Employment Law and People with Disabilities

Stephanie Cowdell*

I: INTRODUCTION

Employment is an important factor in determining a person's status and well-being in New Zealand society. Employment provides structure, purpose, a meaning to life and money for living. However, people with disabilities are often unable to achieve this level of participation, as their unemployment rate is considerably higher than that of people without disabilities.[1] Even when those with disabilities are employed, they are concentrated in lower grade and lower paid positions.[2]

Two bodies of law affect the employment of people with disabilities. The first provides support for the right of people with disabilities to work and is found principally in the Human Rights Act 1993 ("HRA"). The HRA aims to empower people with disabilities by providing legal protection against discrimination on the grounds of disability in employment. The underlying rationale is that those with disabilities are able to work and are entitled to any reasonable accommodation that would enable them to do so. In addition, the principal statute governing employment in New Zealand, the Employment Contracts Act 1991 ("ECA"), complements the HRA in its opposition to paternalism. It should be said, however, that the economic agenda of the "new right"[3] with its drive for economic efficiency,[4] sits uneasily with the requirement

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1 See statistics cited in: *Report of the Working Party on Employment and Training Policies for People with Disabilities to the Minister of Employment:: Developing an Integrated Policy to Facilitate Employment and Training of People with Disabilities* (Wellington: The Working Party, 1991).

2 Riseborough, "People with Disabilities in the Labour Market: An Introduction" (1991) 16 NZJIR 249, 253.

3 Anderson, Banks, Hughes and Johnson, *Butterworths Employment Law Guide* (Wellington: Butterworths, 3rd ed 1997) 10.

4 Employment Contracts Act 1991, Long Title.

under the HRA that people with disabilities be reasonably accommodated in employment.[5]

In contrast, the second provides a safety net for those who either cannot work or can only work in a limited capacity. The Social Security Act 1964 and Accident Rehabilitation and Compensation and Insurance Act 1992 ("ARCIA") provide financial assistance to people with disabilities who are unable to work. The Disabled Persons Employment Promotion Act 1960 ("DPEPA"), makes provision for people who can work to some degree but, due to disability, cannot compete in the open labour market.

This article will examine the legal context in which people with disabilities in employment find themselves. In particular, it will examine the legislation supporting the entitlement of people with disabilities to employment. Part II discusses the protections against discrimination provided for people with disabilities under the HRA.[6] The scope of these protections is explored and limits identified. Part III goes on to examine the DPEPA. The issue of whether the DPEPA is meeting the needs of those for whom it was originally designed will be considered.

II: THE HUMAN RIGHTS ACT 1993[7]

In 1975, the United Nations Declaration on the Rights of Disabled Persons expressed the right of disabled people, according to their capabilities, "to secure and retain employment or to engage in a useful, productive and remunerative occupation."[8] In 1993, the United Nations General Assembly adopted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.[9] The Standard Rules establish that States have a responsibility "to actively support the integration of persons with disabilities into open employment."[10]

In New Zealand, the expression of those rights is found in the Human Rights Act 1993. [11] The HRA is the most significant legislation for New Zealanders with disabilities who want to enter or remain in open employment. The employment provisions prohibit discrimination against people with disabilities in all aspects of the employment process including hiring, training,

5 See text infra at Part II.

6 The ECA is only referred to when necessary rather than discussed in detail in this article. While s 27 of the ECA includes discrimination as a basis for a personal grievance, the grounds on which claims of discrimination can be made do not include disability.

7 The following discussion on the HRA is based on Adzoxornu, *Brooker's Human Rights Law* (Wellington: Brookers, 1996) E3.01-E4.09.

8 General Assembly Resolution 3447 of 9 December 1975, para 7.

9 48th Session, 20 December 1993 (Resolution 48/96).

10 UN Standard Rules, Rule 7(2).

11 HRA, ss 21, 22, 29 and 35.

compensation and benefits. The law also requires an employer reasonably to accommodate a qualified individual with a disability to perform a job. There are, however, limitations. Such accommodation is not required if it would be unreasonable, or the individual would pose a direct threat to the health and safety of the individual or other employees in the workplace.

1. The Definition of Disability

Disability is defined in s 21:

> Prohibited grounds of discrimination - (1) For the purposes of this Act, the prohibited grounds of discrimination are -
> (h) Disability, which means -
> (i) Physical disability or impairment:
> (ii) Physical illness:
> (iii) Psychiatric illness:
> (iv) Intellectual or psychological disability or impairment:
> (v) Any loss or abnormality of psychological, physiological, or anatomical structure or function:
> (vi) Reliance on a guide dog, wheelchair, or other remedial means:
> (vii) The presence in the body of organisms capable of causing illness:

This definition is comprehensive, with no apparent limits on the degree of disability suffered, unlike overseas legislation. The United States, with its Americans with Disabilities Act 1990 ("ADA") restricts the definition by including only an impairment that "substantially limits life activities".[12] In the United Kingdom's Disability Discrimination Act 1995, the impairment must have "a substantial and long-term adverse effect on [the person's] ability to carry out normal day-to-day activities."[13] The ADA also expressly excludes from its definition of mental illness compulsive gambling, kleptomania, pyromania and psychoactive disorders resulting from the use of illegal drugs.[14]

Much of the United States case law examines the ambit of the term disability. Argument has arisen over whether a person is entitled to the protections from discrimination contained in the ADA, or whether he or she is entitled to be treated differently by being reasonably accommodated. Given the broad definition in the HRA, it may be that in any similarly marginal cases, judicial interpretation or legislative amendment may refine the definition in s 21(1).

By virtue of s 21(2) of the HRA, an individual is also protected from

12 42 USCA § 12102(2)(A).
13 Sections 1 and 2, Schedules 1 and 2.
14 Supra at note 12, at §§ 12211 and 12114(a).

discrimination if he or she has a relative or associate who has a disability. This would cover, for example, the situation where a mother has a child with a disability and is not employed because an employer mistakenly concludes that she may often need leave to care for the child. Section 21(2) also protects an individual from discrimination where he or she has a past record of disability. Protection also exists for those perceived by an employer as being more disabled than they actually are.

The only disability that may not be covered under s 21(2) is one that is yet to occur and one that is not an illness caused by organisms. For example, an individual could be discriminated against because he or she has a genetic predisposition towards a future impairment, although it is not manifest at the relevant time.[15]

2. Indirect Discrimination

The HRA prohibits both direct and indirect discrimination.[16] Direct discrimination occurs where the immediate or proximate reason for denying an applicant a job is that he or she has a disability. Indirect discrimination occurs where, for example, an employer imposes an unreasonable physical requirement which excludes people with a particular disability from being considered for a job. If the employer cannot show a good reason for the physical requirement, the employer will have discriminated indirectly against a disabled person. Job descriptions often include very specific skills that a disabled person could not possess. This may result in indirect discrimination against a person with a disability if he or she could perform the same job using different skills. For example, a secretarial job may require shorthand and typing skills. However, if the main function of the job is to produce documents a visually impaired person could do it using a dictaphone and a modified computer.[17]

3. Exceptions

Section 22 states that it is unlawful to discriminate in employment matters on s 21 grounds. Where an applicant or an employee is qualified, an employer cannot refuse to employ that person, offer less favourable terms of employment, terminate the employment or cause the person to retire by reason of any of the prohibited grounds of discrimination. The principal exceptions to s 22 are contained in s 29.[18] Section 35 provides for a general qualification on those exceptions, thus imposing a duty on an employer to accommodate a person with

15 Compare this to Australia's Disability Discrimination Act 1992, s 4(1).

16 HRA s 65.

17 Northdurft and Morpeth, "Riddles in the Sand - Human Rights and Disability" (1995) 1 HRLP 14, 16.

18 A limited exception also exists in s 25 where employment involves national security.

a disability if it is reasonable to do so. These provisions attempt to strike a balance between protecting the needs of employees with disabilities and employers' needs to operate efficiently.[19]

4. The Requirement to be "Qualified"

Section 22 only covers a person with a disability who is "qualified" for the work required to be performed by the employer. Notwithstanding the disability, he or she must have the required education, skill and physical or intellectual ability to perform the job. In *Jamal v Secretary, Department of Health*,[20] the Court said that a person could not be employed as a pilot, for example if he or she were blind. Therefore, a person with a disability would not be qualified if the disability constituted an "insurmountable barrier" to the performance of the duties of the position.[21] In *Larkins v CIBA Vision Corp*,[22] a customer services representative was unable to handle phone calls from customers because of panic attacks, mood swings and dissociative episodes. The Court held that the employee was not a qualified individual under the ADA and therefore the employer was not required to accommodate the employee.

It is not always clear whether an employer has made a lawful decision as to whether a person with a disability has the requisite qualifications for a position. However, it is clear that to be a legitimate physical or intellectual requirement, it must be one sufficiently related to the job.[23] The difficulty is in deciding whether an employer's subjective decision is a sufficient basis to avoid unlawful discrimination.

5. Reasonable Accommodation

Where a disability would not preclude an applicant, an employer must take into consideration the limitations imposed by the applicant's disability and then make a reasonable accommodation which would enable the applicant to perform the duties of the position. Section 29(1)(a) requires an employer to provide special services or facilities for a person with a disability as required. Section 35 provides that an employer shall not discriminate against a person with a disability if some of that person's duties could be carried out by another person. If, after reasonable accommodation, a person with a disability cannot perform the essential or inherent functions of the position, the person will not be qualified under the HRA. Even though a person with a disability may be able to perform

19 Supra at note 17, at 15.

20 (1988) 14 NSWLR 252 (CA).

21 Ibid, 262.

22 858 F Supp 1572 (N D Ga, 1994).

23 *Willis v State Railway Authority of New South Wales (No 2)* (1992) EOC 92-455 (EOT, NSW).

the essential functions of a position with or without reasonable accommodation, that person is not qualified if he or she could perform those duties only with a risk of harm to self or others where it is not reasonable to take that risk.[24] Further, an employer is not obliged to select an applicant with a disability if there is another applicant without a disability who has better qualifications.[25]

Section 29 permits discrimination in employment matters against a person with a disability where it is unreasonable for the employer to provide special services or facilities to enable that person to perform the duties of the position. To claim the benefits of the exception, an employer must prove that it is unreasonable to provide special services or facilities to enable the person with a disability to perform the duties of the position satisfactorily.[26] Failure to prove this will mean that the exception will not apply.

(a) The Essential Functions of a Position

The United Nations Convention Concerning Discrimination in Respect of Employment and Occupation states that people with disabilities should be evaluated on whether they can perform the "inherent requirements" of the work.[27] This is akin to the "essential functions" of a job referred to in the ADA.[28] Although the HRA does not use the term "essential functions of the position", the concept of reasonable accommodation necessarily encompasses a distinction between what may be termed the "essential" or "core" duties and the "nonessential" or "peripheral" duties of a position. This prevents people with disabilities being barred from the workplace by their inability to perform tasks that are peripheral to the main job requirements. This may result in indirect discrimination.

To assess the essential or inherent duties of a position it is important to determine whether all relevant employees perform the duty, the amount of time required by the task as a proportion of the employees' total work schedule and the significance of the task in the context of the overall work environment.[29] Factors relevant to this assessment include what functions the employer believes are essential, the job description, the terms of any collective employment contract, experience of previous holders of the position and the current experience of any incumbents in similar jobs.[30] In *X v Department of Defence*,[31] the

24 HRA, s 56.

25 Cooper, "Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act" (1991) 139 U of Penn L Rev 1423, 1432 - 1433.

26 HRA, s 85.

27 As cited in Nothdurth, supra at note 18, at n 5.

28 Supra at note 12, at § 12111(8).

29 Supra at note 25, at 1443.

30 Supra at note 17, at 18.

31 Unreported, No H94/98, 26 June 1995, discussed in Bourke, "Mental Illness: Discrimination in Employment and the Disability Discrimination Act, 1992" (1996) 3 J L & Med 318, 331.

Australian Human Rights and Equal Opportunities Commission applied a narrow test when it determined the inherent requirements of a position. The complaint concerned the Army's dismissal of a soldier with HIV. The Army had argued that the plaintiff could not perform the inherent requirement of availability for deployment given the risk of transmission of HIV to others on the battlefield. The Tribunal held that deployability was an incident of employment rather than an inherent requirement of the job and that the dismissal was therefore unlawful.

(b) Possible Reasonable Accommodations

Once the essential duties or the inherent requirements of a position have been decided, the next step is to determine the appropriate accommodation that would enable a person with a disability to perform those duties. The ADA suggests physical modifications to make facilities accessible, modification of existing equipment, part-time or modified work schedules, adjustments to training materials and policies, the provision of readers or interpreters and job restructuring.[32] The New Zealand Employment Service's Workbridge programme has assisted many employers with advice and financial subsidies to reasonably accommodate people with disabilities. For example, Workbridge assisted a company wishing to employ a sales manager who suffered from renal failure.[33] His dialysis treatment raised concerns about his availability to work the hours required. Workbridge provided a fax, modem and a laptop computer so that the employee could receive details of orders and continue working while on dialysis. This, and flexible working hours, meant that he was able to work the required 20 hours a week.

(c) Job Reorganisation

Reasonable accommodation may entail reorganisation of a job once the essential functions of that job have been determined. Further, s 35 states that an employer cannot rely on the exceptions in the HRA to treat a person differently if with some adjustment of the employer's activities, another employee could carry out the duties that fall under the exception. However, the adjustment to the employer's activities must not involve unreasonable disruption. The distinction between the provisions of s 35 and s 29 indicates that the reallocation of peripheral duties should not be part of the provision of special services of facilities contemplated in s 29(1)(a). This section could be of particular benefit to newly disabled employees or those with a deteriorating disability. It might provide them with employment security not otherwise available as a result of ill

32 Supra at note 12, at § 12111(9).

33 Workbridge Inc, *Workbridge 95* (Christchurch: Workbridge Marketing, 1995) 9.

health and incapacity.[34]

In *P v A Ltd*,[35] P alleged that he had been dismissed because of his hearing disability. A Ltd admitted that P's broken hearing aid had been "the last straw" and had led to P's dismissal. The Human Rights Commission Complaints Division considered that although there appeared to be some performance problems, those problems did not justify summary dismissal. It noted that for a complaint to be made out, a discriminatory reason need not be the sole factor, but only "a substantive and operative factor" in the decision. It decided that the duty reasonably to accommodate P's disability under s 29 required A Ltd to explore alternatives to P's situation rather than to automatically dismiss him. While a broken hearing aid might have created temporary difficulties, A Ltd did not explore the range of options available. For example, another employee could have spoken to customers in the limited situations which required this. A Ltd had failed to provide any evidence beyond vague and unsubstantiated comments to justify the s 29 defence. Moreover, as the facts indicated, the dismissal may have been procedurally unfair and P could have succeeded in an alternative action at the Employment Tribunal.

(d) Health and Safety

Sections 29(1)(b) and (2) require the balancing of safety risks associated with the employment of a person with a disability against the employer's ability to take reasonable measures to minimise that risk to a normal level. Under both the HRA and other relevant law,[36] the workplace must be kept safe and free from risk of harm. The Employment Tribunal has decided three cases that concerned the possible risks associated with employing people who have certain disabilities.

Wilson v Sleepyhead Ltd[37] was an unjustified dismissal action taken by an employee who suffered from epilepsy and was employed as a fitter and turner. His job involved working on ladders, working around moving machinery and welding. After he suffered two seizures at work, the second occurring while underneath machinery, he was dismissed on safety grounds. His employer argued that he had a duty to protect the grievant and other employees from injury. The employer feared that Mr Wilson might have another seizure, thereby endangering himself and other employees.[38]

The Tribunal held that the employer's concern about safety was justified, as there was a small but foreseeable risk that Mr Wilson could be injured.[39] Medical evidence showed that he should not perform work involving height or

34 Doyle, "Disabled Workers' Rights, the Disability Discrimination Act and the UN Standard Rules" (1996) 25 ILJ 1, 8.

35 Complaints Division C294/94.

36 Health and Safety in Employment Act 1992, s 16.

37 [1992] 3 ERNZ 614.

38 Ibid, 615.

39 Ibid, 618.

heat until a reasonable time without incident had elapsed. Therefore, it would have been necessary at least to suspend Mr Wilson's employment. However, the Tribunal held that before making the decision to dismiss, the employer needed to be reasonably informed about his condition in relation to his responsibilities.[40] It held that the employer failed in this regard by not giving Mr Wilson the opportunity to put forward any medical evidence. This failure in procedural fairness was sufficiently serious to render the dismissal unjustified.[41]

Wilson v Sleepyhead has a twofold significance to the HRA. Firstly, it reinforces the employer's obligation to properly consider how an individual's disability might affect his or her ability to perform a job. This will be necessary to decide whether any reasonable accommodation could be made so that the employee need not be dismissed. Secondly, the employer must be reasonably familiar with the employee's condition in order to make a fair decision.

In *O'Loughlin v Hodgson*[42] a diabetic orthodontic assistant was dismissed after suffering from hypoglycaemic attacks that left her confused and disorientated. After the fourth attack Mrs O'Loughlin was dismissed by her employer, Mr Hodgson, because of his concerns about her performance and safety. The attacks occurred without warning during working hours and disrupted the practice. Mrs O'Loughlin was left in sole charge for two days of the week, so there was concern about her safety during this time. After the first attack, it was arranged that biscuits would be available for morning tea and Mrs O'Loughlin was encouraged to eat them. The employer argued that the dismissal was justified because of his concerns for the employee's safety.[43]

There was no evidence that Mr Hodgson had mentioned safety in relation to the previous three attacks. There was also evidence that he believed that the attacks resulted from Mrs O'Loughlin not taking care of herself. The Tribunal was not convinced that the employer had done everything to encourage the employee to bring her diabetes under control.[44] It ruled that Mr Hodgson should have discussed the situation and explored solutions with Mrs O'Loughlin.[45] The dismissal was therefore unjustified on procedural grounds. This decision again makes it clear that an employer is obliged to examine alternative solutions to dismissal in consultation with the employee.

B v M Ltd[46] involved alleged discrimination against a diabetic employee under s 22. The employee could not wear safety boots because of his diabetic condition. Safety boots were said to be a requirement of his particular job, and he was consequently transferred to a different work area nearby. The employer justified the transfer on the basis of its obligation under s 29(1)(b) and s 6 of the

40 Ibid, 619.
41 Ibid, 620.
42 [1993] 2 ERNZ 265.
43 Ibid, 268-269.
44 Ibid, 270.
45 Ibid.
46 Complaints Division, C272/94.

Health and Safety in Employment Act 1992 ("HSEA"). The Complaints Division found that there had been no breach of s 22(1)(b) and (c) of the HRA as the employer had been responding to the risk of harm from the absence of safety footwear. It was also satisfied that the transfer and adjustment to the complainant's working conditions amounted to a reasonable accommodation under s 29.

On its face, the decision seems reasonable. However, the concept of reasonable accommodation was effectively used against the complainant. The complainant did not want to be reasonably accommodated by being transferred, but by not having to wear safety boots. In the writer's view, the use of the concept of reasonable accommodation against the complainant lessens the right of the individual concerned to equal treatment. That being said, it is unlikely that the decision would have been any different. The Complaints Division could have held that the accommodation sought by B was unreasonable and, therefore, unable to be upheld due to safety concerns.

Section 29(2) qualifies the exceptions in s 29(1)(b). An employer cannot rely on those exceptions if reasonable steps to reduce risk to a normal level could be taken, without unreasonable disruption. This amounts to part of the general duty of reasonable accommodation imposed on the employer. The employer cannot refuse to employ a person with a disability only because there is a risk that the person might injure him or herself or others. The employer must consider ways of reducing that risk to a normal level in the workplace, but, this does not mean eliminating the risk entirely.

American courts have ruled that the risks associated with the employment of a person with a disability should be assessed with reference to the individual concerned.[47] This means that an employer should not rely on speculation about possible risks or statistical evidence related to the disability that the applicant or employee has. This may require an investigation into the individual's employment record and medical history. Possible ways of reducing the risk, if any, would then be determined.

(e) The Cost of Reasonable Accommodation

Whether it is reasonable to accommodate a person with a disability may depend on the cost to the employer. Under the ADA, an employer must accommodate an employee with a disability unless it would cause the employer "undue hardship".[48] Factors that should be considered include the size, nature and resources of the facility at which the accommodation is to be implemented, and the size, nature and resources of the business itself.[49] In requiring reasonable accommodation, the HRA expressly contemplates that there may be some cost to

47 Supra at note 25, at 1447.

48 Supra at note 12, at § 12111(10)(A).

49 Ibid, § 12111(10)(B).

the employer in employing a person with a disability. Sometimes there may be no cost at all, or, as minor changes are often made to meet the needs of employees, employers may not think of a small accommodation as a cost in the long-term.

It is unclear what sort of cost would be considered reasonable in New Zealand as the HRA is silent on the issue. United States case law may provide some guidance. For example, the number of people who will benefit from the proposed accommodation should be taken into account.[50] This may include potential future benefits and may take into account able-bodied employees and customers. For example, building ramps as an alternative to stairs can benefit older people and people with pushchairs. Further, it has been held that the net cost of the accommodation must be taken into account rather than the gross cost.[51] This accounts for any tax credits or any financial assistance that the employer receives for providing the necessary accommodation. In New Zealand such assistance can be obtained from the Accident Rehabilitation and Compensation Insurance Corporation and Workbridge.

(f) Applications for Employment

Section 22 of the HRA makes it unlawful for an employer to discriminate against an applicant with a disability when making a hiring decision or when offering terms and conditions of employment. Section 23 makes it unlawful for an employer to use or circulate any form of application, or to make any inquiry of or about an applicant which indicates, or could reasonably be understood as indicating, an intention to breach s 22. This includes answers to questions on a job application form, verbal inquiries made of an applicant by an employer and pre-employment medical screening.[52] The legitimate interests of an employer to request disability information on a job applicantion must therefore be balanced against the right of the job applicant not to be discriminated against on the grounds of disability.

The employer must be able to establish whether the applicant is qualified to do the job in question. It is therefore legitimate for an employer to require a job applicant to answer questions relating to the physical or mental ability to perform the essential functions of the position. This is important for a number of reasons. Firstly, there are individual variations between people with the same disability. Secondly, an employer needs information about an applicant's disability so that the employer can consider the kind of accommodation that will discharge its statutory obligations.[53] Thirdly, should New Zealand follow the

50 Supra at note 25, at 1450.

51 Ibid.

52 Adzoxornu, "Pre-employment Medical Screening - How to Avoid Discrimination and Privacy Complaints" (1995) 1 HRLP 67.

53 Ibid, 73.

United States approach, United States case law places a burden on persons with a disability to produce some evidence of a plausible reasonable accommodation themselves.[54]

Finally, an employer has a legitimate interest in protecting the safety of other employees. There is a duty under s 29 of the HRA and s 6 of the HSEA to take all practicable steps to ensure the safety of employees while they are at work. To do this, the employer needs to evaluate any risks posed by a potential employee who has a disability. This is particularly so if the job in question involves the use of machinery. The HSEA places a duty on an employer to ensure that the machinery used by any employee at work is designed, made, arranged and maintained in a manner that ensures it is safe for the employee to use.[55] As this duty is owed to a specific employee, the employer will need information on that employee in order to make any necessary adjustments to the plant.

A further issue that may concern New Zealand employers is the possible costs of employing a person with a disability arising out of the accident compensation regime under ARCIA. Employers will be concerned about anyone who is more likely to sustain injury, as it is the number of accidents which determines the employers' accident compensation premium levels. Section 7(6) of the ARCIA provides that employees will not be covered by the Act if they do not disclose to an employer that they are suffering or have suffered from a personal injury. A limited inquiry by employers will be lawful as the ARCIA overrides the HRA.[56] However, wide-ranging questions regarding all previous accident compensation claims should not be allowed, as previous claims may be irrelevant to the job and may involve highly personal matters. It is also suggested that the identification of a condition relevant to the job should be used to better place the applicant, rather than to exclude the applicant from employment.[57]

In *K v W*,[58] K alleged that he had been unlawfully terminated because of his disability and that W refused to accommodate his disability. As a result of surgery K could not lift heavy items without serious risk to his health. K said that when he applied for the position of salesperson at W's store there was nothing in the job description to indicate that the position required heavy lifting and he believed that yard staff could do any heavy lifting that was required. On K's second day at work he told his employer that he could not lift heavy items and was subsequently dismissed by W. W claimed that K had knowingly misled him in his answers to medical questions on the application form and that W

54 Supra at note 25, at 1465.

55 Section 6(1)(c).

56 New Zealand Employers' Federation Inc: *A Guide for Employers on the Human Rights Act and Equal Employment Opportunity* (Wellington: New Zealand Employers' Federation Inc, 2nd ed 1997) 9.

57 Ibid.

58 Complaints Division C199/96, noted in (1997) 2 HRLP 242.

would not have employed him if his disability was known. W argued that if K was to remain employed another person would have to be hired to do the lifting that K could not do.

The Complaints Division found that K had honestly answered the questions on the application form about being on medication or receiving medical treatment. It found K's assumption understandable that the words "ensuring stock is moved" meant other staff would do the physical work. Regarding the s 29 defence, the Complaints Division found that having employed K, W had a duty to attempt to reasonably accommodate K's disability and that on the facts it had not done so. W had failed to demonstrate, with a trial period, that any difficulties experienced would cause unreasonable disruption to the workplace and, therefore, make it unreasonable for W to accommodate K's disability. For example, there were 52 other staff at that branch, including four other salespeople, and it would probably have been possible for K to ask another staff member to lift heavy goods.

This complaint highlights several difficulties in deciding what amounts to discrimination and the further difficulties in proving that it has occurred. The employer obviously thought that it would be more convenient to have all salespeople capable of lifting stock, and believed that this was clear in the job description. It is not clear whether the complainant would have applied for the job if he had read the job description to mean that it involved lifting. Moreover, it is possible that other job seekers who could not lift did not bother to apply. The Complaints Division eventually found that the job did not involve lifting. Therefore, there was some degree of discrimination against people with a certain disability by the employer when it advertised the job description, a matter which would not have been discovered if K had not been employed.

The employer thought, from the questions set out in the application form, that he would be able to identify a disability that would prevent an applicant from lifting. If the questions had been worded differently and K had answered differently he may not have been employed. While a complaint to the Complaints Division could have been made, discrimination would have been more difficult to prove as the employer would have been able to argue that whoever they had employed was better qualified. The Complaints Division also held that the employer had a duty to reasonably accommodate K "having employed" him.[59]

The term "having employed" is unfortunate as it implies that the employer did not have such a duty before K was employed. Under the HRA, discrimination at any stage of the employment process is unlawful. The obligation to accommodate an employee is thus no different from the obligation to accommodate an applicant.[60] If the obligation to an applicant is not recognised,

59 Ibid.

60 It should be noted that as employees may take alternative action under the ECA, employees with disabilities do, in fact, enjoy more protection from discrimination than applicants with disabilities.

then based on *K v W*, a problematic situation could result; a person is protected from discrimination if he or she is employed, but the applicant is not employed because he or she is discriminated against.

From the above discussion it can be seen that the HRA provides some protection to employees with disabilities. However, as there has been little case law on the issue, the broad terms used under the HRA lack definition. Therefore, the ambit of that protection and how far that protection will extend is unclear. The experience overseas, particularly in the United States, may provide guidance in future cases.

III: THE DISABLED PERSONS EMPLOYMENT PROMOTION ACT 1960

In New Zealand, the HRA ensures that people with disabilities are not discriminated against in employment matters. The philosophy behind this law is equality; people with disabilities should have the same opportunities as the able-bodied to gain employment. However, the provisions of the HRA only protect people with disabilities from discrimination in employment matters if they are qualified for open employment. If the disability cannot be reasonably accommodated, or a job's essential functions require the use of physical or mental functions that are impaired, the applicant will not be qualified for open employment and the provisions against discrimination do not apply.

People with disabilities that prevent them from participation in open employment arguably still have the right to participate in a labour market that is suitable for them. This labour market is either supported or sheltered employment and is currently governed, at least in part, by the Disabled Persons Employment Promotion Act 1960 ("DPEPA"). The challenge of statutory reform in this area is to update this Act to make it consistent with the current philosophy of equality, while still providing a framework for those people who benefit from supported or sheltered employment.

1. The Origins of the Act

The purpose of the DPEPA was to ensure "better provision for the employment of disabled persons".[61] In 1960, this referred to the establishment and operation of sheltered workshops. A "sheltered workshop" is defined as "any place owned or controlled by an organisation approved by the Minister under s 3 of the Act in which disabled persons are employed".[62] At the time the DPEPA was passed most people with physical or mental disabilities were

61 Disabled Persons Employment Promotion Act 1960, Long Title.
62 Section 2.

institutionalised from an early age. As adults a sheltered workshop was often the only place available in which they could work. This was not only a result of attitudes in the wider community, but also a consequence of institutionalisation which rendered many incapable of surviving in society at large.

The DPEPA is administered by the Department of Labour. Under the Act, the Minister of Employment may provide sheltered workshops with blanket exemptions from industrial awards or agreements and all or any of the legislative provisions that relate to employment.[63] The DPEPA allows an approved organisation running a sheltered workshop to determine the level of pay and conditions for the people working there. In 1960 the New Zealand industrial climate was very different from that of today. Unions had blanket coverage over most industries, including the factory work done in many of the workshops at that time. The DPEPA was necessary because industrial awards did not contain provisions for underpayment or for flexibility in hours of work. It created a marked distinction between sheltered workshop employers and employers in the open labour market.

2. Sheltered Workshops in 1998

In 1998 there still exist a number of sheltered workshops established under the DPEPA.[64] There are many different organisations which have exemptions under the DPEPA, often with different aims. Some are motivated primarily by charitable reasons and this is reflected in the type of disabilities they cater for and the activities that they provide. Others operate as profit-making enterprises and are similar to a mainstream business. Some organisations are a mixture of both. In this environment it is often difficult to disentangle the 'work' elememt from the 'social service' aspect of the existing sheltered workshops.

Some workshops arrange recreational activities and educational programmes and so function more as community centres for people with disabilities. These workshops are happy to pay small amounts to people for correspondingly small work requirements. An example of the work that a severely disabled person might perform is the counting of nails that are then put into a small bag. To count the nails the person is provided with a wooden counting board with fifty holes in it which he or she will then fill. This task can take a person with a severe disability several hours, but can provide considerable satisfaction. At present, the workshop can pay such a person an amount less than the minimum wage for such work. However, it is also common for people who attend this type of workshop to pay an attendance fee even though they receive a modest wage.[65] The attendance fee is often the person's disability allowance and in some instances is paid directly to the workshop from Income Support. This appears to

63 Section 4.

64 *New Zealand Gazette*, 12 December 1996, 4733.

65 Supra at note 1, at 79.

have resulted from the difficulties that some workshops have experienced in acquiring regular funding to operate.

In other workshops the environment is similar to that of an ordinary factory; often there may be some employees without any disability. There is no attendance fee at this type of workshop and the work performed is usually packaging, which can vary in complexity and may involve the operation of machinery. These workshops commonly pay their employees $50 for a 40 hour week.[66]

3. Exemption from the Minimum Wage Act 1983

The Minimum Wage Act 1983 ("MWA") is the statute from which all sheltered workshops have an exemption. The original rationale for the exemption was to ensure that people with disabilities had access to employment in spite of their low productivity rates, in view of which employers would be reluctant to pay full rates. The fact that the majority of the labour force in sheltered workshops has been available at very low cost has significantly assisted them to compete for commercial contracts, enabling them to provide an alternative to open employment for people with disabilities. This results in a compromise, as the people employed do not receive the minimum wage, but still gain some benefits of employment. They have something to do, they can socialise with other workers and can contribute to society. However, work for less than the minimum wage is not wholly compatible with the philosophy of equality.

In the larger workshops, not all employees are people with disabilities. Many are people who are on unemployment benefits, recent immigrants and include other people who for various reasons cannot find other work, for example, sex offenders.[67] This raises policy questions about the way that the DPEPA is being used. It was never originally intended to apply to workers, either with or without disabilities, who could work at the normal rate. However, there is nothing in the DPEPA that prevents this. Under a rights-based analysis if people with disabilities are working at open employment levels, but are not paid the commensurate rate, then they must be being discriminated against on the grounds of disability.

The HRA does not limit or affect the provisions of any other Act which is in force until 31 December 1999.[68] Until then, the provisions of the DPEPA will override the HRA. From 1 January 2000 the DPEPA will require amendments to make it consistent with the HRA, to the effect that people with

66 This is the amount allowed before the employee's benefit is reduced.

67 The writer was told by workshop supervisors that in at least one workshop sex offenders are employed alongside workers with disabilities. While the implications of this are disturbing and outside the scope of this paper, this use of the DPEPA shows the harm to which people with disabilities working in this environment could be exposed.

68 Sections 151 and 152.

disabilities who work at open employment levels may be able to use a rights-based argument to demand that they be paid the minimum wage.

4. The Future of Sheltered Employment

It would appear that there is no unanimity among the disabled or those involved in sheltered workshops with regard to the future of the regime. This reflects both varying experiences with workshops and, to some extent, differences in principle. On a more cynical note, the views of management may also be influenced by the constant scramble for funds that occurs amongst organisations of this type. They will tend to promote their particular organisation as being preferable to others.

The most serious criticisms of the current regime are claims of exploitation and the lack of appropriate protection for workers in sheltered workshops. Another concern is that because "organisations continue to be dependent on gaining commercial contracts to remain financially viable, they have an incentive to keep their most able employees".[69] These employees work at a faster rate and so make up for the less productive workers. Arguably, these employees would receive more benefit from open employment or a supported employment situation.[70]

Supported employment is "the process of placement, training and ongoing support of people with disabilities aimed at their earning financial remuneration in integrated work settings".[71] The issue is not whether the person is ready for employment, but what support the person would need in order to enter employment and how this could be provided. It acknowledges that some people with disabilities may need permanent support services to experience an ordinary working life. Agencies in this field seek to discover a person's aspirations, strengths, preferences and support needs. They match these to the requirements of a particular job and provide whatever support is necessary to maintain that person in the job. Supported employment is work for remuneration in the mainstream labour market, people are paid for the work they do and receive associated benefits such as annual leave, sick leave, bonuses and training opportunities. At present, no specific legislation governs this area.

Although employment options for many people with disabilities have increased to include employment in the wider community, there will always be a group of people with disabilities more suited to a sheltered work environment. Some experience such substantial impairments of work-related functions, in so many spheres, that open employment is an impossibility. The idea that such

69 Workbridge Inc, *Disability and Employment in New Zealand: The Next Step* (Auckland: Workbridge Inc, 1996) 14.

70 Ibid, 16.

71 Mannion, "A Brief History of the Establishment, Development and Role of the Association for Supported Employment in New Zealand" in Bennie (ed), *Supported Employment in New Zealand 1996* (Levin: Network, 1996) 61.

people could work in open employment is also unrealistic in the current economic climate. A person whose disability means they cannot ever reach required productivity levels will not be an attractive employment prospect to efficiency-driven employers.[72] In addition, people who work in sheltered workshops, even if given the choice of open employment, may wish to stay in their current environment.

5. Possible Reform

Sheltered workshop operators typically fear that reform of the DPEPA would impose an obligation on them to pay the minimum wage. This could force them to cease operation or significantly change the way in which they operate. Different kinds of workshops would be affected in different ways. The workshop operators that run community centres and have charitable aims believe that they are doing a good job and want to retain the status quo. They are happy with the arrangement that allows them to pay small amounts of money for what may be a correspondingly low production level. This seems to be a satisfactory arrangement and matches the charitable aims of this type of workshop. The workshops reward people for their achievements, irrespective of any comparison with an able-bodied person. If required to pay minimum wages they would not be able to accept the low-priced contracts for the type of work that they have at present.

Workshops that operate in a more structured factory situation would not be affected to the same extent by the requirement to pay the minimum wage. They would probably shed some of their slower workers and cut back in other areas. They would have to negotiate the prices of their contracts to cover the increased costs of wages. Most people in sheltered workshops receive government benefits. Payment of the minimum wage could cause abatement of various benefits and the worker's financial position may deteriorate as a result. While these enterprises could survive, the outcome for their workers would be less favourable.

6. The 1991 Working Party

In 1991, the Working Party on Employment and Training Policies for People with Disabilities ("Working Party") identified three major problems with current sheltered, supported and open employment provisions for people with significant and lasting incapacities. Firstly, the irrelevance of the DPEPA to the current institutional realities in the sheltered and supported employment sector was identified. Secondly, it noted the conflicting signals and incentives which the mix of industrial legislation, benefit policies and vocational service funding

72 Supra at note 1, at 77.

programmes provided. Finally, it was considered undesirable that the current policy mix favoured community organisations providing sheltered and supported employment over employers providing employment in the open labour market.[73] This reflects the current thinking that people with disabilities should not be segregated from mainstream society as they were in the past.

The Working Party proposed five possible options for reform of which two were preferred.[74] Both these options involve individual assessments of the employee involved, rather than any blanket exemptions that would cover the place of employment. They would be tailored towards people with disabilities rather than any person who could not obtain employment.

The first option was to repeal the DPEPA. Instead, operators of sheltered workshops or supported employment programmes would be required to obtain an under-rate workers permit if they wished to pay an employee less than the minimum wage.[75] The MWA provides for a system of under-rate permits.[76] These permits exempt an individual worker from the minimum wage if the worker satisfies a Labour Inspector that he or she is incapable of earning wages at the minimum rate prescribed under the MWA. The worker must personally apply for the exemption. The permit prescribes a minimum rate for the worker and states the period of time for which the permit will apply. The current system involves a Labour Inspector deciding that a person is only doing a percentage of the equivalent work of an able-bodied person.

The Working Party saw this option as one that would successfully reform the employment opportunities available to people with a significant and lasting incapacity.[77] It would effectively offer them the same conditions of employment regardless of whether they sought work in the sheltered, supported or open employment sectors. It may make graduation into open forms of employment more likely. The adoption of this scheme should be undertaken in conjunction with the liberalisation of the benefit abatement regime.

There are disadvantages to this scheme.[78] The Working Party thought that it would maintain the bias against open employment because there would be no provision for direct financial support for employers employing someone with a disability. However, employers would benefit indirectly from state support because, if they paid under-rate wages, the employee would still receive an addition to their benefit. The process of assessing productivity-based wages for people with disabilities was also thought to be difficult and costly. Finally, there could be a reduction in employment opportunities in sheltered workshops due to an inability to compete for contracts as a result of increased wage costs.

The second option proposed by the Working Party was the repeal of the

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73 Ibid, 83 - 84.
74 Ibid, 88.
75 Ibid.
76 Section 8.
77 Supra at note 1, at 95.
78 Ibid, 95.

DPEPA and the provision of long-term partial-wage subsidies to sheltered, supported and open labour market employers of people with disabilities.[79] This would effectively equalise the conditions of employment of people with disabilities regardless of the sector in which they found work, but by different means. A major advantage of this option is that it makes explicit to both employers and employees that the primary status of people with disabilities in all kinds of employment is that of employee not beneficiary.

Individual assessments would still be required. The role of such assessments would be to determine the respective proportions of an employee's wage to be met by the employer or the state. The government would also have to set a benchmark for the total wage to be paid. This might be the prevailing market wage, the minimum wage or the benefit level as well as a set amount.[80] The Working Party considered this option to be the one most likely to improve the conditions of employment of people with significant disabilities, but it was not sure how the costs involved in each option would compare.[81]

7. The DPEPA in 1998

The problems with the legislation identified by the Working Party in 1991 still exist. Since then, changes to industrial legislation and the enactment of the HRA have magnified those problems. The DPEPA has been in need of reform for some time, but it would appear that no reform is currently planned. The only recent development has been the re-issuing of exemptions to sheltered workshops in 1996.[82] Currently, all organisations with exemptions under the DPEPA have exemptions from the requirements of the MWA, while a few are also exempt from the Holidays Act 1981. Therefore, for reasons not made explicit, some employees will have more protection than others depending on the organisation for which they work.

In the less business-focused organisations, management often sees the relationship within the organisation not as one of employer and employee with its accompanying rights and obligations, but rather as a less structured service provider and client relationship. Although their "clients" are often engaged in work, there is no perceived reason for negotiated minimum conditions of employment or for any kind of independent representation or bargaining agent. The DPEPA implicitly reinforces these views even though the workshops are no longer exempted from all industrial legislation. Significantly, the exemptions in the DPEPA apply to the workshop itself rather than to each individual employee.

While workshop operators are usually motivated by good intentions, they are often unaware of their obligations under other legislation. For example, some

79 Ibid, 97.
80 Ibid, 98.
81 Ibid, 99.
82 Supra at note 64.

workshops have house rules that say a penalty will be imposed for lateness. While there is no evidence that such rules are used excessively and that employees are being exploited, the mere fact that these rules exist exposes the workshops to such claims. Workshop operators should be made aware that they are bound by all the minimum codes of employment except those from which they are explicitly exempt.

The ECA covers people who work in sheltered workshops. "Employee" means any person of any age employed by an employer to do any work for hire or reward.[83] Workers in sheltered workshops would fall under this definition and so they have the right to determine who should represent their interests in relation to employment issues.[84] They have the same rights as any other employee in New Zealand. An interesting question with regard to law reform in this area is whether those rights are adequate to protect the interests of people engaged in sheltered employment. The law is predicated on an individual being able to make his or her own choices about the negotiation of conditions of employment.

When an order is made under the Protection of Personal and Property Rights Act ("PPPRA"), a worker in sheltered employment may not have the capacity to contract in regard to his or her own property.[85] In the past, workshop operators have resisted attempts by advocates to represent workers as they have used this inability to contract to argue that there is no contract of employment in existence. However, this may not be the case. Apart from the PPPRA there is nothing in law that restricts the capacity of a mentally disordered person to enter into a contract of employment.[86] It is also clear that people who work in sheltered employment have a sound understanding of the fact that they are completing tasks in exchange for a payment. Further, it does not seem unreasonable for some kind of representation to be available. These people may need to have someone to negotiate for them if they are to be treated fairly and they have a right to representation under the ECA. At present, lack of knowledge, both among workshop operators and their employees, should be addressed so that if an employee requests or needs an advocate an appropriate person can be engaged.

The DPEPA sets out procedures for the approval of organisations wanting to operate sheltered workshops[87] and for the recommendation of exemptions from employment legislation.[88] As part of these procedures, New Zealand Employment Service staff are required to consult with the New Zealand Council of Trade Unions, the New Zealand Employers Federation and any union which would normally have representation in the workshop prior to exemption. As

83 Section 2.
84 Section 10.
85 Protection of Personal and Property Rights Act 1988, s 58(2).
86 Supra at note 3, at 839.
87 Section 3.
88 Section 4.

unions in New Zealand do not have the same influence as they did when the DPEPA was passed, such consultation is no longer applicable. It is not clear which organisations, if any, were consulted in 1996.

If the DPEPA is retained, the sections that set out the procedures for approval and the granting of exemptions, at least, should be updated. Further, the statute still relies on the participation of unions to help regulate the conditions in sheltered workshops.[89] Currently unions play a very different role to that which they played previously, consequently their influence on the functioning of sheltered workshops no longer exists. In addition, collective employment contracts do not cover more than one workplace and so the level of pay and conditions in sheltered workshops is not necessarily relevant to workers doing similar work in other organisations. Although there are unions that represent the fully paid staff in sheltered workshops, it would probably be inappropriate for the same union to also represent the workers.

One alternative is that another body should be involved to represent the interests of people with disabilities who work in sheltered workshops. The Health and Disability Commission or the Disabled Persons Assembly may be suitable. This would be in accord with the UN Standard Rules, one of which is "States, workers' organisations and employers should cooperate with organisations of persons with disabilities concerning all measures to create ... employment opportunities".[90]

IV: CONCLUSION

The law relating to people with disabilities and employment in New Zealand is in an unsatisfactory state. As Part II of the article has shown, the HRA protects the rights of people with disabilities to a degree. There is a prohibition against not only direct but also indirect discrimination. To prevent discrimination in the workplace, employers are required to act positively by enabling employees with disabilities to work. Although employers are not expected to incur unreasonable expense or effort in doing so, that effort could require financial contribution or job reorganisation. This concept of reasonable accommodation has been confirmed in instances that have resulted in complaints to the Complaints Division.[91] Importantly, for people with disabilities wishing to enter the job market, the HRA provides protection for job applicants as well as employees.

However the ambit of the protection afforded by the HRA is by no means clear. The relatively recent enactment of the HRA means there is little case law

89 Section 5.

90 Rule 7(9).

91 See for example *P v A Ltd*, supra at note 35.

to "flesh out" such concepts as for example, the requirement to be qualified and reasonable accommodation. What are the limits that should be set? Overseas experience with similar legislation will probably provide some guidance on these issues. In addition, there are limits to the protection that the HRA provides. The right of people with disabilities to work can be limited by, for example, the right of other employees to safe working conditions.[92] Further, the HRA only assists those who can work in open employment. Employers are not required to assist those who cannot as this would amount to unreasonable accommodation.

The ECA has also been of assistance, even though it does not specifically provide for the protection of employees with disabilities. Employment Tribunal decisions have recognised the right of those employees to fair treatment. An employer must take steps to become informed about the nature of the disability and discuss alternative solutions to dismissal with the employee concerned.[93] It is hoped the principle of fair treatment is recognised in any future interpretation of cases decided under the HRA.

Part III demonstrates that the biggest challenge facing the DPEPA is the need for reform. This is for two reasons. First, the DPEPA has not kept pace with the changing perception of disability. Where once having a disability meant that a person was seen as generally incapable that same person is seen now as someone who merely happens to have a disability. Previously, the perception of general incapability meant that the government adopted the role of "benevolent caregiver" through legislation such as the DPEPA. However as perceptions have changed so has the position and the recognised rights of people with disabilities. For example, many people with disabilities in the last decade have been deinstitutionalised. In addition, people with disabilities have come to be seen as people with the same rights as everyone else. This culminated in the enactment of the HRA in 1993.

Secondly, the DPEPA is out of step with the current employment environment. Organisations without exemptions under the MWA compete for the same commercial contracts as organisations with those exemptions. A level playing field does not operate in this respect. At the time of the enactment of the DPEPA, unions played a far more significant role in determining the shape of employment in New Zealand. Now the "hands-off" approach of the ECA means the role of unions in employment is generally less significant. With the advent of HSEA, sheltered workshops may need to assess the environment in which people in the workshops operate. If there are people working in sheltered workshops who should not be there, workers with disabilities may be vulnerable to harm.[94] This could be a health and safety issue under the HSEA. Further, the DPEPA does not cover those working in supported employment. Given that no legislation currently covers supported employment, a gap exists.

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92 See supra at note 42. While this case was not decided under the HRA, it is likely that similar cases will come before the Complaints Tribunal.

93 See supra at note 37, and supra at note 42.

94 Supra at note 67.

Any reform must be consistent with the current philosophy of equality and individual rights while at the same time providing for those who cannot work in open employment. As a starting point it is clear that DPEPA cannot meet the needs of people with disabilities in the current employment environment. The best options for reform identified by the 1991 Working Party both involved repeal of the Act. Therefore, it is likely that any reform will see repeal rather than amendment of the DPEPA.

The focus of reform must be on those who cannot work in open employment. This is because people whose disabilities can be reasonably accommodated in open employment should be covered under the HRA and the ECA. Currently, the blanket exemptions from minimum statutory employment requirements sheltered workshops receive enables them to employ those workers as well as workers without disabilities. To address this, the Working Party's suggestions of exemptions or partial wage subsidies of the individual worker should be adopted. Wage subsidies are the preferable option in the writers view. It achieves consistency with a rights-based approach to disability as people will be regarded as employees rather than beneficiaries. In addition, wage subsidies can be graduated so as to cover those who are able to work in supported rather than sheltered employment.

The specific needs of people working in both sheltered and supported employment must also be addressed. If particular disabilities render some people more vulnerable than others, ensuring the working environment is safe is a priority. The provision of advocacy for such employees should be considered.

As a precursor to reform, thought must be given to the diversity of the population of people with disabilities, and the consequent diversity of their needs. Changes in technology mean that it is possible to accommodate people with disabilities in ways previously unheard of. On the other hand, technology has also replaced many tasks that a person with a disability could have done in the past. Further, the current drive for economic efficiency may be having a detrimental effect on people with disabilities. For example, employers who wish to operate with lower staff levels are likely to look for multi-skilled employees, making it more difficult to accommodate a person with a disability. Any reform must also take into account the fact that it may never be possible for some people with disabilities to work in open employment.

The consequences of reform should also be considered. If society's conception of disability changes so that people with disabilities are seen as able rather than disabled, then they may be expected to work regardless of their disability. This will not assist those who cannot work in open employment. It could result in people with severe disabilities finding it more difficult to receive benefits. Any reform should start therefore from the position that people with disabilities should not suffer a drop in income that presently enables them to have a reasonable standard of living.

To conclude, the enactment of the HRA has given comprehensive recognition to the right of people with disabilities to have access to the same

goods and services, including employment, as people without disabilities. This article has attempted to show that this is a step in the right direction. However, there are those whose disabilities mean that they do not fall within the ambit of the HRA. Arguably these people are in need of more protection as a result. In employment terms, they are instead covered by outdated legislation such as the DPEPA whose continued existence demonstrates that reform is urgently needed. If society wishes to promote the well-being of all its members, the time to address the needs of those whose disabilities mean that they remain outside the ambit of the HRA, has come.

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