direct consequence of the right to equality of the person with a disability. It is, and it must be emphasized, an *enforceable duty* rather than a mere favour or privilege at the mercy of the employer. Asking the question whether the respondent has provided reasonable accommodation should be seen as an integral part of determining whether the respondent has explored less discriminatory options prior to the discriminatory conduct in question. It is argued that it is not only designated groups who should be entitled to reasonable accommodation. If it is necessary in order to enable one to compete in the labour market on an equal basis then those needs should be accommodated.[1157] Thus it is submitted that in spite of the inclusion of reasonable accommodation in the chapter of the EEA relating to affirmative action measures, the failure to provide reasonable accommodation should be considered unfairly discriminatory conduct by the employer.

6.4.10. 'Reasonable' accommodation

Paragraph 6 of the Disability Code deals with reasonable accommodation of persons with disabilities.[1158] The aim of workplace accommodation is to reduce the impact of an employee's impairment on the employee's functional capacity and to enable the employee to fulfil the essential[1159] physical and mental outputs of a specific job. These measures, where reasonably possible, should be applied at all stages of employment, that is during recruitment and selection; in the working environment or when the environment changes; in the way the work is usually done, evaluated or rewarded; and in relation to the benefits and privileges of employment.[1160]

It was stated in the *Lucas* case that

> 'It would seem that in deciding what is reasonable depends on the circumstances of the workplace and the employee. The employer and the employee should adopt a collaborative problem-solving approach to modify employment practices to give the

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[1157] See M van Jaarsveld 'Towards a Reasonable Explanation of Reasonable Accommodation: Lessons from the United States of America' (2002) 14 *SA Merc LJ* 357. van Jaarsveld considers how reasonable accommodation has been approached for HIV/AIDS and religion as well as disability in the United States.

[1158] This is also covered in Item 6 of the TAG which provides more detailed examples of potential accommodation.

[1159] For this reason it is imperative that employers delineate exactly what the indispensable functions of the position are. Item 6.3.1. of the TAG states 'An employer should analyse the job function functions to determine the inherent requirements, basic qualifications and competencies required to perform essential functions. Job specifications must be drafted to ensure that they do not unnecessarily exclude people with disabilities.' Furthermore application forms should focus only on asking how an applicant is qualified to perform the essential functions of the job. (Disability Code Paragraph 7.1.3).

[1160] As has been discussed above an employer is also obliged to consider possible accommodation before dismissing a person for incapacity as a result of illness or disability.

> employee with the disability opportunities for job performance that would be similar, if not equal to a similarly situated employee who does not have any disabilities. The goal is ultimately to facilitate greater retention and employment for people with disabilities. Of course one would have to consider the extent, the purpose, arrangements of the accommodation and the employer's resources.'[1161]

In line with comparative jurisdictions a failure to provide reasonable accommodation may be justified by an employer by showing that it would cause an unjustifiable hardship.[1162] The approach to undue hardship, as the limit of the employer's duty to make reasonable accommodation, under both the Disability Code and the TAG is rather restrictive.[1163] According to both the Disability Code and TAG, 'unjustifiable hardship' is action that requires 'significant or considerable difficulty or expense'[1164] Comparative jurisprudence illustrates that undue hardship should not be conceived in isolation but rather as a disproportionate burden relative to the employers business and resources.[1165]

Thus reasonable accommodation involves a consideration of

(a) the nature and extent of the person's disability;
(b) the requirements of the position;
(c) the barriers to effective performance of the job by the person concerned;
(d) an assessment of the cost and practicalities involved in removing those barriers;
(e) and the employer's financial and operational ability to do so.[1166]

It is important for the employer to be creative and innovative and to remember that each individual is unique. The employer should consult the employee and where practical, technical experts when contemplating the accommodation of an employee's impairment.[1167] The aim would be to establish the most appropriate and feasible mechanisms to accommodate the employee's impairment. The nature of

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[1161] *Lucas supra* at para 33.
[1162] Disability Code Paragraph 6.11 and 6.12. Item 6.12 of the TAG states that the assessment of what will constitute an unjustifiable hardship should also take into account the impact of providing or failure to provide accommodation to the employee and the systemic patterns of inequality in society. In doing so, the objectives of the EEA and the Constitution should also be considered.
[1163] Ngwena and Pretorius 2003 *op cit* at 1834-1835.
[1164] Paragraph 6.12 and Item 6.12 respectively. It is interesting to note that in the description of 'unjustified hardship' under the draft Disability Code 'significant or considerable difficulty or expenses' was qualified by 'which would substantially harm the viability of the enterprise'. Another victory for employers in the final Disability Code!
[1165] Ngwena and Pretorius 2003 *op cit* at 1835. In some cases it might justify significant expense as demonstrated in an American case, *Nelson v Thornburg* 567 F Supp. 369 (E.D. Pa. 1983) where a court ordered a state department to provide reasonable accommodation to three blind workers, including readers, computers and braille forms, notwithstanding that the cost of accommodation was substantial. This was because the cost of reasonable accommodation was not onerous when the resources at the command of the state department where taken into account.
[1166] B Jordaan 'Managing Poor Performers and Absentees' (2005) in *Juta's Annual Labour Law Update* 123-127.
[1167] This may include medical specialists, occupational therapists, and so on.

the accommodation will depend on the individual's needs, the impairment and its effects on the employee's ability to perform work, and the nature of the employee's job and work environment.

6.4.10.1. Accommodating mental health difficulties

Mental health problems should be addressed and accommodated in the workplace like any other disability. Pechman states, 'accommodating an individual's psyche... is an inherently elusive task.'[1168] Employers are often daunted by the prospect of accommodating mental health problems because unlike an accommodation for physical disability, which may entail the once off building of a ramp for example, the provision of accommodation for mentally ill persons is 'an ongoing process, rather than as a one-time solution.'[1169] Furthermore, it often requires an attitude shift that necessitates a conscious effort for a 'sanist' employer. Goldstein notes that it is the limitation and not the impairment that the employer should accommodate.[1170] In *Taylor v Principal Fin Group*[1171] it was stated that as an employer should not assume that someone with an impairment has a limitation, the better public policy dictates the opposite assumption, that a disabled employee is not limited in their ability to adequately perform their job. However it should be borne in mind that sometimes stress cannot be eliminated, as it is inherent in the nature of that job.

Goldstein states notes that the major problems in need of accommodation for people with psychiatric disorders relate to attendance, stress[1172] and conduct problems.[1173] It should be remembered that although every attempt should be made to accommodate an employee with a mental health problem, sometimes the inherent requirements of the job necessarily exclude the person being able to perform the essential functions of the position.[1174] In *Tyndall v Nat'l Educ Ctrs*[1175] it was held that one who does not come to work cannot perform any of his job functions, essential or otherwise. Thus this court

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[1168] L Pechman 'Mental Disabilities in the Workplace' (1994) March *N Y L J* 1 at 1.
[1169] D Zuckerman 'Reasonable Accommodations for People with Mental Illness Under the ADA' (1993) 17 *Mental & Physical Disability L Rep* 311 at 311.
[1170] Goldstein *op cit* at 927.
[1171] 93 F.3d 155. 164 (5th Cir. 1996).
[1172] See further Stefan 1998 *op cit* at 827-36 where she discusses the various causes of workplace stress and the approach taken by the American courts.
[1173] Goldstein *op cit* 946.
[1174] If the employee develops a mental health problem in the course of employment that, despite accommodation, precludes them from fulfilling their job functions an employer is obliged to attempt to find alternative placement. If this is not possible, dismissal for incapacity may be the only option available.
[1175] 31 F.3d 209 at 213 (4th Cir 1994).

held that an employee who cannot meet the employer's attendance requirements cannot be considered qualified for the job.

As was noted in the discussion on dismissal, misconduct by an employee who has mental health difficulties is not automatically excused for that reason. There must be a causal link between the psychological illness and the conduct. An employer may apply the same conduct and performance[1176] standards to an employee with mental health difficulties, however, they should make every attempt to establish whether workplace conditions, such as stigma[1177] or harassment, have exacerbated the psychological difficulty or precipitated the misconduct.[1178] In which case possible accommodation should be attempted before dismissing such an employee for misconduct.

Unfortunately many employers opt for termination a psychologically ill employee's contract of employment (through boarding, disability benefits or incapacity management) rather than accommodating an employee in the workplace. Coetzer *et al* suggest that such employers would use whatever assistance they can get and even manipulate the medical profession in assisting them with attaining their goal of terminating the employee's contract of employment. The authors argue that this should be combated by psychiatrist's correctly identifying the individual's illness and limitations in order to advise the employer appropriately on reasonable workplace accommodation to assist the employee's productive return to work.[1179] It should be remembered in light of the legislative mandate to eliminate past and current discrimination that every attempt to retain and advance disabled employees[1180] should be made insofar as it is possible and does not amount to an unjustifiable hardship.

As was decided in *Bennett's* case[1181] the employer's duty to accommodate an employee is even more onerous when an employee's difficulties are work related. In that case Bennett had repeated nervous breakdowns as a result of work-related stress. It was found that simple changes and consideration on

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[1176] Furthermore an employer is not required to lower its performance evaluation standards to accommodate an individual however the Disability Code states at Paragraphgraph 6.10. that 'an employer may evaluate work performance against the same standards as other employees but the nature of the disability may require an employer to adapt the way in which performance is measured.' .

[1177] Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person's condition.

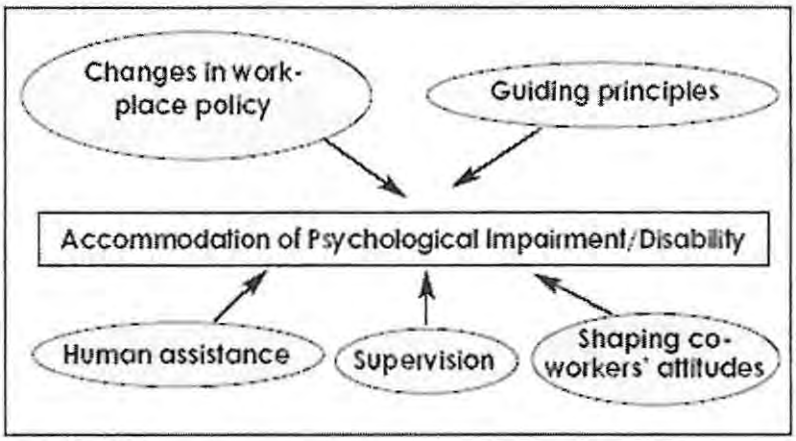
[1178] Progressive performance management and discipline as well as employee assistance supports ensure that all employees have a range of opportunities to address performance issues on an individualised basis before sanctions or termination are considered.

[1179] P Coetzer, A Botha and D Huyser 'Psychiatric impairment and disability assessment: Proposals to overcome current inadequacies' (2002) 8(3) *SAJP* 66 at 67.

[1180] *Lucas supra.*

[1181] *Bennett supra.* (See Dismissal under the LRA above).

behalf of his supervisors' not only would have prevented the difficulty in the first place but it would prevent a relapse. Coetzer *et al* propose a holistic model for accommodating psychological illness in the workplace.[1182] Each step of the model will be discussed below.



Coetzer *et al*'s holistic model for reasonable accommodation of employees with mental health problems.

a) Changes in workplace policy

Coetzer *et al* recommend that workplace policy regarding reasonable accommodation should allow for flexibility of enforcement.[1183] The authors suggest that workplace policies should support relatively inexpensive accommodatory measures such as: (*i*) permitting contact with friends and other supportive individuals during work hours; (*ii*) if possible and practical, allowing such employees to work from home; (*iii*) providing enclosed offices for individuals who lose concentration and accuracy amid distractions; (*iv*) allowing employees to adapt work hours in order to attend medical appointments; (*v*) creating a job-sharing policy that will provide backup for the period that the employee is absent from work; and (*vi*) permitting the employee to self-determine the workload and pace at which the work is performed.[1184]

[1182] Coetzer *et al* 2002 *op cit* at 68. This model reflects the approach taken in the TAG however it is useful as it is specifically designed to cater for people with mental health problems. It is submitted that employers would be prudent to follow this model as discussed below.
[1183] Coetzer *et al* 2002 *op cit* at 69.
[1184] *Ibid.*

b) Guiding principles

1. *Reasonable accommodation should be instituted in a manner that will empower the affected employee and that is non- stigmatising*[1185]

In order to do so it is important to recognise and focus on the individual strengths, rather than the weaknesses, of the affected employee and thereby recognise the potential contribution the employee may make to the overall goals of the organisation. In the *Granovsky*[1186] case the Canadian Supreme Court recognised the importance of respecting the dignity of the person whose impairment is being accommodated:

> 'governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied'[1187]

This comment illustrates that failure to provide accommodation or accommodation based on incorrect assumptions can be as damaging to a disabled person as direct discrimination. As submitted above, the Canadian approach to reasonable accommodation is one worthy of emulation as it recognises that accommodation is necessary and integral to the protection and advancement of disabled peoples' right to equality and human dignity.

However it is not only the failure to provide accommodation that can impair a person's dignity. In *Eaton v Brant County Board of Education*[1188] it was held by the Canadian Supreme Court that an accommodation can in itself violate an individual's dignity as a human being equally deserving of consideration, or place discriminatory obstacles in the way of their self-fulfilment. Thus accommodation should be provided in a manner that most respects the dignity of the person, if to do so does not create unjustifiable hardship. Dignity includes consideration of how accommodation is provided and the individual's own participation in the process. Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and

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[1185] In *Gibbs v Battlefords and Dist Co-operative Ltd* (1996) 27 CHRR D/87 (SCC) the Supreme Court of Canada recognized the distinct disadvantage and negative stereotyping faced by persons with psychiatric problems and has held that discrimination against individuals with psychiatric disabilities is unlawful.

[1186] *Granovsky supra.*

[1187] *Granovsky supra* at para 33. It is submitted that although *Granovsky* focused on State action, similar principles apply to persons responsible for accommodation under South African human rights law.

[1188] [1997] 1 SCR 241.

empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued.[1189] Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well as to whether an accommodation maximises integration and promotes full participation in society.

2. *The employer should be willing to engage in joint problem-solving with the affected employee*[1190]

Both the TAG and the Dismissal Code recommend consultation and counselling as a means of ensuring that equitable and effective accommodation can be achieved. As the employee is the person who experiences the difficulty, it would be unreasonable and patronising for the employer to assume that they know what is best for the employee. Thus it is essential for ensuring the dignity and independence of the person with the mental health problem that they are actively involved in determining the best way in which their ability to fulfil the essential functions of the job can be facilitated.

3. *The employer should create a culture/climate where the affected employee is able to accept reasonable accommodatory measures voluntarily*[1191]

The duty to accommodate arises only when the employee (or applicant) voluntary discloses his or her disability, or where the disability is 'reasonably self-evident'.[1192] People are reluctant to disclose their mental health problem or history for fear of the stigma or disdain it could invoke. Furthermore it should be borne in mind that some mental illnesses may render the employee incapable of identifying his or her needs. In the case of mental health problems, as opposed to physical disabilities it is less likely that the employer will be aware of the impairment as it is not obvious.[1193] One American Court commented that the 'ADA does not require clairvoyance'.[1194] However employers should make an effort to monitor the mental health of their employees and recognise the dilemma that accompanies the disclosure of a

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[1189] *Eaton supra.*
[1190] Coezer *et al* 2002 *op cit* at 69.
[1191] Coetzer *et al* 2002 *loc cit.*
[1192] Disability Code Paragraph 6.4.
[1193] The nature or degree of certain disabilities might render them 'non-evident' to others. These may include persons whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able; persons who have recovered from conditions but are treated unfairly because of their past condition, and persons whose disabilities are episodic or temporary in nature. It might only become known when a disability accommodation is requested or, simply, the disability might remain 'non-evident' because the individual chooses not to divulge it for fear of stigma or personal reasons.
[1194] *Hedberg v Ind Bell Tel Co*, 47 F.3d 928 (7th Cir. 1995) at 934.

mental health problem. For example, severe change in an employee's behaviour could signal to an employer that the situation warrants further examination.[1195]

Employers should endeavour to establish a trusting relationship based on mutual respect. An environment should be created in which disclosure is not stigmatised but where the employee has certainty that confidentiality will be respected with regard to his or her illness. Employers should always inform all employees that a disability-related assessment or accommodation can be provided as an option to address performance issues. These measures will make it easier for an individual with a mental health problem to request the necessary accommodation. It is further suggested that an employer should not press an individual for details about their mental health difficulty, nor should they place to onerous a burden on the medical proof thereof. Bearing in mind the courage it takes to request accommodation, it is submitted, the fact that someone is having difficulty in some aspect of work and that it is related to a mental health problem should be sufficient.

c) Human assistance

Coetzer *et al* submit that two strategies that can prove of great assistance, depending on the nature of the person's impairment, are the following.[1196] Firstly, a 'job coach' could be appointed to assist the employee with the application of his or her skills while performing the required job outputs. Secondly, individual training for employees with mental health problems can be effective. This could include the designation of a co-worker to serve as a peer and/or support for the employee, or the pairing of workers with mentors who could provide guidance.[1197]

d) Supervision

Coetzer *et al* argue that supervision is probably the single most important aspect in accommodating an employee who has a mental health problem. The authors recommend that the employer should appoint a supervisor who is supportive and has good listening skills to supervise such employees.[1198] In addition it is important that the supervisory staff receive training in order to improve their ability to

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[1195] Careful monitoring of employee performance is particularly important in light of the duty on the employer to reduce unnecessary work related stress. See *Bennett supra.*
[1196] Coetzer *et al* 2002 *op cit* at 70.
[1197] *Ibid.*
[1198] Coetzer *et al* 2002 *loc cit.*

provide clear direction and constructive feedback and offer appropriate praise and positive reinforcement. It is helpful for a psychologically ill employee to have a clear idea of what is expected of them. Supervisors should facilitate this by setting out the job duties, responsibilities and expectations. The supervisor and employee should agree on short-term performance indicators to analyse the efficacy of the accommodation provided.

e) Shaping co-workers' attitudes

As has been illustrated throughout this thesis, stigma, negative attitudes and harassment and ridicule resulting there from are exceptionally damaging for a person with a mental illness. Thus employers should educate co-workers on the subject of psychological impairment by providing sensitivity training, thereby dispelling myths with regard to mental health problems.

6.4.10.2. Concluding Remarks

It is submitted that this model provides an excellent framework within which mental health problems can be adequately and appropriately addressed in workplace. The major obstacle that remains is to ensure that employers do not see the accommodation of people with mental health difficulties as special treatment. It should be viewed as a means of encouraging equality and diversity in the workplace.

The provisions for reasonable accommodation have been well formulated in the Disability Code and the TAG (however, as always, the focus is on physical disabilities) but it is submitted, in agreement with Ngwena that the framing of reasonable accommodation as an affirmative action measure is simply incorrect. It is argued that the inclusion of reasonable accommodation in Chapter III of the EEA does not preclude an interpretation that reasonable accommodation measures are available as an anti-discrimination measure and a means by which to achieve substantive equality. It is hoped that if this issue ever comes before the court that the *ratio* of *van Heerden*[1199] *and Harmse*[1200] will be applied. It is further submitted that in approaching such a decision, the courts would be wise to consider Canadian case law on the matter as it has adopted an imitable position on the role of reasonable accommodation as integral to the right to equality.

[1199] *Van Heerden supra.*
[1200] *Harmse supra.*

6.4.11. Enforcement of the Act

6.4.11.1. Unfair discrimination

Any dispute relating to unfair discrimination must be referred to the CCMA within six months of the act or omission that allegedly constitutes unfair discrimination. The CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved after conciliation then the dispute may be referred to the Labour Court or, if all parties to the dispute consent, to arbitration.[1201]

6.4.11.2. Employment Equity Plans

Where a Labour Inspector has reasonable grounds to believe that a designated employer has failed to comply with any of its duties in terms of the Act, the inspector must request the employer to provide a written undertaking that it will comply with these duties within a specified period.[1202]

If the employer has refused to give a written undertaking or has failed to comply with an undertaking already given, a Labour Inspector may issue a compliance order.[1203] Such compliance order has to state what steps the employer should take to comply with the provisions of the Act and the period within which those steps should be taken, as well as the fine that may be imposed on that employer should he fail to comply with the order.[1204] An employer who receives an order from the Director-General must comply with that order or appeal to the Labour Court.[1205]

6.4.11.3. Penalties

Grogan states that the EEA ensures compliance by a mixture of carrot and stick.[1206] The carrots are the possibility of an award by the Employment Equity Commission that recognises an employer's

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[1201] EEA Section 10.
[1202] EEA Section 36. Section 35 of the EEA provides that in order to monitor and enforce compliance with the provisions of the Act, the Labour Inspector may enter certain premises without warrant or notice, question persons and inspect records and documents, articles, substances and machinery, and inspect or question any person about work performed.
[1203] EEA Section 37.
[1204] EEA Section 37(2). The employer then has to comply with the compliance order or within 21 days of receipt of the order, object to the compliance order by making written representations to the Director-General. EEA Sections 37(5) and 39.
[1205] EEA Section 40.
[1206] Grogan *Workplace Law* 2005 *op cit* at 313.

achievements,[1207] and being favoured when it comes to the awarding of state contracts. An employer will not be given state contracts unless, when tendering, it is able to furnish a certificate stating that it is complying with the Act.[1208] The Act specifically states that failure by an employer to comply with its provisions is sufficient ground for rejection of any tender, or for the cancellation of an existing agreement.[1209] There are also fines for non-compliance.[1210]A special provision for the vicarious liability of an employer for any of its employees contravening the EEA[1211]is sure to encourage employers to have strictly enforceable anti-harassment policies and to ensure that their employees are aware of what constitutes permissible conduct under the Act.[1212]

6.4.11.4. Individual Complaints

In terms of section 34 of the Act any employee or trade union representative may bring the alleged contravention of this Act to the attention of another employee, an employer, a trade union, workplace forum, a Labour Inspector, the Director-General or the Commission. Discrimination resulting from a failure to comply with the Act is however enforced through the individual complaint system. The flaws in this approach in creating systemic equality were well noted in the chapter on Australia. However additional difficulties arise in the South African context. Reyneke and Oosthuizen argue that although it is encouraging that a number of forums have been created to enforce the different rights of the disabled in different situations there remain certain difficulties.[1213] Despite our justice system becoming more and more accessible, many people are illiterate and will probably not know about all the different forums that exist, and may not be able to choose the best and most cost effective forum for a particular case. Legal aid is available for the indigent, but the legal aid centres are not accessible to all.

[1207] EEA Section 30(2)(a).
[1208] EEA Section 53. These certificates will be issued on application by the Minister of Labour, and are valid for one year.
[1209] EEA Section 53(4).
[1210]The EEA provides further for fines for non-compliance. These range from a maximum of R500000 for the first contravention of the duties related to consultation over, drafting and implementation of, employment equity plans as well as the failure to publish prescribed details, to a maximum of R900 000 where there have been four previous contraventions of the same provision in three years.
[1211] EEA Section 60.
[1212] In terms of s60 an employer will not be liable if it can prove that it did all that was reasonably practicable to ensure that the employees would not contravene the Act. It will further be exempt if it can demonstrate that once it became aware of the contravention that all concerned parties were consulted and that the necessary steps were taken to eliminate the alleged conduct.
[1213] Reyneke and Oosthuizen 2004 *op cit* at 114.

6.4.11.4. The Commission for Employment Equity

The Act provides for the establishment of a Commission for Employment Equity (EEC).[1214] It has no enforcement powers as it is purely an advisory body. It may help draw up Codes of Good Practice. However it is submitted that it would be much more useful for people with disabilities to have a body that would provide advice, finance and perhaps fulfil a monitoring purpose. The Department of Labour is overstretched as it is. If the monitoring of the Act in respect of people with disabilities could be delegated to a separate body, especially one that could be empowered to institute class actions or to institute action against employers who are repeatedly discriminating or failing to comply with the requirements of the Act this would improve the efficacy of the EEA.[1215]

6.4.11.5. The South African Human Rights Commission

It is possible that Human Rights Commission (SAHRC) could fulfil the proposed roles mentioned above. The SAHRC is an independent constitutional body with national jurisdiction to: 'Investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated'.[1216] In its policy paper on disability the SAHRC states that in order for the Commission to fulfil its obligations to all disabled people in South Africa, it is necessary for it to play a central role in interpreting the rights of the Constitution in relation to disabled people.[1217] The SAHRC has set up a designated committee that deals specifically with disability. It identifies its role as monitoring human rights abuses of disabled people, providing mechanisms to facilitate the participation of disabled people in any decision making processes that will affect them, education, research and the removal of social barriers.

The SAHRC can also play a role in dispute resolution pertaining to people with disabilities.[1218] Therefore it is submitted that the Commission for Equal Opportunity, as set up by the EEA, has a

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[1214] EEA Section 29.
[1215] See the arguments relating to enforcement bodies in the chapters 4 and 5.
[1216] Constitution Section 184(2)(a) and (b).
[1217] South African Human Rights Commission 'Disability' (1997) Policy Paper # 5 at 5.
[1218] Section 8 of the **Human Rights Act** authorises the SAHRC to: 'Resolve any dispute or rectify any act or omission, emanating from or constituting a violation of or threat to any fundamental right, by mediation, conciliation or negotiation'. Reyneke and Oosthuizen submit that this is particularly appropriate in cases where a matter could be settled by informal methods (such as mediation) where a lengthy investigation is necessary or where the nature of the unfair discrimination requires an ongoing audit of rules and practices, monitoring of compliance and education on equality issues. Reyneke and Oosthuizen 2004 *op cit* at 114.

minimal role to play with regards the monitoring of the protection of the rights of people with disabilities in the workplace. However the SAHRC with its social approach to the protection of disabled persons and proactive stance on the elimination of discriminatory practices and behaviour has the ability to ensure the rights of disabled persons are adequately protected.[1219] It is thus important that the SAHRC remains sufficiently well funded and determined to carry out its mandate.

6.4.12 Evaluation of the Act

This Act is an excellent attempt at comprehensive anti-discrimination legislation. It has incorporated the constitutional ideal of substantive equality by prohibiting unfair discrimination and by the inclusion of positive measures such as reasonable accommodation and affirmative action. However, as demonstrated above, is found wanting in several respects. For the most part, this can be attributed to hasty and sometimes shoddy drafting. It is apparent from the discussions above that this Act had as its primary purpose the promotion of previously disadvantaged racial groups and women. Disabled people are inadequately protected and it appears as if people with psychiatric difficulties were added as an afterthought without much consideration of the real needs of this highly prejudiced group of people. It is submitted that many of these difficulties may be remedied through prudent judicial interpretation.

It is argued further that some amendment to the definition of disability, as discussed above, is necessary in order to improve the position of both physically, mentally and psychiatrically impaired individuals. The ideology behind the EEA is laudable but it has a fair way to go before it could be considered a statute that, in reality, gives effect to the rights and dignity of people with mental health difficulties.

Until such time as the government becomes aware of the shortcomings of the Act and takes action to amend such, it is imperative that employers endeavour to treat all employees with equal dignity regardless of the extent of protection afforded by the EEA. It is hoped that eventually educational programmes and interaction between people with and without mental health problems will render affirmative action unnecessary. It is submitted that the approach to disability that is adopted in PEPUDA (as discussed below) is one worthy of emulation by those applying, using and interpreting the EEA.

[1219] It is interesting to note that the SAHRC has been present at all sessions of the Ad Hoc Committee for the UN Disability Convention.

6.5 The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

PEPUDA was drafted in accordance with s9(4) of the Constitution, and to facilitate further compliance with international law obligations including treaty obligations.[1220] It contains a comprehensive list of grounds on which discrimination is prohibited. One of these grounds is disability. Section 6 of the Act states the following: 'Neither the State nor any person may unfairly discriminate against any person.'[1221] Section 9 provides for the prohibition of unfair discrimination on ground of disability and reads as follows:

> 'Subject to section 6 no person may unfairly discriminate against any person on the ground of disability, including —
> (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
> (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
> (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.'

It is clear that these provisions are aiming at the integration of disabled people in society. This Act does not define the concept of disability. The Act embraces the idea of equality as encompassing the full and equal inclusion of all disabled people within society through the removal of barriers and the development of positive measures. This is based on a notion of inclusion that shifts the norms of society to include a broad understanding of diversity and human worth. It is a more radical concept than integration which tends to mean that disabled people will be absorbed into the dominant culture when and if they are ready. While integration places the onus on the disabled person to adapt to the society's status quo, the concept of inclusion requires society to take the lead in addressing the social, economic and physical environment to ensure that all disabled people are recognised and included as full and equal citizens. Within this model, the Act seeks to address the discrimination experienced by disabled people as well as those who are perceived to have a disability.[1222] In light of the extensive

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[1220] PEPUDA Section 2(h). Christianson notes that although international conventions relating to race and gender are specifically mentioned there is no mention of disability. She suggests that although this may be a mere oversight, a more likely explanation for this omission is that the drafters of our legislation are not yet in tune with the principles and ethos of disability equity in our society. Christianson 'Disability Discrimination in the Workplace' 2004 *op cit* at 162.

[1221] This section commenced on the 1st of September 2000.

[1222] C Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (2001) 65-6.

criticism levelled at the definition of disability under the EEA, it is suggested that approached adopted in PEPUDA is commendable and worthy of emulation.

Albertyn[1223] states that s9 provides examples of unfair disability discrimination within the principle of substantive equality that contemplates the removal of obstacles as well as the development of an inclusive environment through positive measures. 'Enabling facilities', suggests Albertyn refers not only to physical structures and barriers, such as ramps, but also to the social and environmental context that denies access. The authors suggest that the prohibition on disability discrimination in the workplace for example does not only mean the absence of physical barriers, but also the attitudes and norms that assume that people with disabilities cannot do the job and are thus excluded from the opportunity to take the job in the first place.[1224]

The differential treatment of people with disabilities is not necessarily discriminatory. Indeed, the need to create an enabling environment that addresses the specific needs of disabled persons and corrects past imbalances means that, disabled people will often require some form of differential treatment. To address this point, the Act includes within the meaning of unfair discrimination, the failure to reasonably accommodate disabled persons.[1225]

6.5.1. The Relationship between the EEA and PEPUDA

Hate speech, which is regulated in PEPUDA, is not dealt with specifically in the EEA. Thus hate speech in the workplace would probably fall under PEPUDA, where hate speech is dealt with extensively.[1226] Certain categories of persons are excluded from the EEA.[1227] In addition s5(3) of this Act states that the Act: 'Does not apply to any person to whom and to the extent to which the Employment Equity Act 55 of 1998 applies.' The EEA provides a detailed framework for workplace equality and was passed before this Act. Reyneke and Oosthuizen contend that it seems logical that the two Acts operate side by side and apply to different sectors of society.[1228] It remains to be seen whether those persons who fail to meet the definition of disability under the EEA may well have

[1223] *Ibid.*
[1224] Albertyn 2001 *op cit* at 66-7.
[1225] PEPUDA Section 9(c). This is in contrast to the approach to reasonable accommodation adopted by the EEA.
[1226] C Cooper and R Lagrange 'The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act And The Employment Equity Act' (2001) 22 *ILJ* 1532 at 1540.
[1227] Members of the various defence forces; independent contractors; non-employees as regards harassment issues; and small employers in relation to affirmative action measures.
[1228] Reyneke and Oosthuizen 2004 *loc cit.*

remedies under PEPUDA as it adopts a more social approach that would encompass perceived and past disabilities and those that do not cause a substantial functional limitation on their ability to work. Cooper and Lagrange state that as far as unfair discrimination is concerned, although affected employment practices are not elaborated on in anything like the detail contained in the definition of 'employment policy or practice' set out in s 1 of the EEA, nevertheless, the very wide and open-ended nature of the unfair discrimination provisions should be able to provide adequate coverage to those persons not covered by the EEA.[1229] Moreover, there are various sections within PEPUDA which develop further the duty of the state and other persons or bodies to eliminate unfair discrimination.[1230]

[1229] Cooper and Lagrange *op cit* at 1543.
[1230] See, for instance, s 28(1), (3)(a)(i) and (b)(i).

Chapter 7

Conclusion

In recent years there have immense changes in social policy towards disability throughout the world. This thesis has sought to illustrate that despite the legislative and other initiatives by various jurisdictions, the rights of disabled persons are still under catered for. It has further been demonstrated that people with mental health issues are even worse off than those traditionally considered 'disabled'. People with mental health problems appear to be even more misunderstood and prejudiced by negative and often fallacious attitudes than those with physical, sensorial or developmental impairments. The pejorative effects of pervasive stigma and harmful stereotyping include harassment in the workplace, and an inability to obtain and retain employment. Mental health problems are becoming increasingly prevalent as a result of increased stress levels and demands placed on employees. Not only should the law prevent employers from unfairly discriminating against people with mental health problems but it should ideally also impose a duty on an employer to maintain a workplace that insofar as is possible promotes good mental health.

It is concluded that despite the legislative measures that may exist it is vital for an employer to establish a working relationship with its employees that facilitates disclosure of mental health issues without fear of persecution. At a workplace policy level, the provision of accommodation or adjustments is crucial in order to ensure that everyone may participate in the workplace at an equal level. What is particularly challenging in the case of people with mental health difficulties is that such accommodation may necessitate an adjustment in attitude by the employer and co-workers which is much more difficult to enforce than the duty to build a ramp for wheelchair users for examples.

The thesis has revealed that anti-discrimination legislation has been relatively successful in securing and upholding the rights of disabled people. However anti-discrimination legislation that is founded upon an individual approach to disability does not reflect the reality of the difficulties faced by disabled people and is even more ineffective in the instance of people with mental health difficulties. In the chapter 4 it was demonstrated that better coverage and protection is provided by a move towards a social approach to disability that is cognizant of the role that attitudes and stigma can play in exacerbating the discrimination experienced by people with mental health problems. The chapter 5 indicates that a broadly drafted definition of disability based on a social approach can do little to

overcome defences to discriminatory conduct and judicial interpretations that unfairly favour the employer.

It is acknowledged that in any employment law dispute the rights of all parties involved should be carefully balanced to achieve a just result. However it is submitted in the thesis that the employer's need to make a profit should not easily trump over the human rights of individuals, especially when discriminatory employment decisions are based on a misunderstanding of the nature of mental health problems rather than on the factual reality.

The novelty of disability discrimination law in South Africa puts us a distinct advantage. South Africa has had the opportunity to learn from the experience in different jurisdictions that have been dealing with discrimination against people on the basis of disability for over a decade. The thesis shows that internationally, courts have consistently held against employees in disability discrimination actions. The majority of these losses are the result of an employee being unable to prove that he is disabled or, if he does manage to prove his disability, that he is too disabled to work. It is argued in the thesis that these decisions reflect an incorrect focus on the person's disability instead of the discriminatory action taken by an employer. It is submitted that when South African courts deliberate upon a disability discrimination issue that they should bear in mind not only the unfair results but also the unnecessary waste of legal resources that have occurred in other jurisdictions that have focused on the question of whether or not a person classifies as disabled. It is particularly instructive to note how the reasonably well-drafted and intentioned ADA has done little to advance the rights or employment of people with mental health problems, mostly as a result of excessively strict judicial interpretation on the meaning of disability and especially regarding whether an impairment creates a substantial limitation.

South African law has an ideal structure to fully protect and advance people with mental health problems should the constitutionally enshrined right to dignity and equality be given its full weight. The inclusion of people with disabilities as a group entitled to affirmative action measures is important. However the exclusionary definition of this group detracts from the impact that this could have. It is concluded that South Africa should, like Canada, see substantive equality for all and equal representation of all members of the population on the workforce as the ultimate goal. Every effort should be made to ensure that the dignity of all individuals be respected so that those desirous of

obtaining employment in an already competitive market are not additionally hindered by discriminatory attitudes.

This thesis has shown that there are numerous legislative approaches that may be taken to ensure the rights of individuals with mental health problems. However, legislative intervention is insufficient to combat something so pervasive as the stigma experienced by people with mental health problems. The forthcoming UN Convention on disability requires that member states take action in the form of educational programmes to combat the stigma associated with disability. It is submitted that a fundamental shift in attitude is required in order to overcome the discrimination experienced by people with mental health problems. Changing attitudes is an almost impossible task. Legislative initiatives will continue to play a role. Affirmative action measures can not only improve the chances of people with mental health difficulties obtaining employment, but it is likely that interaction with people with mental health problems will assist in dispelling some of the myths that perpetuate beliefs about the employment of people with mental health issues.

It is necessary that governments' recognise the enormity of the problem of discrimination experienced by people with mental health difficulties. In South Africa this means that the legislative measures should correlate not only with the values and ethos of the Constitution but furthermore they should adhere to a social approach to disability in reality rather than by paying lip service to a government policy that endorses such an approach. It is concluded that the EEA and its accompanying Disability Code and the TAG require reconsideration and amendment. Furthermore, some clarity is required as to whether the definition of disability in the EEA should be applied to employment actions taken under the LRA. Until such time however courts should ensure that they adopt a very broad approach to interpreting the Act in order to give effect to their constitutional mandate to promote substantive equality. In addition it will be necessary for the government to ensure that the public is properly educated about the reality of mental health problems. Controlling the portrayal of people with mental health problems in the media would assist in achieving this goal. Not only would these steps improve the situation of people with mental health problems, they would also bring South Africa in line with its international obligations once the new UN Disability Convention is completed.

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