Different — yet equal

The historical development of disability discrimination legislation in the US, the UK, Canada and Australia

James Justice Bond,
B.A. (Political Science and History), Macquarie University 2012
Master of Politics and Public Policy, Macquarie University 2013

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Supervisor, Associate Professor Geoffrey Hawker

Faculty of Arts
Macquarie University
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Contents

Abstract

This thesis examines the historical development of anti-discrimination policy in four jurisdictions, with an emphasis on persons with disabilities. It details the development of disability discrimination legislation in the US and Australia, and of equality legislation in the UK and Canada. It is argued that more equitable policies have co-evolved with historical changes in the social construction of marginalised individuals. More specifically, the study employs an historical institutionalist framework to investigate the array of factors driving the evolution of the human rights institutions in each country. The case studies throw up a wealth of factors, but two major factors stand out, one structural, the other agential.

The major structural factor is federalism. In the three federal nation-states the national jurisdiction shares power and competencies with subnational jurisdictions, with implications for human rights legislation at the federal level. This contrasts with the UK, a unitary state, but with its sovereignty now constrained by the European Union.

The major agential factor is the nature, institutional location and timing of activism promoting human rights. The study highlights several prominent political and academic actors, who initiate new policy proposals in response to (and utilising) critical junctures in the history of human rights institutions in each country.

The thesis concludes by indicating that a fertile area of future research lies in the exploration of the lineage, transmission and development of the ideas centred on human rights and justice argued by such entrepreneurs.

Declaration

I certify that the work in this thesis entitled *Different — yet equal: The historical development of disability discrimination legislation in the US, the UK, Canada and Australia* has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

The research presented in this thesis did not require approval by Macquarie University Ethics Review Committee.

Signed: 

Full name: James Justice Bond

Student number: 41998561

Date: 28 September 2014

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1. Introduction

1.1 Overview

This monograph examines the historical development of anti-discrimination and equality policy in the United States, Australia, the United Kingdom and Canada. It argues that more tolerant and equitable policies have evolved as society has changed its perception of marginalised individuals, those who are perceived as different, and therefore stigmatised. Persons with disabilities are the focus of this investigation. Where there is specific disability discrimination legislation, as in the US and Australia, this will be examined. Where disability discrimination is subsumed into wider equality legislation, as in the UK and Canada, the wider package will be examined. This will also entail investigating the degree to which human rights are entrenched in the constitutions of each country. The examination will be diachronic rather than synchronic: rather than comparing the mechanics of the current legislation in the four jurisdictions as played out in the courts and wider society, the aim will be to elucidate the development of these policies through time. The strength of the historical approach is that it elucidates the interplay between shifting social constructions and the development of increasingly enlightened legislation. As a result, the study has one foot firmly in history, the other foot firmly in public policy. It is also relevant to sociology and disability studies.

1.2 The social constructivist approach

This paper will broadly use the approach of social constructivism and more specifically the approach of historical institutionalism, a choice determined by the subject matter investigated. This study focusses on disabled people and other marginalised groups, and will argue that marginalisation and discrimination are the result of negative social constructions of these

members of society.[1] The conceptual starting point is the *social model of disability*, which has underpinned the discipline of disability studies since it was founded in the early 1980s. The model argues that while physical and mental impairments are medical facts, the barriers erected to the full participation of disabled people in society are socially constructed and discriminatory. As investigated in the following chapters, this understanding of disability developed amongst disability activists in the 1970s.[2] From there the concept was developed into a theoretical framework by disabled academic Michael Oliver in 1983[3].

Now the mainstay of disability studies for three decades, like any orthodoxy the social model has not been immune to criticism. Critique has centred on the basic dichotomy of the model itself and on the intersectionality of disability with other sources of disadvantage (such as gender or location within the North-South divide), and has also come from scholars arguing from particular impairment standpoints.

The basic premise of the model, privileging the professional expertise of the sociologist over the expertise of the medical practitioner or therapist, is far from applicable to all situations, including the design of assistive technology for disabled people.[4] Another criticism

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[1] The preferred terminology in disability studies is to refer to 'disabled people', 'disabled persons' or 'people with disabilities', rather than 'the disabled', a term that is felt to be demeaning and impersonal.

[2] Paul Hunt's articulation of the concept in 1975 was the earliest recorded example, as discussed in Section 4.3. The contributions of Americans William Roth, Harlan Hahn, Irving Zola and Paul Longmore are discussed in Section 2.4.

[3] Michael Oliver, *Social Work with Disabled People*, Macmillan, for the British Association of Social Workers, London 1983. The most recent edition is: Michael Oliver, Bob Sapey and Pam Thomas, *Social Work with Disabled People*, 4th edn, Palgrave Macmillan, Basingstoke 2012. Oliver has since elaborated on the concept, notably in 1990 and most recently in 2013: Michael Oliver, *The Politics of Disablement: A Sociological Approach*, Palgrave Macmillan, Basingstoke 1990; and Michael Oliver, 'The social model of disability: thirty years on', *Disability & Society*, 28: 7, 2013, pp. 1024-1026.

[4] Guy Dewsbury, Karen Clark, Dave Randall, Mark Rouncefield and Ian Sommerville, 'The Anti-Social Model of Disability', paper jointly written by academics at the Department of Computing, Lancaster University and the Department of Sociology, Manchester Metropolitan University, and hosted on the Computer Studies server, University of St Andrews at < http://ifs.host.cs.st-andrews.ac.uk/Research/Publications/Papers-PDF/2000-04/AntiSocialModelofDisability.pdf >, downloaded 27 November 2014.

is that the social model, by prioritising the socially located disability, plays down the role the medically located impairment. As argued by feminist disability theorist Liz Crow, impairment is a source of real physical suffering for disabled people. This stands in contrast with the experience of gender, sexuality and ethnicity which form the basis for the other major civil rights movements.[5] In similar fashion Eva Feder Kittay believes that an approach that stresses the removal of socially constructed barriers to disability fails to deal with the real depth of impairment faced by people with the severest forms of intellectual disability.[6]

As a model developed in the global North, the applicability of the social model of disability to developing countries has been questioned. Its ethos of individual empowerment, of the disabled person negotiating socially constructed barriers, contrasts with the more consensual community based ethos of many African and Asian cultures.[7] Since this particular vision of human rights is exported by the technologically advanced countries of the global North, developing countries are compelled to view their traditional practices as inferior.[8] Many of the issues salient to disability rights in the global North, such as the independent living movement, are irrelevant or of low priority in the South.[9]

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[5] Liz Crow, 'Including all our Lives; Renewing the Social Model of Disability', in J. Morris (ed.) *Encounters with Strangers: Feminism and Disability*, Women's Press, London, 1996, p. 4. The chapter is available from <http://www.roaring-girl.com/wp-content/uploads/2013/07/Including-All-of-Our-Lives.pdf> and was downloaded on 27 November 2014 The host site, Roaring Girl Productions was founded in 1999 by Liz Crow and is based in Bristol, UK.

[6] Eva Feder Kittay, 'When Caring Is Just and Justice Is Caring: Justice and Mental Retardation', *Public Culture*, vol. 13, no. 3, Fall 2001, p. 558.

[7] Raymond Lang, 2007, pp. 26-27, downloaded from from the Leonard Cheshire Disability and Inclusive Development Centre at University College London at <http://www.ucl.ac.uk/lc-ccr/centrepublications/workingpapers/WP03_Development_Critique.pdf> on 02 July 2014.

[8] Helen Meekosha and Karen Soldatic, 'Human Rights and the Global South: the case of disability', *Third World Quarterly*, vol. 32, no. 8, 2011, p. 1388.

[9] Helen Meekosha, 'Decolonising disability: thinking and acting globally', *Disability & Society*, vol. 26, no. 6, 2011, p. 670.

Yet northern global hegemony manifests itself in more deleterious ways than simple intellectual arrogance. Overall the economic and geopolitical practices of the North are disabling the people of the South, through invasion, colonialism, globalisation and neo-colonialism. These practices include regional wars and armed conflict, the arms trade and nuclear testing, and the establishment of factories and sweatshops to assemble and disassemble products desired by the North with the South paying the cost in pollution, industrial and environmental accidents, health risks and disability.[10] These effects are compounded by the insidious intersectionality of other hegemon-subaltern roles centred on race and gender.

However, despite these reservations, to allow this project to be operationalised around a central concept, the social model of disability has been chosen due to its widespread acceptance. This project will take the constructivist approach of the social model of disability and apply that argument to the arena of public policy, where *social constructionism* is relevant at two levels.[11] First, each jurisdiction has an array of institutions both physical and ideational that promote or inhibit effective legislation, and these institutions are ultimately the result of certain agreed norms, values and understandings that are fundamental to that society; that is to say, they are socially constructed. Second, there is an interplay between the commonly accepted understanding of marginalised groups and legislation relating to them; again, the image of the marginalised groups is socially constructed. The use of social construction in

[10] Meekosha 2011, throughout.

[11] This theoretical approach derives from: Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Anchor Books, Garden City, New York, 1966, cited by Mats Alvesson and Kaj Sköldberg, 'Chapter 2, (Post-)positivism, social constructionism, critical realism: three reference points in the philosophy of science' in *Reflexive Methodology: New Vistas for Qualitative Research*, Sage, London, 2000, p. 24.

public policy was pioneered by Ann Schneider and Helen Ingram.[12] They argue that policy-making is responsive to the social constructions current in wider society, and that 'these constructions are subject to deconstruction and unmasking'.[13] Fundamentally, social constructions are sets of 'beliefs, perceptions, images, and stereotypes' that are intersubjective, generalised and widely held within society.[14] A shared culture, media, literature, politics and history within a society validate certain constructions of facts, experiences, beliefs, and events.[15] Within public policy, certain widely accepted constructions of target populations as deserving or undeserving, certain issue definitions and particular characterisations of knowledge and information become institutionalised into policy designs, 'which subsequently reinforce and disseminate these constructions'.[16] While social constructionism will be used in tracing changing attitudes towards people with disabilities, the slow co-evolution of society's institutions will be traced using historical institutionalism.

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[12] Helen M. Ingram and Anne L. Schneider, 'Public Policy and the Social Construction of Deservedness', in Anne L. Schneider and Helen M. Ingram (eds), *Deserving and Entitled*, State University of New York Press, Albany NY, 2005, pp. 1-28; Helen Ingram, Anne L. Schneider and Peter Deleon, 'Social Construction and Policy Design', in Paul A. Sabatier (ed), *Theories of the Policy Process*, 2nd edn., Westview Press, Boulder, Colorado, 2007, pp. 93-126. Figure 4.1 on p. 96 of the latter book is particularly useful.

[13] Anne Larason Schneider and Helen Ingram, *Policy Design for Democracy*, University Press of Kansas, Lawrence, Kansas, 1997, p. 105.

[14] Schneider and Ingram 1997, p. 73.

[15] Schneider and Ingram 1997, p. 75.

[16] Anne Larason Schneider and Mara Sidney, 'What Is Next for Policy Design and Social Construction Theory?', in *The Policy Studies Journal*, vol. 37, no. 1, 2009, p. 106. The role of discourse in spreading particular ideas, in propagating particular social constructions and in establishing certain institutions within society can be termed be termed ideational institutionalism, constructivist institutionalism or discursive institutionalism; see Sabine Saurugger, 'Constructivism and public policy approaches in the EU: from ideas to power games', in *Journal of European Public Policy*, vol. 20, no. 6, 2013, p. 889. Also: Vivien A. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse', in *Annual Review of Political Science*, vol. 11, 2008, pp. 303-326.

1.3 Historical institutionalism

When intersubjective socially constructed beliefs and perceptions become so widely accepted that they become fundamental to a society, they can be termed that society's social and political *institutions*. These institutions may be ideational, such as 'justice', or they may be physical entities built on ideational foundations, such as 'the Supreme Court', or even the roles played by institutional actors, such as 'Chief Justice'.[17] These institutions include the socially constructed barriers confronting disabled people, but encompass much more than that, potentially including all the social and political factors structuring a society. Institutions relevant to this study include a country's constitution, its mix of political parties and its evolving landscape of anti-discrimination laws. This study will attempt to identify a broad range of such institutions, trace their interplay and development over time, and attempt to identify the broader historical trends. This will entail the use of *historical institutionalism*.

Historical institutionalism was founded by Sven Steinmo, Kathleen Thelen and others at a workshop in Boulder, Colorado in January 1989.[18] It is characterised by 'its attention to real world empirical questions, its historical orientation and its attention to the ways in which institutions structure and shape political behaviour and outcomes'.[19] Institutions vary from formal organisations to the conventions, norms and codes of behaviour that structure the

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[17] Stephen Bell, 'Institutionalism: Old and New', in Dennis Woodward, Andrew Parkin, John Summers (eds.), *Government, Politics, Power And Policy In Australia,* 7th ed., Pearson Education Australia 2002, available from the University of Queensland eSpace at <http://espace.library.uq.edu.au/view/UQ:9699>. See p. 364 of book or p. 2 of digital file. Stephen Bell is Professor of political economy and Deputy Head of the School of Political Science and International Studies at the University of Queensland.

[18] Sven Steinmo, 'Historical institutionalism', in Donatella Della Porta and Michael Keating (eds.), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, Cambridge University Press, Cambridge, 2008, p. 136 (footnote). Professor Steinmo's university is the University of Colorado in Boulder.

[19] Steinmo 2008, p. 118.

conduct of political actors.[20] While shaping the present and future decisions of actors, institutions are also the product of past political conflict and choices, and there is thus an interplay between structure and agency.[21] As Sven Steinmo points out:

> In history, the very objects of our study (institutions and human beings) change, adapt and are effected by history itself.[22]

In terms of level of analysis, historical institutionalism is described as a middle range theory.[23] It examines institutions such as a nation's constitution and party system, which are are seen as sitting below the macro-level socioeconomic structures of the polity such as its class system or economic system, and above the level of individual actors.[24] Accordingly, historical institutionalists do not start with global assumptions about societies, deducing then testing hypotheses on that basis. Rather, they start with the empirical material, developing hypotheses inductively.[25] In fact, meaningful prediction may be impossible given the complex interaction of interdependent variables over time.[26] Even if variables cannot be disaggregated and simple lines of causality found, the constellation of variables itself remains causally significant.

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[20] Kathleen Thelen and Sven Steinmo, 'Historical institutionalism in comparative politics', in Sven Steinmo, Kathleen Thelen, Frank Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge University Press, Cambridge, 1992, p. 2; Bell 2002, pp. 1-3 of digital version; Steinmo 2008, p. 159.

[21] Thelen and Steinmo 1992, pp. 10, 28.

[22] Steinmo 2008, p. 134.

[23] Kathleen Thelen, 'The Explanatory Power of Historical Institutionalism', in Renate Mayntz (ed.), *Akteure – Mechanismen – Modelle, Zur Theoriefähigkeit makro-sozialer Analysen*, Campus Verlag GmbH, Frankfurt/Main, 2002, p. 95; Thelen and Steinmo 1992, pp. 6, 11; Bell 2002, p. 3 (of digital version).

[24] Thelen and Steinmo 1992, p. 11; Thelen 2002, p. 94; Bell 2002, p. 3.

[25] Thelen and Steinmo 1992, p. 12.

[26] Steinmo 2008, p. 134.

In a similar manner, institutions are not isolated monolithic entities; rather, they exist within a matrix of other institutions, which can be termed a policy framework.[27] Within such a matrix, three layers are often distinguished: a constitutional level, a policy decision level and the operational level of individual decisions.[28]

Institutions tend to resist change. This is due to a number of factors: sunken costs and investments (both ideational and financial) in existing institutions, the constraining effect of other linked institutions within the matrix, and the degree to which policies benefit prominent sections of society who favour the status quo.[29]

As a result, *path dependence* is common.[30] Thus, institutions following a defined trajectory, until subjected to an exogenous shock or endogenous change. Exogenous shocks explored in this monograph include for example the World Wars. Endogenous change is more subtle, and may be the result of shifts in ideational processes, as legislators, academics or activists promote new conceptions to the policy community.[31] Whether such ideas gain traction is

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[27] Robert Ackrill and Adrian Kay, 'Historical-institutionalist perspectives on the development of the EU budget system', *Journal of European Public Policy*, vol. 13, no. 1 January 2006, pp. 113–133 114, 115, 129, 130.

[28] Ackrill and Kay 2006, p. 117.

[29] Kathleen Thelen, 'Historical institutionalism in Comparative Politics', *Annual Revue of Political Science*, vol. 2, 1999, pp. 392-396; Henry Farrell and Abraham L. Newman, 'Making global markets: Historical institutionalism in international political economy', *Review of International Political Economy*, vol. 17, no. 4 October 2010, p. 618; Jörg Broschek, 'Historical Institutionalism and the Varieties of Federalism in Germany and Canada', *Publius: The Journal of Federalism*, vol. 42, no. 4, 2011, pp. 665-666.

[30] Path dependence can be defined as 'the persistence of particular institutional patterns or outcomes, often over very long stretches of time' — James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change', in James Mahoney and Kathleen Thelen (eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*, Cambridge University Press, New York 2010, p. 6.

[31] Daniel Béland, 'Ideas, institutions, and policy change', *Journal of European Public Policy*, vol. 16, no. 5, August 2009, p. 702-709.

determined by factors peculiar to that historic point in time. Such decisive moments are called *critical junctures*.[32]

In gross overview then, historical institutionalism presents a model of punctuated equilibrium, of policies following a determined trajectory until interrupted by the shock of a critical juncture.[33] When a fine grained analysis is employed, however, we can see that the individual nested institutions within a policy matrix each have their own histories and trajectories, each subject to change as new ideas and ideologies, actors and activists come on the scene. A change in one institution may produce rolling changes in other institutions within the matrix.[34] Change is thus less deterministic, and more contingent on a pattern of variables unique to that particular geographical place and historical time. Change arises from a complex of factors and is therefore highly contextual.[35] Such complexity is often best examined by employing a series of linked case studies, a preferred methodology of historical institutionalists, which is the method adopted in this study.[36]

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[32] Thelen 1999, 338-392; Béland, 2009, p. 703; Broschek 2011, p. 3-4, 8-9, 15; Giovanni Capoccia and R. Daniel Keleman, 'The study of critical junctures', *World Politics*, vol. 59, April 2007, pp. 341-369. Mahoney and Thelen define critical junctures as 'periods of contingency during which the usual constraints on action are lifted or eased', 2010, p. 7; Thelen and Steinmo see them as 'points of departure from established patterns', 1992, p. 27.

[33] Thelen and Steinmo 1992, p. 15; Steinmo 2008, p. 168.

[34] Ackrill and Kay 2006, p. 114; Jörg Broschek, 'Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism', *Regional and Federal Studies*, vol. 21, no. 4/5, October/December 2011, p. 540-543.

[35] Ellen M. Immergut, 'The Theoretical Core of the New Institutionalism', *Politics & Society*, vol. 26, no. 1, March 1998, p.

[36] Thelen 2002, p. 95. See also Deborah Mabbett and Helen Bolderson, 'Theories and methods in comparative social policy' in J. Clasen, (ed.), *Comparative Social Policy: Concepts, Theories and Methods*, Blackwell, Oxford, 1999, p. 23

1.4 Case study method and comparative method

In cross-national comparative research the case studies chosen must form a meaningful set in terms of construct equivalence, that is, their similarities and differences must allow the evaluation of the same characteristic across all members of the set.[37] The countries studied in this project — Australia, Canada, the UK and the US — form such a set. Francis Castles identified four cultural families among the nations of the industrialised world, and these four countries (along with New Zealand and Ireland) he termed the Anglo-American family.[38] A different typology of countries was developed by Göran Therborn, who writes of 'affinity groups' or countries connected by policy diffusion and borrowing, and of 'lineages' or countries whose political and legal institutions share a common origin.[39] With shared histories and similar political cultures, these countries constitute a defined lineage, while at the same time constituting an affinity group, borrowing concepts and policies from each other.

Despite their similarities, the legislation examined in this project demonstrates wide divergences, indicative of the particular histories and institutions, the actors and factions, the ideologies and ideas endemic to each country. The bulk of this monograph is made up of individual case studies, tracing the development of legislation in each country in response to these factors. In examining the motivations and ideologies, conflicts and compromises of political actors, factions and parties, a narrative complexity is reached, achieving a 'thick

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[37] Melinda Mills, Gerhard G. van de Bunt and Jeanne de Bruijn, 'Comparative Research: Persistent Problems and Promising Solutions', *International Sociology*, vol. 21, no. 5, 2006, p. 623.

[38] Herbert Obinger and Uwe Wagschal, 'Families of nations and public policy', *West European Politics*, vol. 24, no. 1, 2001. Their work extends that of Castles, demonstrating in social and economic policy 'the hypothesised families of nations can be shown to exist, and they are quite robust and stable over time' p. 99.
For Castles: Francis G. Castles (ed.), *Families of Nations: Patterns of Public Policy in Western Democracies*, Dartmouth Publishing, Aldershot, Hampshire,1993.

[39] Göran Therborn, 'Beyond the Lonely Nation-State', in Castles 1993. This is cited by Mabbett and Bolderson 1999, p. 26.

description'.[40] Comparability is guaranteed between the case studies, by examining broadly similar institutions in each.

By applying the comparative method to the four cases it becomes possible to distinguish between local factors endemic to that country from more universal factors operating globally. The comparative method rarely uses actual control variables of the type used in the experimental method, but comparison between cases does allow us to establish patterns of similarities and differences. The similarities may then be regarded as control variables, the differences as independent variables.[41] A notable example of this method within this area of investigation was that of Elizabeth Lightfoot.[42] In the 1990s Australia and the UK both adopted and adapted the same disability anti-discrimination legislation from the US, but with entirely different results. These differential outcomes, Lightfoot reasons, are due to different institutional factors in each adopting country. These institutions can then be further deconstructed by applying ideational institutionalism, to reveal the differing rationales and assumptions operating in Australia compared with the UK.[43]

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[40] See Clifford Geertz, *The Interpretation of Cultures*, Basic Books, New York, 1973, 478 pp., downloaded 01 May 2014 from <http://monoskop.org/images/5/54/Geertz_Clifford_The_Interpretation_of_Cultures_Selected_Essays.pdf>. Geertz attributes the term "thick description" to Gilbert Ryle (p. 6).

[41] Timothy Lim, *Doing Comparative Politics: An Introduction to Approaches and Issues*, 2nd edition, Lynne Rienner Publishers, Boulder, Colorado, 2010, p. 19, citing Giovanni Sartori, *Comparative Constitutional Engineering*, New York University Press, 1994, p. 16.

[42] Elizabeth Lightfoot, 'A Comparative Study of Social Policy Transfer', *The Social Policy Journal*, vol. 1, no. 4, 2002, pp. 5-22.

[43] Detailed discussion of the issues raised by Elizabeth Lightfoot can be found in sections 3.4, 3.5 and 4.4.

1.5 The literature

By undertaking a comparative study of disability discrimination policy between the US, the UK and Australia, Elizabeth Lightfoot's paper is conceptually closest to the current project of all the literature reviewed.[44] This present paper is more ambitious than Lightfoot in examining four countries, exploring the origins of the institutions that shape policy, and tracing developments to 2014. A similar comparative study is that of Samuel Bagenstos.[45] This examines disability employment law in the US, UK, Australia, Germany and Italy to discern how closely the legislation approaches the social model of disability. Primarily concerned with employment rather than discrimination, Bagenstos' study (like Lightfoot's) has been overtaken by events, with the enactment of new legislation in Britain and amended legislation in the US.[46]

Two studies compare the US with Canada, but draw different conclusions. In the US the *Americans with Disabilities Act 1990* (ADA) deals with disability discrimination, while in Canada the appropriate law is the *Canadian Human Rights Act 1977*. Katharina Kovacs Burns and Gary Gordon found that in the US the ADA was robust legislation effecting change even at the state level, while in contrast the *Canadian Human Rights Act* merely regulated a variety of federal entities, leaving disability discrimination legislation largely to the provinces to

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[44] In all some 84 articles were discovered as having some significance for this project. These articles were analysed as explained in Section 1.6 on data collection and analysis.

[45] Samuel R. Bagenstos, 'Comparative Disability Employment Law From An American Perspective', *Comparative Labor Law & Policy Journal*, vol. 24, 2003, p. 649.

[46] Specifically, in the UK the *Equality Act 2010* superseded the previous *Disability Discrimination Act 1995*, and in the US the *Americans with Disabilities Act 1990* was amended by the *ADA Amendment Act 2008* (as discussed in the following chapters).

implement in a very heterogenous fashion.[47] This highlights the importance of federalism as a factor.

On the other hand, Wayne Oakes examined the jurisprudence arising from the US and Canadian anti-discrimination laws and found that the US courts severely diminished the effectiveness of the legislation.[48] In contrast the Canadian system of administrative tribunals and courts had developed a broad conception of disability, based on and consistent with the *Canadian Charter of Rights and Freedoms 1982*. Like the *US Bill of Rights*, the Charter is entrenched, so that the constitutional framework is the same, the major difference being the interpretation placed on legislation by the courts. This demonstrates the role of the judiciary in applying legislation, and the importance of constitutional entrenchment of human rights, issues examined in the current paper.

1.6 Data collection and analysis

The short time frame of the current project (of less than a year) has dictated that the sources used should be readily available, such as books, journals and on-line government records. The wide historical and geographical scope of the project has permitted this approach. In contrast, the more focussed continuation project envisaged for next year will then use such in-depth sources as archival records and interviews to retrieve details not examined in this short thesis.[49]

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[47] Katharina Kovacs Burns and Gary L. Gordon, 'Analyzing the Impact of Disability Legislation in Canada and the United States', *Journal of Disability Policy Studies,* vol. 20, no. 4*,* 2010, pp. 205-218.

[48] Wayne Thomas Oakes, *Disablement and the Law in the United States and Canada*, Master of Laws Thesis, York University, Toronto, 2002. It must be pointed out that Oakes was examining the ADA in 2002, before the *Amendment Act* of 2008 corrected this problem - see section 2.4.

[49] The strategy is deliberate. The present study covers a four jurisdictions from their earliest human rights legislation to the present day. The longer study initiated next year will focus on particular items of legislation enacted recently (since 1990), the ideological movements and political actors behind them. The current project is therefore a scoping study.

An initial search was made in a range of databases for appropriate journal articles in relation to each jurisdiction covered by the four case studies.[50] The search terms varied as the project developed, but included permutations of the following: disability discrimination legislation, comparative study, social construction, Australia, Canada, United States, United Kingdom, human rights, constitution, as well as the names of specific items of legislation and political actors. In elucidating the main theoretical components of the thesis (in the first and last chapters), authors widely acknowledged as pioneers (such as Michael Oliver in disability theory and Sven Steinmo in historical institutionalism) were placed at the centre of an expanding web or citations and references, allowing an evaluation of the authority and relevance of the journal articles and book chapters retrieved.

Journals and books also informed the historical narrative traced in each case study, but here primary sources also had a role. These sources included political speeches both inside and outside the legislature, specific bills proposed and acts passed. In examining these texts an elementary level of discourse analysis was employed. Discourse analysis looks beyond what is said, and considers the social, historical and political context behind the document, attempting to highlight the ideological standpoint of the text's author.[51] In the current study evidence was sought of the author's use of human rights concepts or of the social model of disability as organising principles behind the articulated discourse.

Newspapers form the final category of sources. They provided a ready account of the detail of events as they occurred, events which are often taken for granted in more secondary

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[50] These databases were: Cambridge Journals Online, EBSCOhost Advanced Search, Google Scholar, MQ Research Online, ProQuest (and specifically ProQuest Social Sciences), Sage Journals, Scopus, Springer Link, Taylor and Francis Online, Trove (Australian National Library) and Worldwide Political Science Abstracts.

[51] Teun van Dijk, '18 Critical Discourse Analysis', in Deborah Schiffrin, Deborah Tannen, and Heidi E. Hamilton (eds.), *The Handbook of Discourse Analysis*, Blackwell Handbooks in Linguistics, Malden, Massachusetts and Oxford UK, 2001, p. 353 (in particular)

sources. They reveal for example the contemporary drama of demonstrations staged outside Westminster in May 1994 by members of the Disabled People's Direct Action Network. Press accounts were also a ready source of biographical information, published on the deaths of such giants on the parliamentary stage as Sir Peter Large and Lord Morris of Manchester.

The bulk of the literature discovered relates to the individual countries examined in the four case studies, and relevant works will be cited in those particular chapters. Chapters 2 to 5 deal with human rights, equality legislation and disability discrimination legislation in the United States, Australia, the United Kingdom and Canada, while chapter 6 attempts a summation and analysis in the light of the individual case studies.

2. The United States

The first member of the Anglo-American family to be examined is the United States. At the US federal level disability anti-discrimination legislation is represented by the *Americans with Disabilities Act 1990* (ADA), which parallels similar but separate anti-discrimination statutes in other areas such as race and gender, most notably the *Civil Rights Act* of 1964. This chapter will examine the historical and social forces which produced the ADA. Two broad eras in disability policy can be distinguished here, an earlier era in which governments adopted a paternalistic stance towards disabled people, dominated by the medical model of disability, and a more recent era in which the effects of the civil rights movement, the disability rights movement and the adoption of the social model of disability were felt.[52] We will then examine the initial implementation of the legislation, concentrating on contestations between the legislature and the judiciary over its interpretation.

2.1 The early development of citizens' rights in the US

In contrast with Australia and the UK, certain individual liberties are entrenched in the US Constitution. Rather than altering the text of the Constitution as originally drafted, they were added as Amendments, a designation they still carry, such as the Fifth Amendment, relating to due legal process, double jeopardy and self incrimination. Collectively these Amendments constitute the US *Bill of Rights*. The delegates to the Philadelphia Convention of 1787 had largely completed drafting the US Constitution, when Colonel George Mason proposed the

[52] Periodisation of broad social movements is difficult, but if forced to choose a key event, the passing of the *Architectural Barriers Act* of 1968 seems appropriate, since it was the first major piece of legislation to challenge the societal barriers to the full participation of disabled people in society (as examined below). It should be noted that the medical model of disability continues to have relevance in areas directly related to physical and mental impairment such as medical treatment and rehabilitation. The social model addresses shortcomings in society's accommodations of people with disabilities, such as legislation relating to services. For discussion of an economic model of disability, see section 6.3.5.

inclusion of a Bill of Rights, modelled on that of his own state, Virginia.[53] Mason had published the Virginia *Declaration of Rights* three weeks before the Declaration of Independence in 1776. Inspired by Enlightenment philosophers such as John Locke, the Virginia document stated *inter alia* that:

> all men are by nature equally free and independent, and have certain inherent rights …
>
> all power is vested in, and consequently derived from, the people; …[54]

These sentiments in turn inspired the text of the *Declaration of Independence* (1776), the US *Bill of Rights* (1791) and the French Revolutionary *Declaration of the Rights of Man* (1789). These ideas and ideals served as the foundational concepts for the young United States, years before physical institutions such as the Capitol building were constructed.

The human rights ideals embodied in the *Bill of Rights* were subject to slow progressive realisation, especially in the case of African-Americans. It took a Civil War and three further constitutional amendments — the 13th (1865), 14th (1868) and 15th (1870)[55] — to end slavery, and even then a segregated society persisted for another century in parts of America's South. The construction of all men as equals was long challenged by an opposing ideology, based on a negative construction of African-Americans as racially inferior and an economic resource to be exploited. The constitutional and legal barriers to the participation of African-Americans in society had been removed in the 1860s, but societal barriers remained,

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[53] Garrett Epps, 'The Bill of Rights', *Oregon Law Review*, vol. 82, 2003, pp. 517-527; 'Virginia Declaration of Rights' at the Bill of Rights Institute, <http://billofrightsinstitute.org/resources/educator-resources/americapedia/americapedia-documents/va-declaration-rights/>, viewed 28 May 2014. In this outline of human rights legislation in the US, this is our first critical juncture.

[54] *Virginia Bill of Rights*, 12 June, 1776, text available at the Bill of Rights Institute,<http://www.constitution.org/bor/vir_bor.htm>, viewed 28 May 2014.

[55] David A. Schultz, *Encyclopedia of the United States Constitution*, Infobase Publishing, New York, 2009, pp. 271-272, 291-294 and 735-736.

necessitating the *Civil Rights Act* of 1964. The full realisation of the human rights of disabled people in the US has also been a protracted process, subject to competing social constructions. The history of disability rights in the US can be periodised into an era before and an era after the adoption of a human rights perspective, a conception borrowed from the Civil Rights Movement of the 1960s.

2.2 The era of disability dependency

Until the late 20th century the dominant construction of disabled people was one of segregation and dependency. Progress in science and medicine in the late 19th century enhanced the positivist view that diagnosis, treatment and rehabilitation were the best policy option for people with disabilities. Rather than encouraging disabled people to take part in society, often specific and separate institutions (ideational and physical) were constructed for them, using the same quarantine model as TB sanatoria and lunatic asylums. Here disabled people were dependent on private charity or the welfare of a paternalistic government. The most extreme form of such government intervention was seen in the early twentieth century eugenics movement. Francis Galton had founded the Eugenics Education Society of Great Britain in 1907 to promote public policies aimed at improving the national gene pool by preventing the 'least fit' from having families. Various state jurisdictions within the US were early adopters of these policies, with four states enacting sterilisation policies by 1910, and 29 states by the mid-1930s. The Swiss canton of Vaud followed in 1928, Denmark in 1929, and Hitler's Germany's in 1933, with the Nazis openly adopting sample legislation promoted by American eugenicists.[56]

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[56] Deborah Barrett and Charles Kurzman, 'Globalizing social movement theory: The case of eugenics', *Theory and Society,* vol. 33, 2004, pp. 487–527. The eugenics movement failed to gain legislative success in Australia — Dave Earl, ''A Group of Parents Came Together': Parent Advocacy Groups for Children with Intellectual Disabilities in Post—World War II Australia', *Health and History*, vol. 13, no. 2, Special Feature: Health and Disability, 2011, p. 88.

A range of support organisations were set up in this period to raise funding, conduct research and supply services, such as specialist schools for children with sensory, physical or intellectual disabilities.[57] These included the American School for the Deaf founded in 1817, [58] the American Foundation for the Blind founded in 1921, [59] the Paralyzed Veterans of America, founded in 1946 [60] and the national Association for Retarded Citizens founded in 1950.[61]

By far the greatest agent of change in this period was presented by the rehabilitation needs of veterans who had served in the two World Wars.[62] In 1918 Congress enacted the *Smith-Sears Veterans' Rehabilitation Act* (or *Soldiers' Rehabilitation Act*) initially for the vocational rehabilitation of WWI veterans. This was expanded in 1920 (as the *Smith-Fess Vocational Rehabilitation Act* or *Civilian Rehabilitation Act*) to include physically disabled civilians.[63] The Act was subsequently amended in response to World War II (1943), the Korean War

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[57] Dvorit Gilad and Arie Rimmerman, 'The Mission and Development Processes of the Disability Movement in Israel and the United States: A Comparison', *Journal of Disability Policy Studies*, vol. 20, no.10, 2012, p. 3.

[58] American School for the Deaf, 'A Brief History of ASD', ASD 2014 at <http://www.asd-1817.org/page.cfm?p=429>, viewed 27 May 2014.

[59] American Foundation for the Blind, 'History', AFB 2014 at <http://www.afb.org/info/about-us/history/12>, viewed 27 May 2014.

[60] Paralyzed Veterans of America, 'Mission Statement', PVA 2014, at <http://www.pva.org/site/c.ajIRK9NJLcJ2E/b.8002863/k.A5D7/Mission_Statement.htm>, viewed 27 May 2014.

[61] Gilad and Rimmerman 2012, p. 3.

[62] In historical institutionalist terms, these were exogenous shocks, precipitating rapid change.

[63] Colorado State University, 'A Brief History of Legislation' (Resources for Disabled Students), CSU 2014, at < http://rds.colostate.edu/history-of-legislation>, viewed 27 May 2014.

(1954) and the Vietnam War (1965), with the 1943 amendment for example including people with mental retardation.[64]

The first efforts to address barriers to the participation of disabled people in society were in the area of building standards. Following a 1958 conference on the issue, the Rehabilitation Center at the University of Illinois published a set of voluntary standards for the design of accessible buildings in 1961. These standards were then used in the 1965 amendment of the *Rehabilitation Act*, which established a National Commission on Architectural Barriers. The Commission's investigations found a widespread lack of public and professional awareness of the existence of barriers, leading Congress to pass the *Architectural Barriers Act* in 1968, which 'mandated that buildings designed, constructed, altered, or leased with federal funds would comply with standards for accessibility.' [65] The *Architectural Barriers Act* was 'the first policy to truly incorporate civil rights ideas into disability policy'.[66] This was significant. First, the legislation came four years after the *Civil Rights Act 1964*. African-Americans had successfully argued their right to participate in society, without being hindered by social barriers. Second, by implying that the physically disabled had a right to use a building, and that the building's owners or lessees had a duty to facilitate that access, the new legislation showed that the social construction of disabled people had begun to shift, incorporating the new concept of disability rights within the overall concept of civil rights.

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[64] Polly Welch and Chris Palames, 'A Brief History of Disability Rights Legislation in the United States', *Strategies for Teaching Universal Design*, Adaptive Environments Center and MIG Communications, 1995, accessible at <http://www.udeducation.org/resources/61.html>, viewed 27 May 2014. Material comes from page 2 of the online version.

[65] Welch and Palames 1995, p. 3.

[66] Kyra R. Greene, *The Role of Protest Waves, Cultural Frames and Institutional Activism in the Evolution of American Disability Rights Policies*, Thesis for Doctor of Philosophy, Stanford University, 2007, p. 2.

2.3 The era of disability rights

The *Architectural Barriers Act 1968* inspired the first waves of protest by disability rights activists. These protests started in 1970 when students with physical disabilities at the University of California, Berkeley and Long Island University, Brooklyn demanded barrier-free access to classrooms and campus facilities, and founded civil rights organisations such as Disabled in Action.[67] Between 1972 and the passage of the ADA in 1990, over 600 protests took place demanding accessible buildings and transport for disabled people both on and off campuses.[68] The student leaders of these protests were also active in other organisations, such as the Independent Living Movement, which began as a campaign for university support of independent living for students with disabilities on campus at Berkeley, received government funding and eventually became a network of 300 Independent Living Centres allowing people with disabilities to lead independent lives in their communities. Likewise ADAPT, which is now a national disability rights organisation engaging in nonviolent direct action on a wide range of disability issues, started in Denver in 1983 as Americans Disabled for Accessible Public Transit, focussed on a single issue in a single city. [69]

Importantly, the growing disability movement proposed a new social construction of disabled people as autonomous and self-determined individuals, capable of living in their communities, rather than viewing them as dependents. It also managed to unite those from different disability backgrounds, who recognised that although their impairments differed,

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[67] David M. Haugen, Susan Musser and Andrea B. DeMott, *Rights of the Disabled*, Infobase Publishing, New York, 2008, p. 116.

[68] Gilad and Rimmerman 2012, p. 4.

[69] ADAPT, 'Welcome to ADAPT!', ADAPT website at <http://www.adapt.org/>, viewed 27 May 2014; Haugen et al. 2008, p.122.

they faced similar barriers in society.[70] What had begun as student protest led to the formation of small local organisations, which coalesced into a national social movement, demanding anti-discrimination legislation for disabled people similar to that of the *Civil Rights Act* of 1964, which had outlawed discrimination based on race, colour, religion, sex, or national origin.

The success of the disability rights movement, both in initially mobilising and in having their concerns placed on the political agenda, was due in large part to the success of the earlier civil rights movement. The civil rights movement had legitimated a civil rights 'master frame', a particular social construction of oppressed groups, in which differential treatment stems from discriminatory social structures, not from the victim's inherent ethnicity, gender or other characteristics.[71] African-Americans had succeeded in promoting the concept of minority civil rights, so that it had become readily accepted by both the public and the politic elite, therefore institutionalised. Adopting the tactics and rhetoric of the civil rights movement, disability activists engaged in protest (as noted above), but also found political elites more accessible than earlier activists had done, due to widespread acceptance of the legitimated minority rights frame or social construction. In fact, as explored by Kyra Greene, some disability activists became 'institutional activists', employed by government agencies

[70] Kyung Mee Kim & Michael H. Fox, 'A comparative examination of disability anti-discrimination legislation in the United States and Korea', *Disability & Society*, Vol. 26, no. 3, 2011, p. 271.

[71] Katharina Heyer, 'Rights or Quotas? The ADA as a Model for Disability Rights', *Handbook of Employment Discrimination Research: Rights and Realities*, edited by Laura Beth Nielsen and Robert L. Nelson (eds.), Springer, 2005, p. 253; K. Greene 2007, p. 209. Daniel Béland (2009: 701) addresses framing as an ideational process within historical institutionalism.

and 'working within bureaucratic and representative political positions to forward the goals of a social movement'.[72]

The reframing of the disability cause was largely adopted by government, and this was reflected in legislation. In 1973, in response to large numbers of Vietnam War veterans in the community, many with disabilities, the *Rehabilitation Act* was once again amended, with the following significant provisions:

- to address the notion of equal access of people with disabilities through the removal of architectural, employment and transportation barriers;
- to support the rights of persons with disabilities in the federal government's hiring practices;
- to enforce standards set under the *Architectural Barriers Act* of 1968;
- to prohibit disability discrimination in businesses with federal contracts; and
- to prohibit disability discrimination in programs receiving federal funds (known as Section 504).

Importantly Section 504 derives its conceptual framework from Title VII of the 1964 *Civil Rights Act* and was the first statutory definition of discrimination towards people with disabilities.[73] However, Section 504 did not address implementation, and there were delays in

[72] K. Greene 2007, p. 165. Judith Heumann is an example of this phenomenon. She was a cofounder of several national and international organizations, including Disabled in Action, the Center for Independent Living, and the World Institute on Disability, was an active member of the Democrat Party and later worked in the Clinton administration. She is currently Special Advisor for International Disability Rights within the State Department. Sources: Gilad and Rimmerman 2012, p. 4; Dr. Edward Berkowitz, 'George Bush and the Americans with Disabilities Act', The Social Welfare History Project website, at <http://www.socialwelfarehistory.com/recollections/george-bush-and-the-americans-with-disabilities-act/>, viewed 29 May 2014; State Department press release, dated 16 April 2014, 'Special Advisor for International Disability Rights Judith Heumann to Travel to China and Vietnam', at <http://www.state.gov/r/pa/prs/ps/2014/04/224882.htm>, viewed 29 May 2014.

[73] Welch and Palames 1995, p. 4.

writing regulations that would have interpreted and enforced its provisions.[74] In 1977, when the new Carter administration seemed to show the same lack of resolve as the outgoing Ford administration, disability activists mobilised and forcibly occupied Federal Health, Education and Welfare (HEW) buildings in 10 cities across the US, the longest sit-in being the 29 day occupation of the San Francisco office.[75] The Secretary of HEW signed. Section 504 came into force, providing disability discrimination protection within all institutions receiving federal funds, covering areas such as education, employment, and housing.[76]

The following year saw the establishment of the National Council on the Handicapped within the federal Department of Education.[77] The Council issued two historic reports in the following decade. The 1986 report, *Toward Independence*, was subtitled *An Assessment of Federal Laws and Programs Affecting Persons with Disabilities - With Legislative Recommendations*, while the 1988 report, *On the Threshold of Independence*, analysed progress made over the previous two years and proposed the text of a draft bill, which they termed the *Americans with Disabilities Act* of 1988. The proposed legislation would widen disability anti-discrimination coverage beyond federally funded programs to include 'employers engaged in interstate commerce having fifteen or more employees, … public accommodations, interstate transportation companies, and State and local governments'.[78]

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[74] Kim and Fox 2011, p. 272; Welch and Palames 1995, p. 4.

[75] Haugen et al. 2008, p. 120.

[76] Heyer 2005, p. 241.

[77] Haugen et al. 2008, p. 120. It is now the National Council on Disability.

[78] National Council on Disability (NCD), *On the Threshold of Independence*, Draft Legislation § 4, p. 17, available at <http://www.ncd.gov/publications/1988/Jan1988>, viewed 27 May 2014.
Key roles in the National Council on the Handicapped (now the National Council on Disability) were played by Lex Frieden and Justin Dart, who also took part in the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, appointed by Congressman Major Owens — Lex Frieden, 'NCD and the Americans with Disabilities Act: 15 Years of Progress', paper in pdf format available from National Council on Disability website at <http://www.ncd.gov/publications/2005/06262005>, viewed 27 May 2014.

This effectively extended anti-discrimination provisions into the private sector, to all but the smallest commercial operators.

Significantly, the proposed legislation had been drafted by Reagan appointees to the Council, rather than by radicals in the disability movement. [79] The social construction of people with disabilities as unjustly excluded from facets of society had become mainstream amongst policy makers, a concept promoted by academics in disability studies on both sides of the Atlantic.

2.4 Contributions by American academics

As discussed in chapter 1, British academic Mike Oliver published the social model of disability in 1983. In the US William Roth, associate professor of social welfare and public policy at the State University of New York, wrote in identical terms of 'handicap as a social construct', while in 1985 Harlan Hahn, then at the University of Southern California, contrasted the socio-political definition of disability against the medical and economic definitions, essentially the same scheme as Oliver's model.[80]

Other influential American academics were Irving K. Zola and Paul Longmore. As Chair of the Sociology Department of Brandeis University, Irving K. Zola founded the discipline of disability studies in the US in the early 1980s. He established the Society for the Study of

[79] Welch and Palames 1995, p. 6. According to Berkowitz 2014, p. 3, the draft was written by Justin Dart, Robert L. Burgdorff Jr. and Lex Frieden. K. Greene 2007, p. 161, shows that a majority of the members on the NCD in 1988 were persons with disabilities and a majority had been disability rights activists, but were now playing the role of institutional activists, co-opted into assisting legislators (for example through the Congressional Task Force). This demonstrates that the goals of the disability movement were no longer seen as radical and had become mainstream.

[80] William Roth, 'Handicap as a Social Construct', *Society* , Vol. 20, no. 3, 1983, pp. 56-61; Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, originally 1985, republished online by the by Independent Living Institute (ILI) Library, at <http://www.independentliving.org/docs4/hahn2.html>, viewed 27 May 2014. See section 4.3 for the historical background to Mike Oliver's 1983 model in the UK.

Chronic Illness and Disability, distributing its mimeographed newsletter from his office. In 1986 that society changed its name to the Society for Disability Studies (SDS), while the newsletter has now become the online *Disability Studies Quarterly*.[81] Like Hunt, Oliver, Roth and Hahn, Zola recognised the importance of the environmental barriers confronting people with disabilities, arguing that these arose from an interaction between individual impairments and 'the social, attitudinal, architectural, medical, economic, and political environment'.[82] On the other hand he saw no sharp dichotomy between the able-bodied and those with disabilities, arguing that the entire population is at risk of chronic illness and disability, and that the greying of the population will see increasing numbers of people disabled in old age. In public policy terms, rather than promoting specific programs for people with disabilities, Zola advocated a more universal approach recognising that everyone in the population will require some level of assistance at some stage of life.[83]

Like his colleagues, Paul Longmore perceived 'two contending paradigms of disability.'[84] These he termed the medical model and the minority model. Writing as professor of history and director of the Institute on Disability at San Francisco State University, he documented the importance of the minority model in the history of disability activism in the US.[85] The

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[81] Gary L. Albrecht, 'Disability Studies', *Encyclopedia of Disability*, Sage, Thousand Oaks California and London, 2006, p. 485; Rosemarie Garland-Thomson, 'Roadkill Truths', *Disability Studies Quarterly* vol. 34, no. 1, 2014, p. 3, printed from <http://dsq-sds.org/article/view/4014/3539> on 27 November 2014.

[82] Irving Zola, 'Toward the Necessary Universalizing of a Disability Policy', *The Milbank Quarterly*, vol. 67, suppl. 2, pt. 2, 1989, p. 401.

[83] Jerome E. Bickenbach 'Disability Human Rights, Law and Policy', in Gary L. Albrecht and Katherine D. Seelman (eds), *Handbook of Disability Studies*, Sage, London, 2001, p. 580.

[84] Paul K. Longmore, *Why I Burned My Book and Other Essays on Disability*, Temple University Press, Philadelphia 2003, p. 20.

[85] Penny L. Richards, 'RIP: Paul Longmore (1946-2010)', blog posted on Tuesday, August 10, 2010 on webpage hosted at Disability Studies, Temple University, viewed at < http://disstud.blogspot.com.au/2010/08/rip-paul-longmore-1946-2010.html > on 27 November 2014.

minority model, like Oliver's social model, 'examines the architectural, socioeconomic, and policy environments within which people with disabilities must operate and that shape their experience of disability'.[86] Examining newspaper, film and television accounts of disability, Longmore showed that the language and images chosen by print and visual media discursively construct a social environment in which prejudices against disabled people abound.[87] In documenting the history of the US disability rights movement, Longmore saw it in two phases: before and after the ADA.[88]

2.5 The *Americans with Disabilities Act* of 1990 (ADA)

Support for the ADA bill was both widespread, and also bipartisan. The 1988 draft was refined by senators and congressmen from both parties and by members of the Republican Bush administration. [89] A leading role was played by Democrat Senator Tom Harkin of Iowa, who had been invited by Senator Ted Kennedy to take part — Senator Harkin had firsthand

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[86] Longmore 2003, p. 21.

[87] Albrecht 2006, p. 993; David T. Mitchell and Sharon L. Snyder, 'Representation and Discontents, The Uneasy Home of Disability in Literature and Film', in Gary L. Albrecht and Katherine D. Seelman (eds.), *Handbook of Disability Studies*, Sage, London, 2001, p. 197.

[88] Longmore 2003, p. 215.

[89] At the signing ceremony George Bush thanked 'my friends from Congress, as I say, who worked so diligently with the best interest of all at heart, Democrats and Republicans' — 'Remarks of President George Bush at the Signing of the Americans with Disabilities Act', US Equal Employment Opportunity Commission (EEOC) 2014, at <http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html>, viewed 29 May 2014.

experience of disability, his brother being deaf.[90] This bipartisanship was reflected in the vote in Congress on 12 July 1990, with 377 ayes, 28 noes and 27 not voting.[91]

Two weeks later, on 26 July 1990, President George Bush held the largest signing ceremony in history on the South Lawn of the White House, with many in the audience in wheelchairs, deaf or blind.[92] The White House Office of Public Liaison had mailed thousands of invitations to leaders of the disability rights movement inviting them to the ceremony.[93]

Discourse analysis of President Bush's speech that day reveals concepts heavily influenced by the social model of disability. The President hailed the legislation as 'the world's first comprehensive declaration of equality for people with disabilities', and linked it in importance to the aspirations expressed in the *Declaration of Independence*. The *Civil Rights Act* of 1964 had rectified the injustices of denying equality to many, and now the new Act would extend equality to people with disabilities, who had been until now 'victims of segregation and discrimination'. Indeed, 'we must remove the physical barriers we have created and the social barriers that we have accepted.'[94]

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[90] Thomas Harkin, 'Biography', Senator T. Harkin's website at <http://www.harkin.senate.gov/abouttom.cfm>, viewed 29 May 2014. At the time of writing Harkin had just published a press release 'Harkin Leads Bipartisan Effort to Update Workforce Development Bill, Improve Employment and Training Opportunities for People with Disabilities', dated 21 May 2014 <http://www.harkin.senate.gov/press/release.cfm?i=351766>, demonstrating his lifelong interest in disability issues.

Other key actors in bringing about the ADA were Senator Lowell Palmer Weicker (R-CT), who introduced the ADA in the Senate, and Congressman Tony Coelho (D-CA), who introduced the bill in the House in April 1988 — Lex Frieden 2005, p. 1. A Republican teamed with a Democrat again demonstrates bipartisanship.

[91] Congressional Record 12 July 1990, available from the ADA Archive, at <http://www.law.georgetown.edu/archiveada/#ADA1990>

[92] Welch and Palames 1995, p. 6.

[93] Berkowitz 2014, p. 1.

[94] US EEOC, 'Remarks of President George Bush at the Signing of the Americans with Disabilities Act', US EEOC 2014, at <http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html>, viewed 29 May 2014.

The *Americans with Disabilities Act* of 1990 (ADA) was passed into law, and effected four major areas in which people with disabilities took part in society:

- Title I: Employment — businesses with more than fifteen employees should provide 'reasonable accommodations' to people with disabilities unless the accommodations posed an 'undue hardship' for the business;
- Title II: State and Local Government Activities — government and public activities, such as public transport, could not discriminate against disabled people — this mandated that all new buses should have wheelchair access;
- Title III: Public Accommodations — public accommodations such as hotels, restaurants, theatres, and shops should allow access and use by people with disabilities and wherever practical architectural barriers are to be removed; and
- Title IV: Communications — telecommunication systems should allow access by users with speech and hearing impairments.

As an aid in interpreting the law, the US Equal Employment Opportunity Commission (EEOC) has published a technical assistance manual, regulations and guidance documents.[95] For example, the ADA states that employers should offer reasonable accommodations to disabled employees. The regulations then elaborate the concept more fully, while the guidance documents provide examples. Complaints of discrimination under Title I of the ADA (employment) are lodged with the US EEOC, which also handles aspects of the *Civil Rights Act* of 1964 and the *Rehabilitation Act* of 1973.[96] Complaints of discrimination under the

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[95] These are available from the EEOC at < http://www.eeoc.gov/laws/guidance/index.cfm > and < http://www.eeoc.gov/laws/regulations/index.cfm > and the ADA Library of the Job Accommodation Network (US Department of Labor) at < https://askjan.org/links/adalinks.htm >, all viewed 29 May 2014. The EEOC is a bipartisan Commission comprised of five presidentially appointed members, and part of the Executive branch — 'The Commission', EEOC 2014 at <http://www.eeoc.gov/eeoc/commission.cfm>, viewed 29 May 2014. The EEOC was created as part of the Civil Rights Act — US Commission on Civil Rights Report 1998, *Helping Employers Comply with the ADA*, p. 38.

[96] US EEOC, 'Laws Enforced by EEOC', US Equal Employment Opportunity Commission website at <http://www.eeoc.gov/laws/statutes/index.cfm>, viewed 28 May 2014.

other Titles are filed with the Department of Justice. Individuals may also file lawsuits in Federal court (in the case of Title I, after receiving clearance from the EEOC).[97] Initially many aspects of the implementation of the ADA remained unclear, until defined by the courts.

2.6 Initial implementation of the ADA

Up to this point the history of disability rights in the US has demonstrated what can be achieved when there is nearly universal acceptance of the framing or social construction of an issue. Academics and activists had promoted a certain framing of disability, which had been adopted by the nation's executive and legislature. The question was now to what extent the private sector would adopt the new construction of disability, and what stance the judiciary would adopt.

Ten years after the ADA was passed, the US Commission on Civil Rights (USCCR) reported that people with disabilities felt that the ADA had provided them with 'better access to buildings, greater access to transportation, and fuller inclusion in the community'.[98] The report quotes a 1996 survey by the United Cerebral Palsy Association in which 88 percent of the sampled 1,330 disabled people felt that local businesses were more accessible, with similar figures for other public amenities.[99] Case law shows a similar trend in regard to access to amenities, one of the most significant cases being *Michigan Paralyzed Veterans of America (MPVA) v. The University of Michigan*.[100] The MPVA claimed that the university's Michigan

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[97] US Department of Justice, A Guide to Disability Rights Laws, pp. 3-6, available at <http://www.ada.gov/cguide.htm>, viewed 29 May 2014.

[98] US Commission on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?*, USCCR Report October 2000, available at <http://www.usccr.gov/pubs/ada/main.htm> and viewed 29 May 2014. Quote is from Chapter 2, page 1 (when printed as a pdf).

[99] ibid.

[100] US Department of Justice, 'Justice Department Reaches Settlement with University of Michigan Concerning Football Stadium's Accessibility for Persons with Disabilities', DoJ press release 10 March 2008, available at <http://www.justice.gov/opa/pr/2008/March/08_crt_186.html>, viewed 29 May 2014.

Stadium had inadequate seating for disabled people, with only 81 places. With the Department of Justice as co-complainant, the disable veterans succeeded in having the university add more than 200 wheelchair places over the following two years (2008-2010).

In relation to employment, the same 2000 USCCR report commented that 'the ADA has no doubt increased employment opportunities for people with disabilities and changed the public's perception of them,' citing a survey by Dr. David Blanck of the University of Iowa in which up to 90% of disabled job-seekers had been found employment, and that the average cost of accommodations was less than $30 each.[101] When Title I (employment) cases required the adjudication of the courts, however, this optimist scenario was reversed.

Several academics have investigated the outcomes of ADA Title I legal cases in the years following its initial implementation, to determine the proportion of judgements favouring employers rather than employees. The results are summarised in Table 2.1.

Author	Published	Decisions favouring employers	Basis
Ruth Colker	2005	87%	judgment decisions 1994 - 1999
A. Allbright and J.W. Parry	annually 1998-2005	92% (average)	Title I decisions in federal courts 1998-2005
US EEOC	1998	86%	administrative complaints resolved by EEOC 1990-1998

Table 2.1. Success rate of employers in ADA Title I (employment) cases.

The divergences between these figures can be attributed to their differing methods and input data sets, but the conclusion is clear: Title I of the ADA was not working as the

[101] US Commission on Civil Rights 2000, p. 2 and p. 4.

legislators had intended. In the majority of cases in which disabled employees sought employment, continued employment or accommodations, they lost.

The problem is best illustrated by three Supreme Court cases from June 1999, now referred to as the 'Sutton Trilogy': S*utton v. United Airlines, Inc*., *Murphy v. United Parcel Services, Inc*., and *Albertson's Inc*. *v. Kirkingburg*. At issue were the myopia of the two Sutton sisters, Mr. Murphy's hypertension and Mr. Kirkingburg's monocular vision, these conditions being corrected by contact lenses, medication or use of the functioning eye respectively. Since these conditions were controllable by mitigating measures, they were deemed by the court not to be disabilities.[102] Thus, the Sutton sisters were denied jobs as airline pilots on the basis of their uncorrected vision, but deemed not to be disabled because they have perfect vision when they wear glasses or contact lenses. Accordingly, they were denied the protection of the ADA.[103]

The ADA does not list specific impairments, but defines disability as 'a physical or mental impairment that substantially limits one or more major life activities'.[104] The courts chose to interpret an individual's limitations from a medical viewpoint, rather than taking into account the wider cultural, social, and economic context in each case. As Thomas Horejes (2013) points out, this was a clash of world views.[105] Civil rights activists and the US Congress had drafted the ADA with the social model of disability in mind, hoping to correct some of the injustices faced by people with disabilities. The courts on the other hand had chosen a positivist interpretation in which only empirical data matters, an approach Horejes identifies

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[102] Thomas P. Horejes, '(Re)conceptualizing Disability Policy Frameworks', *Journal of Policy Practice*, Vol. 12, no. 1, p. 27; Heyer 2005, p. 254.

[103] Heyer 2005, p. 241.

[104] LII, '42 U.S. Code § 12102 - Definition of disability', Legal Information Institute (LII) website, Cornell University Law School, at <http://www.law.cornell.edu/uscode/text/42/12102>, viewed 29 May 2014.

[105] Horejes 2013, p. 25 ff.

as the Policy Science Model. In this model, the language of statutory law is subjected to textualist analysis to arrive at neutral, value-free and objective decisions, and the legislative history and social context of the Act are dismissed as irrelevant.[106] The persistence of older social constructions of disability in the courts was due to the history of the disability movement. Activists had focussed on lobbying the executive and legislative branches, but had not targeted the judiciary, employers or even in many cases public opinion.[107]

2.7 The ADA Amendment Act of 2008

In response to the Supreme Court's narrow interpretation of the ADA, the National Council on Disability gathered narratives from people with disabilities and their marginalisation by various federal courts. These eight case studies were written up by the Consortium for Citizens with Disabilities (CCD) as a 13-page testimony entitled *Real Case Stories: The Effect of the Federal Courts' Decisions on People with Disabilities*, and promoted amongst the activist community as 'real stories about real Americans with disabilities who have been hurt by court decisions that violate the original intent of the *Americans with Disabilities Act* (ADA) of 1990'.[108] Just as the *Civil Rights Restoration Act* of 1987 had modified the *Civil Rights Act* of 1964, the renewed aim of activists was an 'ADA Restoration Act'.[109]

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[106] Horejes 2013, passim but particularly p. 30; Kim and Fox 2011, p. 272; Sara Pfister Johnston, *Unequal Treatment or Uneven Consequence: a Content Analysis of Americans with Disabilities Act Title I Disparate Impact Cases from 1992 – 2012*, PhD Thesis, University of Iowa, 2013, p. 10.

[107] K. Greene 2007, p. 25; Gilad and Rimmerman 2012, p. 4.

[108] Consortium for Citizens with Disabilities (CCD), 'Real People, Real Stories: Why We Need ADA Restoration', Reunify Gally activist website, material posted 17 September 2007 at <http://reunifygally.wordpress.com/2007/09/17/real-people-real-stories-why-we-need-ada-restoration/>, but still accessible on 29 May 2014; Horejes 2013, p. 32.

[109] CCD website, loc. cit.

The result was the passing of the *ADA Amendment Act* of 2008. The preamble of the Act is very explicit about its purpose, stating that 'the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect'.[110] It then proceeds to refine the definition of disability, stating that mitigating measures should not detract from a determination of impairment. It also addresses episodic conditions such as epilepsy and post traumatic stress disorder, which, although not always active, can substantially limit major life activities.[111]

The *ADA Amendment Act* ended a period of contestation over the social construction of disability and more specifically over what forms of disability would be covered by legislation. The history of human rights legislation in the United States is one of slow expansion of rights to marginalised groups. As we have seen, the nation was founded on the premise that all citizens are free, equal and holders of certain rights, yet this conception was not fully extended to African Americans until the *Civil Rights Act* of 1964. In the wake of the civil rights movement disability too was constructed as a civil rights issue. This allowed the incipient disability rights movement to demand a society free of barriers, leading to such legislation as the *Architectural Barriers Act* of 1968. As part of a 'second wave' movement, disability activists encountered less resistance from authority compared with the civil rights movement, allowing key players to access government, or to become 'institutional activists', such as those on the National Council on Disability.

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[110] US EEOC, 'ADA Amendment Act of 2008', Section 2, (a)(4), available at <http://www.eeoc.gov/laws/statutes/adaaa.cfm>, viewed 29 May 2014.

[111] Colorado State University 2014, p. 3.

The result of this activism was the ADA, the first anti-discrimination act to define disability as a civil rights issue and to mandate equal opportunities, integration, and accommodations for difference.[112] It has been influential in encouraging a similar conception of disability issues and a similar approach to legislation in other countries, with Australia one of the earliest to act, in 1992.

[112] Heyer 2005, p. 241.

3. Australia

3.1 Federation and the Australian Constitution

A century after the American experience of union, the British colonies in Australia entered their own negotiations on the future institutions of an Australian federation of states. Meeting at conventions in Sydney (1891 and 1897), Adelaide (also 1897) and Melbourne (1898),[113] the delegates drafted a constitution to lay the foundations for federal-state relations, using the American model as a guide.[114]

The pressing need was to define the role of the new federal government and to set out such fundamental institutions as a constitutional monarchy, a federal structure and a bicameral parliament.[115] The new states would retain considerable autonomy, abrogating only those powers to the Commonwealth that were necessary, such as defence.[116] In this respect, the Australian experience parallels that of the US.

However, unlike the American Constitution, the Constitution of Australia does not include a Bill of Rights. Its text makes minimal explicit references to the rights of the individual.[117]

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[113] This was under the leadership of Edmund Barton, who would later become Australia's first Prime Minister. George Williams, *The Australian Constitution and Human Rights: A Centenary View*, ANU Press, Canberra, 2001, p. 2, accessed at <https://digitalcollections.anu.edu.au/bitstream/1885/42078/2/Williams.pdf> and at <https://digitalcollections.anu.edu.au/handle/1885/42078> on 23 June 2014.

[114] Williams 2001, p. 3.

[115] James Allan, 'A Defence of the Status Quo', in Campbell, T., Goldsworthy, J. & Stone, A. (eds.), *Protecting Human Rights: Instruments and Institutions*, Oxford UP, Oxford, 2003, p. 191.

[116] Bede Harris, 'The Bill of Rights Debate in Australia – A Study in Constitutional Disengagement', *Journal of Politics and Law*, vol. 2, no. 3, September 2009, p. 2.

[117] Harris 2009, p. 3 and Williams 2001, p. 3. These are: the right to vote (s. 41), protection against acquisition of property on unjust terms (s. 51), the right to a trial by jury (s. 80), the freedom of interstate commerce (s. 92), freedom of religion (s. 116) and freedom from discrimination on the basis of state of residence (s. 117). Further rights are implied.

Rather, the rights of the individual would be protected as in Britain, by common law and where necessary legislation. The drafters of the Constitution were no doubt aware that the Eureka Stockade had been no Lexington Green. The thirteen diggers brought to trial were acquitted by the jury system, and rebellion leader Peter Lalor was elected to the Victorian Parliament in 1855 — just one year after the incident at Ballarat.[118] The miners' grievances were addressed and the electoral franchise progressively extended.[119] It seemed that personal liberties were adequately protected by British justice and Australian democracy.[120] In fact, constitutional delegates Isaac Isaacs and Alexander Cockburn both dismissed a bill of rights as an insult to the integrity of Australian legislators.[121] It was also argued that a bill of rights would be an unnecessary constraint on legislators.[122]

The Constitution, as the foundational institution of the Commonwealth, was thus an artefact of the political elite of the late nineteenth century, and a reflection of the aspirations and preconceptions of their era. Conversely, the fundamental and enduring nature of the Constitution means it must resist incorporating the passing preoccupations of any political era, or the agenda of any political party, no matter how firmly entrenched in power.

Quite rightfully then, the Constitution cannot be changed by a mere act of parliament. Rather, proposals must be taken to the people, requiring the approval of a majority of voters

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[118] Ian Turner, 'Lalor, Peter (1827–1889)', *Australian Dictionary of Biography*, vol. 5, Melbourne University Press 1974, and online at <http://adb.anu.edu.au/biography/lalor-peter-3980> accessed 23 June 2014

[119] Malcolm Farnsworth, 'History Of The Voting Franchise In Australia', australianpolitics.com website at <http://australianpolitics.com/voting/electoral-system/history-of-the-voting-franchise> accessed 23 June 2014.

[120] Harris 2009, p. 5.

[121] Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia*, Cambridge UP, Port Melbourne, 2009, p. 17.

[122] Harris 2009, p. 5.

nationwide, plus a majority in a majority of states.[123] Since 1901 there have been 44 such proposals, but only eight relatively minor amendments have succeeded.[124] Without bipartisan support and widespread community endorsement, any proposed amendment is destined to failure.[125]

3.2 Attempts to introduce a federal Bill of Rights

The twentieth century was not kind to the optimism and faith in progress felt in 1901. A depression, two world wars and the rise of totalitarianism shook confidence in the ability of national governments to protect human rights. Nazism had been the ultimate social construction of denigrated groups as the Other, an ideology that fuelled the gas chambers. The world now needed an ideal that the new era could be built on after the fratricide of WWII. The Enlightenment conception of universal inherent rights was revitalised and embodied afresh in the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly in December 1948, and *International Covenant on Civil and Political Rights* (ICCPR), adopted by the same body in December 1966.[126] These ideals have in turn led many nation states to enact human rights legislation, often as a Bill of Rights.

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[123] Harris 2009, p. 3; Williams 2001, p. 1. This is under under section 128 of the Constitution.

[124] The most significant of these were a 1928 amendment allowing the Commonwealth to take over state debts and the 1967 amendment extending the federal Parliament's races power to Indigenous peoples — Williams 2001, p. 1.

[125] Harris 2009, p. 3.

[126] Department of Foreign Affairs and Trade, 'International Covenant on Civil and Political Rights', DFAT 2014, accessed at <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E> on 23 June 2014.

Since Federation there have been three attempts to introduce a Bill of Rights at the federal level in Australia, each time by Labor governments.[127] Given the difficulty of altering the constitution, these attempts have been as ordinary legislation (a statutory bill of rights), rather than as constitutional amendments. Such legislation is more prone to alteration or repeal, compared with a constitutionally entrenched bill of rights, but can be progressively refined and also has greater chances of succeeding.[128] All three attempts failed. The first proposal occurred in 1973, when Lionel Murphy, Attorney-General in the Whitlam government, introduced a *Human Rights Bill*. The bill was based on the ICCPR, although Australia had yet to ratify the convention.[129] The legislation lapsed when the Governor-General dismissed the Whitlam government in November 1975.[130]

The incoming Fraser government ratified the ICCPR in 1980, but did not attempt to incorporate the convention into legislation. Two attempts were then made under the Hawke government: in 1983 by Attorney-General Gareth Evans and in 1985 by his successor Lionel Bowen. The Evans proposal was strongly attacked by Brian Burke, Premier of Western Australia and by Joh Bjelke-Petersen, Premier of Queensland, as undermining states' rights and the system of federalism.[131] The bill was never introduced to Parliament. The Bowen bill was more successful, being passed by the House of Representatives in November 1985, but

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[127] See Chappell et al. 2009, p. 73; and Attorney General's Department (Cth), *National Human Rights Consultation Report*, Report of the National Human Rights Consultation Committee, released on 30 September 2009, pp. 231 ff, accessed at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx> on 23 June 2014.

[128] Williams 2001, pp. 8-9.

[129] Chappell et al. 2009, p. 73.

[130] *National Human Rights Consultation Report*, p. 232. The Dismissal qualifies as a critical juncture.

[131] Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: history, politics and law*, UNSW Press, Sydney, 2009, p. 31.

faced opposition in the Senate, where the Coalition charged the proposal was too ambitious and the Australian Democrats believed it failed to go far enough.[132] It was withdrawn.[133]

As part of these efforts, the Hawke government established an Australian Constitutional Commission in 1985. The Commission's initial report recommended various minor changes to the Constitution. These included broadening the circumstances in which trial by jury was required, extending the right to the freedom of religion to cover state law and extending the right to just compensation to cover forced acquisition by state authorities. The final report of the Commission recommended the addition of a Bill of Rights to the Constitution. When this latter effort, the Bowen bill, failed in the Senate, it was decided to proceed with the minor constitutional changes, putting them to a referendum.[134] The referendum was put to held September 1988 and lost, with only 31% of the electorate approving the measures.[135]

These failures stem from a number of factors.[136] The first is as old as Federation itself, the desire by the Australian states and territories to retain a degree of autonomy from Canberra. Perhaps the most compelling argument is that entrenching a bill of rights will 'transfer a

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[132] The vote in the Lower House was 70 to 51 in favour — Australian Parliament, *Parliamentary Debates*, House of Representatives, 14 November 1985, p. 2899, accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1985-11-14%2F0171;query=Id%3A%22chamber%2Fhansardr%2F1985-11-14%2F0169%22> on 23 June 2014. The Senate debate followed on 28 November 1986, with Senator Gareth Evans conceding defeat — Australian Parliament, *Parliamentary Debates*, Senate, 14 November 1985, p. 2987, accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1986-11-28%2F0061%22> on 23 June 2014.

[133] Chappell et al. 2009, p. 73.

[134] Harris 2009, p. 4.

[135] Byrnes et al. 2009, p. 33.

[136] Besides the ALP, the other major source of proposals for a bill of rights has been the Australian Democrats. In October 2000 the party released a draft law, based on the ICCPR and applicable to Commonwealth, state and territory governments, to common law and even to delegated legislation. It was introduced into the Senate by Meg Lees in 2001, and by Natasha Stott Despoja in 2005 and again in 2008, but failed to gain majority support each time. — Byrnes et al. 2009, p. 33.

significant degree of social policy-making power to unelected judges',[137] thereby shifting 'decision making on important and contentious issues away from the most democratic branch of government - the legislature - towards the least democratic branch - the judiciary'.[138] The alternative to entrenchment is to pass a bill of rights as ordinary legislation, which allows the legislature to retain a degree of control over the implementation of the bill of rights.

Commonwealth acts	Date	State and territory acts	Date
Racial Discrimination Act	1975	SA Sex Discrimination Act (superseded)	1975
Sex Discrimination Act	1984	SA Racial Discrimination Act (superseded)	1976
Australian Human Rights Commission Act	1986	NSW Anti-Discrimination Act	1977
Disability Discrimination Act	1992	Victorian Equal Opportunity Act	1977
Age Discrimination Act	2004	SA Handicapped Persons Equal Opportunity Act (superseded)	1981
		SA Equal Opportunity Act	1984
		WA Equal Opportunity Act	1984
		Queensland Anti-Discrimination Act	1991
		ACT Discrimination Act	1991
		NT Anti-Discrimination Act	1992
		Tasmanian Sex Discrimination Act	1994
		Tasmanian Anti-Discrimination Act	1998

Table 3.1. Australia's anti-discrimination laws

In the absence of a bill of rights, this is indeed how human rights are protected in Australia, by legislative means. Table 3.1 shows the various federal, state and territory acts that make up

[137] Allan 2003, p. 187.

[138] Chappell et al. 2009, p. 67.

Australia's anti-discrimination legislation.[139] It will be noted that while for the most part the states and territories have legislated comprehensive acts to cover all aspects of discrimination, the Commonwealth has enacted specific acts for each protected characteristic such as race or disability. The rest of this chapter will examine one such federal act, the *Disability Discrimination Act* of 1992, the chief means of guaranteeing the human rights of people with disabilities at the Commonwealth level.

3.3 Early disability charities in Australia

As in the United States, the early provision of services for disabled people in Australia was provided by charities, many of them founded in the late nineteenth century.[140] Thus, in Sydney the Royal Institute for Deaf and Blind Children opened their school in 1860,[141] in Melbourne the Deaf and Dumb Institution opened in 1862, the Royal Victorian Institute for the Blind opened in 1867,[142] and the South Australian Institution for the Blind, Deaf and Dumb was established in Adelaide in 1874.[143] It was not until 1893 that a Blind, Deaf and Dumb School was opened in Brisbane — prior to this children from as far away as

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[139] Compiled from Australian Human Rights Commission, 'A guide to Australia's anti-discrimination laws', AHRC 2014, at <https://www.humanrights.gov.au/guide-australias-anti-discrimination-laws> and linked pages, accessed 23 June 2014; and from Consie Larmour, *Sex Discrimination Legislation in the States and Territories*, Research Paper 17 1998-99, Parliamentary Library, Parliament of Australia, at <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99Rp17?print=1> and accessed 23 June 2014.

[140] As we will see, in Britain the Poor Laws, based on parish relief and Poor Law Union workhouses, carried out this function. This was not attempted in the settler societies of Australia and North America, because of the geographic dispersal of the population and the relatively recent date of European settlement.

[141] Royal Institute for Deaf and Blind Children, 'History', RIDBC 2013, accessed at <http://www.ridbc.org.au/history> on 19 June 2014.

[142] eMelbourne, the City Past and Present, 'Disability Services', School of Historical Studies, Department of History, The University of Melbourne, published July 2008, updated 7 February 2014, accessed at <http://www.emelbourne.net.au/biogs/EM00471b.htm> on 19 June 2014.

[143] Disability Information & Resource Centre South Australia, 'Townsend House', DIRCSA 2007, accessed at <http://history.dircsa.org.au/1800-1899/townsend-house/> on 19 June 2014.

Rockhampton attended the Sydney school.[144] Most of these institutes included boarding facilities for disabled children from the country, or adult hostels to accommodate workers in sheltered workshops.[145] Institutionalisation and increasingly medicalisation were seen as the most efficient ways of dealing with people with disabilities.

This policy was particularly problematical for people with intellectual disabilities. While many mildly impaired people were employed in unskilled work, people with severe intellectual disabilities were placed in lunatic asylums, frequently as children. In reaction to this policy a group of parents of intellectually disabled children met in Sydney in February 1947, to form the Society for the Welfare of Mental Defectives with the aim of providing appropriate education, employment and accommodation for children and adults with intellectual disabilities.[146] The society was renamed the Subnormal Children's Welfare Association by the mid 1960s and became the Challenge Foundation NSW in 1984.[147]

Similar events unfolded in Queensland. The Endeavour Foundation was founded as the Queensland Sub-Normal Children's Welfare Association in June 1951 by a group of parents who refused to accept that their children with an intellectual disability could not be educated. In August 1953 they set up their first classroom, a verandah in the Brisbane suburb of

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144 Geoffrey Swan, *From segregation to integration - The development of special education in Queensland*, PhD Thesis, Graduate School of Education of the University of Queensland, 1996.

145 Mary Lindsay, Commonwealth Disability Policy 1983-1995, Background Paper 2 1995-96, Parliamentary Library, 1996, p. 7, accessed at <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9596/96bp06> on 23 June 2014.

146 Dave Earl, ''A Group of Parents Came Together': Parent Advocacy Groups for Children with Intellectual Disabilities in Post—World War II Australia', *Health and History*, vol. 13, no. 2, Special Feature: Health and Disability, 2011, p. 85;

147 Naomi Parry, 'Sub-Normal Children's Welfare Association (NSW) (1946 - 1984)', webpage first published by the Find & Connect Web Resource Project for the Commonwealth of Australia, 2011 at <http://www.findandconnect.gov.au/ref/nsw/biogs/NE01618b.htm>, last updated 01 July 2014, and viewed 01 December 2014.

Coorparoo, where ten children were taught numeracy, literacy and life skills by volunteers. In December of that year they purchased Bowen House in Bowen Hills, and the movement has continued to grow ever since, adopting its current name in 1984. It now supports more than 3,300 people with a disability from over 230 locations in Queensland, New South Wales and Victoria, providing education programs, supported employment, enabling equipment, and group accommodation. Residential accommodation facilities are scattered throughout Queensland, and in-home support is also provided to individuals or groups of co-tenants with a disability living within their own home or rented public or private housing.[148] Other well known and respected Australian disability charities display similar histories.[149]

3.4 The increasing role of the Commonwealth in disability services

The Commonwealth's first entry into disability policy was in 1908, when the government assumed responsibility for disability pensions, passing the *Invalid and Old Age Pensions Act*.[150] The need to rehabilitate disabled veterans of WWI provided a major impetus to disability policy at the federal level, with the establishment of the Repatriation Commission in

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[148] Various linked webpages on the Endeavour Foundation website: 'About Us' at <http://www.endeavour.com.au/Our-Endeavour-Foundation/About-Us>, 'Our History' at <http://www.endeavour.com.au/Our-Endeavour-Foundation/Endeavour-Foundation-History> and 'Accommodation' at <http://www.endeavour.com.au/Disability-services/Accommodation>, accessed 02 December 2014.

[149] The Western Australian experience is detailed by Charlie Fox, *Children with Intellectual Disabilities and Their Families: A Brief Western Australian History*, paper prepared for the Lost Generation Project, June 2010, downloaded from <www.disseminate.net.au/download/LostGenerationHistoryFamilies.pdf> on 02 December 2014.

Particularly interesting is the history of the Cerebral Palsy Alliance of NSW, formerly the Spastic Centre, detailed from the personal viewpoint of its founder in: Neil McLeod, *Nothing is Impossible*, the Spastic Centre, Allambie Heights, 2007. Neil and Audrie McLeod's daughter Jennifer was born with cerebral palsy in August 1938, when very little was known about the condition. The book is available at <https://www.cerebralpalsy.org.au/wp-content/uploads/2013/07/Nothing-is-impossible.pdf> and was downloaded on 02 December 2014.

[150] Karen Soldatic and Barbara Pini, 'Continuity or Change? Disability Policy and the Rudd Government', *Social Policy & Society*, vol. 11, no. 2, 2012, p. 184. The Australian act was more generous than the UK *Pensions Act* of the same year (see section 4.2).

1919 as a service funded and administered by the Commonwealth. After WWII the commission's role was expanded with the establishment of the Commonwealth Rehabilitation Service (CRS), in 1948.[151] While the States retained their role of medical rehabilitation of disabled people, the CRS provided them with vocational training and employment.

Following World War Two there was increasing public pressure on the Commonwealth to fund and regulate services for people with disabilities. Several pieces of legislation were passed, such as the *Aged and Disabled Persons Homes Act 1954* and the *Handicapped Persons Assistance Act 1974*.[152] These acts reflect a paternalistic model, the 1974 Act for example being concerned with the regulation of sheltered employment, rehabilitation facilities and residential accommodation of disabled people.[153] However, by this date the philosophy of normalisation that had begun in the United States was being taken up in Australia, with a movement towards greater inclusion of people with disabilities in community accommodation and mainstream schools.[154] In the US much of the impetus for this movement had come from grassroots organisations, many founded by students agitating for the removal of barriers to access in education, accommodation and transport. In contrast, the same level of activism was largely absent in Australia and the earliest efforts towards normalisation were carried out as programmatic interventions to ameliorate conditions in large overcrowded institutions.[155] Rather the Australian experience appears to match the second phase of the American

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[151] Lindsay 1996, p. 7.

[152] Lindsay 1996, pp. 7-8.

[153] ComLaw, *Handicapped Persons Assistance Act 1974*, Australian Government 2014, accessed at <http://www.comlaw.gov.au/Details/C2004A00190> on 19 June 2014.

[154] Lindsay 1996, p. 8.

[155] Fox 2010, p. 3, details the efforts in WA of Guy Hamilton, appointed in 1964 to head the new Mental Deficiency Division of the State Government's Mental Health Services, who began the process of helping people with intellectual disability join the community.

disability movement, in which disability organisations were working closely with governments to improve facilities for disabled people.

3.5 The disability rights movement in Australia

In Australia 'collective action has tended to focus less on the street and direct action, and more on lobbying governments'.[156] The major disability support organisations for the blind and deaf continued to concentrate on their core constituencies, without developing cross-disability cohesion.[157] By the mid 1980s umbrella organisations had emerged to advocate disability issues to governments, each representing a different constituency. These were the DPI(A) and the DACA. At the same time disability service providers also formed a peak representative body to represent their interests, with positions often at odds with the civil society disability movement. This was ACROD.

ACROD has had several changes of name and acronym. Founded in 1945 as the Australian Advisory Council for the Physically Handicapped, the organisation provided national co-ordination of the various state and territory bodies. Its aim then and now was to allow 'the voluntary sector to address the government with a united voice when lobbying on disability issues'. Its name was changed to the Australian Council for the Rehabilitation of the Disabled in 1963, and subsequently shortened to ACROD, before being rebadged as National Disability Services (NDS) in 2007, the current organisation.[158]

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[156] Christopher Newell, 'Encountering Oppression: the Emergence of the Australian Disability Rights Movement', *Social Alternatives*, vol. 18, no. 1, 1991, p. 48.

[157] Elizabeth Lightfoot, 'A Comparative Study of Social Policy Transfer', *The Social Policy Journal*, vol. 1, no. 4, 2002, p. 19.

[158] National Disability Services, 'About NDS', NDS 2011, accessed at <http://www.ndsonlinewhs.org.au/aboutus.html> on 19 June 2014.

More directly concerned with individual rights has been the DPI(A) or the Disabled Peoples International (Australia). As its name suggests, this was the Australian chapter of an international movement, founded internationally in 1980 and in Australia the following year.[159] At the time the international counterpart of ACROD was Rehabilitation International, which held a conference in Winnipeg in 1980. People with disabilities were invited, but barred from speaking. This precipitated a walkout by people with disabilities and the foundation of Disabled Peoples International, both internationally and in Australia. The Australian organisation served as the major cross-disability advocacy group in Australia during the 1980s and early 1990s.[160] In 1996 it hosted the Fourth World Congress of the DPI in Sydney, but the event proved financially disastrous. As a result the Disabled Peoples International (Australia) went into liquidation and was disbanded. It is not entirely defunct, however. Its NSW constituent organisation, People with Disabilities (NSW) survived, in 2002 repositioning itself as People with Disability Australia (PWDA), the current organisation. PWDA declares its aim is serve 'as a leading disability rights, advocacy and representative organisation of and for all people with disability' and has been active nationally and internationally.[161] For example between 2003-2006 it played a role in developing the UN *Convention on the Rights of Persons with Disabilities* (CRPD) by making submissions, hosting seminars and supporting delegates to the UN.[162]

While ACROD was founded by service providers and the DPI(A) founded by people with disabilities, the third body examined here was set up by the federal government. This was the

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[159] People with Disability Australia (PWDA), 'Our History', PWDA 2014, p. 2, accessed at <http://www.pwd.org.au/about-us/our-history.html> on 19 June 2014; Lindsay, p. 9.

[160] Lightfoot 2002, p. 16.

[161] People with Disability Australia (PWDA), 'Our Vision and Purpose', PWDA 2014, accessed at <http://www.pwd.org.au/about-us/our-vision-and-purpose.html)> on 19 June 2014.

[162] PWDA, 'Our History', cited above, p. 3.

Disability Advisory Council of Australia (DACA), established by the incoming Hawke Labor government in 1983. It replaced the National Advisory Council of the Handicapped, which had a minority of members with a disability. In contrast, the majority of the DACA's members were people with disabilities, sitting alongside carers and representatives from service provider organisations.[163] Between 1989 and 1993 — a critical period, as we will see — the Chair of DACA was disabled lawyer and activist Graeme Innes.[164] DACA was one of the major contributors to government disability policy embodied in the major item of legislation examined here, the *Disability Discrimination Act* of 1992 (Cth).

3.6 Background to the Commonwealth *Disability Discrimination Act 1992*

The Hawke government instituted a major review of disability policy, the Handicapped Programs Review, in 1983.[165] At the time the centrepiece of disability policy was the Handicapped Person's Welfare Program (HPWP) and its associated legislation, the *Handicapped Program Assistance Act 1974* (Cth), initiatives of the Whitlam government. Public consultations were held, with over 3,000 people providing submissions.[166] The views of users of publicly funded disability services were included. This resulted in the *Home and Community Care Act 1985 (Cth)*, followed by the *Disability Services Act 1986 (Cth)*, both of which reflect growing acceptance of the need for greater inclusion of disabled people in

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[163] Lindsay 1996, pp. 9-10

[164] Graeme Innes was until July 2014 the Disability Discrimination Commissioner on the Australian Human Rights Commission. Australian Human Rights Commission, 'Disability Discrimination Commissioner - Graeme Innes', AHRC 2014, accessed at <https://www.humanrights.gov.au/about/commissioners/disability-discrimination-commissioner> on 23 June 2014. This page may not be active after July.

[165] Lightfoot 2002, p. 12.

[166] Soldatic and Pini 2012, p. 184.

mainstream society.[167] Disabled people were to be cared for in the community rather than in institutions, and wherever possible barriers to their employment were to be removed.

The social model of disability (formulated in 1983) provided the rhetoric and rationale for these calls for inclusion of people with disabilities in society. These calls were strengthened by the emergence of neoliberalism and concerns that the link between social security and the labour market should be examined. Ideally disabled people were to be moved from welfare to employment.[168] Accordingly the invalid pension was replaced with a new Disability Support Pension, under the *Social Security (Disability and Sickness Support) Act 1991*.[169] Greater inclusion of disabled people in the community and in employment meant confronting attitudinal barriers to their participation in the form of discrimination. Indeed, the Handicapped Programs Review had included recommendations for federal employment protection for people with disabilities.[170] Policy entrepreneurs within the federal government or aligned with it within DACA thus saw a window of opportunity to promote disability discrimination legislation as part of the government's wider employment policy reforms. The reconstruction of disabled people as potentially employable and therefore deserving

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[167] Soldatic and Pini 2012, pp. 184-185.

[168] Note 'ideally'. In practice moving disabled unemployed people into work requires a level of policy coordination and funding commitment that is rarely forthcoming. Thus the Federal government's Job Services Australia seeks to find employment for people with disabilities, but because the agency is oriented to achieving outcomes, it tends to prioritise clients who are most easily placed in employment, namely those who are least disabled. A study by Harris et al of disability employment in Australia, the UK and the USA found that policies centred on neoliberalism in these countries 'emphasize an individual's responsibility to work, but do not include supports and services that help remove wider structural barriers facing people with disabilities' — Sarah Parker Harris, Randall Owen and Robert Gould, 'Parity of participation in liberal welfare states: human rights, neoliberalism, disability and employment', *Disability & Society*, vol. 27, no. 6, 2012, p. 823. On Job Services Australia 'creaming', see p. 831 of Harris et al, and also Dan Finn, *Job Services Australia: design and implementation lessons for the British context*, Research Report No 752, Department for Work and Pensions (UK), 2011, p. 12, downloaded from <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214527/rrep752.pdf> on 05 September 2014. See discussion at section 6.3.5.

[169] Lindsay 1996, p. 17.

[170] Lightfoot 2002, p. 12-13.

protection in the wider community was turned to their purposes of promoting the need for legislation.[171] The *Disability Discrimination Act 1992* (DDA), now under Bob Hawke's successor Paul Keating, was thus part of a broader policy program.

Previously the Hawke government had enacted the *Human Rights and Equal Opportunities Act* of 1986 to give enforcement to five United Nations declarations and conventions, amongst them the United Nations *Declaration on the Rights of Disabled Persons* (1976).[172] The Act was administered by the new Human Rights and Equal Opportunity Commission (HREOC).[173] Increasingly the president of HREOC was bringing attention to the need for a specific disability discrimination act, to parallel the *Racial Discrimination Act* of 1975 and the *Sex Discrimination Act* of 1984.[174]

In 1989 Dr Neal Blewett, Minister for Community Services and Health, set up the Labour and Disability Workforce Consultancy to identify the major barriers preventing people with a disability entering the general labour market. The consultancy was led by Ms Chris Ronalds, a Sydney barrister, specialising in employment law and discrimination law. Significantly, she had played a pivotal role in the development of the *Sex Discrimination Act 1984* (Cth).[175] The

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[171] Lightfoot 2002, p. 13.

[172] Lindsay 1996, p. 23. Section 3 of the Act lists the five UN conventions covered, and they then form five schedules at the end of the Act — Australasian Legal Information Institute (AustLII), 'Human Rights and Equal Opportunity Commission Act 1986 No. 125 of 1986 - Sect 3', Commonwealth Numbered Acts, AustLII accessed at <http://www.austlii.edu.au/au/legis/cth/num_act/hraeoca1986512/s3.html> on 24 June 2014.

[173] HREOC became the Australian Human Rights Commission in 2008 (public name) and 2009 (legal name) — AHRC, 'Introduction' in *Federal Discrimination Law*, p. 1, accessed at <http://www.humanrights.gov.au/sites/default/files/content/legal/FDL/2011/1_Introduction.doc> on 23 June 2014, and also available from <https://www.humanrights.gov.au/federal-discrimination-law-chapter-1-introduction>

[174] Lightfoot 2002, p. 17

[175] Chris Ronalds, LinkedIn [Profile page], 2014 accessed at <http://www.linkedin.com/pub/chris-ronalds/6b/658/26> on 23 June 2014.

work group authored a discussion paper, *Report of the National Consultations with People with Disabilities - Labour and Disability Workforce Consultancy* (the *Ronalds Report*), which was released by Brian Howe, Dr Blewett's successor as Minister, in August 1990. The report addressed the four areas of wages, unionisation, equal employment opportunities and legal protection of workers with disabilities.[176] Its recommendations included the introduction of anti-discrimination legislation on the ground of disability.[177]

Acting on those recommendations, on 11 June 1991 Brian Howe (as Minister Assisting the Prime Minister for Social Justice) and Michael Duffy, the Attorney-General, announced the establishment of a Disability Anti-Discrimination Legislation Committee, with representation from DACA, HREOC, the Attorney-General's Department and the Department of Health, Housing and Community Services. The committee published a Discussion Paper in July 1991, and commissioned DACA to conduct public consultations with people with disabilities. Public meetings and consultations were held throughout Australia in July and August 1991.[178] Potential participants were contacted through advertisements in major newspapers and through flyers distributed to disability organisations.[179]

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[176] Chris Ronalds, 'Executive Summary', in *Report of the National Consultations with People with Disabilities ('Ronalds Report')*, Labour and Disability Workforce Consultancy, Commonwealth Department of Health, Housing and Community Services, AGPS, Canberra, 1991, p. 16, accessed at <https://www.humanrights.gov.au/publications/national-employment-initiatives-people-disabilities-executive-summary> on 23 June 2014; Sharan Burrow, *Disability and the Unions*, speech delivered on Monday, 21 July 2008 at the NDS Employment Forum in Brisbane, Australian Council of Trade Unions, 2008, accessed at <http://www.actu.org.au/Tools/print.aspx?ArticleId=6052> on 23 June 2014.

[177] *Ronalds Report*, Executive Summary, p. 8.

[178] Consultations were held in every capital city, as well as Alice Springs, Albury-Wodonga, Rockhampton and Launceston, and conducted by consultants Graeme Innes, Maureen Shelley, John Nothdurft and John Simpson — Maureen Shelley, *National Disability Discrimination Legislation*, Report of the national consultations with people with a disability, Disability Advisory Council of Australia Australian Govt. Pub. Service, Canberra, 1991, p. 2.

[179] Shelley 1991, p. 5. Overall 502 people took part in the consultations and an additional 48 written submissions were received.

The Discussion Paper surveyed existing state disability anti-discrimination legislation and reported on the relevant UN conventions. Significantly, it outlined the *Americans with Disabilities Act* (ADA) legislated twelve months previously in the US, which suggested the format of a specific disability discrimination bill to sit alongside the Commonwealth's existing legislation on racial and sexual discrimination.[180] With a response of 95% of participants in favour of the proposal,[181] the Disability Anti-Discrimination Legislation Committee drafted the proposed *Disability Discrimination Bill*, using the ADA as a template, making additions and deletions where necessary, ready for presentation to Parliament.[182]

3.7 Passage of the *Disability Discrimination Act 1992*

Brian Howe presented the Bill to Parliament on 26 May 1992, in conjunction with amendments to the *Human Rights and Equal Opportunities Act* of 1986.[183] Proposing the Bill, the Minister described it in terms of the social model of disability, noting that 'people with disabilities still face a number of barriers to the equal enjoyment of human rights in many areas of life' and suggested the legislation would provide 'effective means of overcoming perhaps the most significant barrier that people with disabilities face in this country — the attitudinal barrier.' [184]

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[180] Shelley 1991, pp. 10, 11, 15, 27, 29; appended Discussion Paper, p. 8, 10, 11 and 12.

[181] Shelley 1991, p. 9.

[182] Lightfoot 2002, p. 13.

[183] This was the *Equal Opportunity Legislation Amendment Bill 1992*. The amendments inserted references to the new disability discrimination act alongside existing references to the *Racial Discrimination Act* and the *Sexual Discrimination Act.*

[184] Australian Parliament, *Parliamentary Debates*, House of Representatives, 26 May 1992, page 2750 ff, accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1992-05-26%2F0028;query=Id%3A%22chamber%2Fhansardr%2F1992-05-26%2F0030%22> on 23 June 2014.

The Bill was then referred to the Senate Standing Committee on Community Affairs.[185] The Senators suggested minor alterations, such as changing the ADA term 'Regulations' to 'Standards' in describing future subsidiary legislation, and adding payphones to the telecommunications provisions. On 15 October 1992 the Bill was returned to the Lower House, where Tim Fischer, Leader of the National Party, indicated the Coalition would support the Bill as amended.[186] The Bill gained royal assent on 05 November 1992.[187]

The Commonwealth *Disability Discrimination Act 1992* (DDA 1992) was drafted and implemented without any major challenges, for a number of reasons. First, although largely patterned after the American act, the DDA differs from the ADA in an important respect. Its definition of disability is broader than that of the ADA, encompassing potential future impairment as well as those of the past and present, and conceding that an impairment need not have an immediate harmful effect on an individual. This wider definition has allowed the DDA to avoid the contestation that the ADA experienced in US courts.

Second, the legislation was enacted smoothly because both sides of politics accepted disability rights as a human rights issue. Although the initial wave of a social movement may

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[185] The committee was composed of one ALP senator, three from the Coalition, two Democrats and one Independent: Michael Tate (ALP), Kay Patterson (Liberal), Bill O'Chee (National), Grant Tambling (CLP), Meg Lees and Janet Powell (Democrats) and Brian Harradine (Independent). They are listed in the Senate Hansard for 15 October 1992, page 1892 at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F1992-10-15%2F0039;query=Id%3A%22chamber%2Fhansards%2F1992-10-15%2F0000%22>

[186] Australian Parliament, *Parliamentary Debates*, House of Representatives, 15 October 1992, p. 2333, accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1992-10-15%2F0123;query=Id%3A%22chamber%2Fhansardr%2F1992-10-15%2F0122%22> on 23 June 2014.

[187] ComLaw, *Disability Discrimination Act 1992*, Australian Government, accessed at <http://www.comlaw.gov.au/Series/C2004A04426> on 23 June 2014.

involve protests and sit-ins, later spin-off movements often have much easier passage.[188] As we have seen, the US Civil Rights Movement created a new conception of equal civil rights, which was largely accepted and internalised within government by the time the Disability Rights Movement emerged. Likewise the DDA was proposed and managed from within government, with policy makers able to co-opt disability activists to the task, recruiting them into bodies such as DACA and the Disability Anti-Discrimination Legislation Committee. Aiding this process was the conception that the DDA would fill a gap in legislation. Although the *Human Rights and Equal Opportunities Act* of 1986 had incorporated the UN *Declaration on the Rights of Disabled Persons* (1975) into Australian law by attaching the UN instrument as a schedule to the Commonwealth act, this was not enough. A specific act for people with disabilities was needed, to accompany those on racial and sexual discrimination.

A third way in which the DDA has avoided conflict is that policy entrepreneurs were able to frame the proposed legislation in terms that coincided with the overall political agenda of neoliberalism and greater workplace participation.

Lastly, the DDA is drafted in general terms, leaving details of its implementation to subsidiary legislation. This effectively postpones discussion of the more difficult aspects of its practical application. Just as the ADA was followed by specific regulations to implement its provisions, the DDA has been followed by more specific Disability Standards: standards for accessible public transport in 2002, education in 2005 and access to premises in 2010.[189] Disability standards in the most difficult area, employment, have been placed in the too-hard

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[188] Kyra Greene, *The Role of Protest Waves, Cultural Frames and Institutional Activism in the Evolution of American Disability Rights Policies*, Thesis for Doctor of Philosophy, Stanford University, 2007.

[189] Attorney-General's Department (Cth), 'Human rights and anti-discrimination', Australian Government, and subsidiary pages, accessed at <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx> on 23 June 2014.

basket. Although prepared by the Australian Human Rights Commission between 1994 and 1998 in consultation with industry, the standards are 'not currently proceeding towards authorisation, as consensus for adoption of regulatory standards in this area is lacking.'[190]

The relatively uncontested passage of the DDA legislation does not mean that the Act has escaped critical examination.

3.8 Review of the *Disability Discrimination Act 1992*

Evaluation of the DDA has taken place in two ways. It was the subject of an enquiry by the Productivity Commission in 2004, and it is regularly examined as part of the Universal Periodic Review process by which Australia reports its progress on human rights to the UN.

The Productivity Commission reviewed the DDA in 2004 as part of an agreement between Australian governments to review legislation that affects competition. The Commission found that the Act is 'likely to have generated a net community benefit' in both social and economic terms.[191] The Commission noted that the Act is based on the social model of disability, but uses a medically-based definition of disability, an approach it finds appropriate since it integrates medical diagnosis with the need to address social and economic barriers.[192] The Act was found to have achieved mixed results in reducing discrimination in different areas of activity, being most effective in the provision of goods and services and in tertiary education, somewhat less effective in access to buildings and transport and least effective in

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[190] Australian Human Rights Commission, 'Disability Standards and Guidelines', accessed at <https://www.humanrights.gov.au/our-work/disability-rights/disability-standards-and-guidelines> on 24 June 2014.

[191] Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No. 30, Melbourne, 30 April 2004, Finding 6.7, p. LIX, accessed at <http://www.pc.gov.au/projects/inquiry/disability-discrimination/report> on 23 June 2014.

[192] Productivity Commission Review, Finding 11.1, p. LXIV

employment.[193] The chief areas of concern were for people with disabilities from Indigenous or non-English speaking backgrounds, those living in regional areas, and those who needed to deal with the justice system.[194]

Australia ratified the UN *Convention on the Rights of Persons with Disabilities* (CRPD) on 17 July 2008.[195] Under Universal Periodic Review, signatory states are obliged to review their human rights situation every four years in relation to the CRPD and other human rights conventions. Australia's first such review took place on 27 January 2011 in Geneva. Prior to the meeting the Attorney-General's department lodged a 20 page *National Report* to the UN in October 2010.[196] More detailed and more damning however was the parallel report on the CRPD issued later by disability NGOs. Seventy civil society organisations such as People with Disabilities and the Australian Human Rights Centre collaborated to form the CRPD Civil Society Report Group. Their *Civil Society Shadow Report* was released by Graeme Innes (in his role as Disability Discrimination Commissioner on the AHRC) on 29 August 2012.[197]

The Report's findings are consistent with those of the Productivity Commission, finding 'a lack of community legal education outreach, in particular to Indigenous communities and

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[193] Productivity Commission Review, pp. XXXII-XXXIV and repeated on pp. LVII-LVIII.

[194] Productivity Commission Review, Finding 5.8, p. LVIII and Finding 9.6, p. LXII.

[195] Attorney-General's Department (Cth), *Australia's initial report under the Convention on the Rights of Persons with Disabilities*, Australian Government, May 2010, p. 1, accessed as a pdf file from <http://www.ag.gov.au/RightsAndProtections/HumanRights/ReportCRPD/Pages/default.aspx> on 23 June 2014.

[196] Attorney-General's Department (Cth), *Australia's Universal Periodic Review*, Australian Government 2011, accessed at < http://www.ag.gov.au/RightsAndProtections/HumanRights/UniversalPeriodicReview/Documents/UniversalPeriodicReview.DOC > on 23 June 2014.

[197] Graeme Innes, *Launch of the Civil Society Shadow Report*, Press release, 29 August 2012, accessed at <https://www.humanrights.gov.au/news/speeches/speech-launch-civil-society-shadow-report-2012> on 23 June 2014. The Civil Society Report Group was funded by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

people from non-English speaking backgrounds', but went further, finding that the DDA fails to address intersectional and systemic discrimination, and has an ineffective complaints process.[198]

The Report was especially critical of Australia's 'piecemeal statutory framework of discrimination and equal opportunity laws' which 'fails to provide comprehensive uniform human rights protections'.[199] A major recommendation was that Australia 'establish a comprehensive, judicially enforceable Human Rights Act', incorporating all the country's obligations under UN conventions.

Sweeping aside the patchwork of federal and state laws relating to human rights would entail a degree of cooperative federalism, but would deliver greater uniformity across all Australian jurisdictions. By legislating a comprehensive Human Rights Act, Australia would unify and harmonise the disparate pieces of legislation currently in force on the various protected characteristics of race, sex, disability and age. This is a step that has been taken in the United Kingdom, which also carried out a policy transfer of the US ADA legislation in 1995, but replaced it with unitary legislation, the *Equality Act*, in 2010, as we shall see in the next chapter.

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[198] Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now - Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities ('Civil Society Shadow Report')*, CRPD Civil Society Report Project Group, August 2012, pp. 39-42, accessed at <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html> on 23 June 2014.

[199] *Civil Society Shadow Report* 2012, pp. 11, 20, 36 and 38.

4. The United Kingdom

4.1 The Constitution of the United Kingdom

The Constitution of the United Kingdom does not consist of a set of fundamental principles encapsulated in one document. Rather, British democracy is regulated by an array of constitutional documents, dating from various periods. Writing in 1897, Albert Venn Dicey described the constitution as a continuously and historically developed tradition.[200] Milestones in this development are various Acts of Parliament which elaborate conceptions that we now regard as constitutional. Examples include the *Acts of Union* of 1707 which determined the pseudo-federal structure of England and Scotland united under one crown, the various *Reform Acts* which progressively extended the franchise, up to the most recent Act bearing on constitutional affairs, the *Succession to the Crown Act 2013*. The constitution is also determined by legal decisions and by understandings and conventions. Aspects of the constitution are acted out by players who accept their roles as determined by convention, confirming the constructivist understanding that human enactment brings social roles to life.[201] Dicey also points out that the constitution is a parliamentary constitution, by which even the Crown is subservient to the law of the land enacted by Parliament.[202] Thus the *Act of Settlement* of 1701 states that the 'laws of England are the birthright of the people … and all

[200] Albert Venn Dicey, *General characteristics of English constitutionalism: six unpublished lectures*, Peter Raina (ed.), Peter Lang AG, Bern (1897) 2009, pp. 59-67.

[201] Alvesson and Sköldberg 2000, p. 26-28.

[202] Dicey 1897, p. 69-73. We will return to the concept of the constitutional primacy of the legislature later.

the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws'.[203]

Law, legislated by Parliament, constrains the actions of the Crown and protects the rights of the individual. Recently these rights have been made more explicit by the *Human Rights Act 1998*, which gives effect to the *European Convention on Human Rights*, and which serves as a statutory Bill of Rights in the UK. More specifically regarding disability discrimination legislation, the UK enacted its own *Disability Discrimination Act* (DDA) in 1995. Poorly implemented by a government uncommitted to the fundamental intention of the legislation, the DDA 1995 has been superseded by the *Equality Act 2010*, which promises to revolutionise equality rights in the UK. These Acts will be examined in this chapter, after a brief historical background.

4.2 The increasing role of government in disability affairs

As we encountered in the USA and Australia, the national government was initially reluctant to become involved in disability affairs, leaving this role to charities and to subordinate jurisdictions. As expected, the principal disability charities in Britain were founded in the nineteenth century. Thus the Royal Blind Society was founded in 1863, the Royal National Institute for the Blind in 1868 and the British Deaf Association in 1890.[204]

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[203] Thomas Erskine May, *A treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, Charles Knight & Co., London, 1844, p. 3. The author was Assistant Librarian of the House of Commons at the time of writing.

[204] Royal Blind Society, 'History', RBS, Worthing, West Sussex, 2014, accessed at <http://royalblindsociety.org/about-us/history/> on 26 June 2014.
Royal National Institute of Blind People, 'History of RNIB', RNIB, London, 2014, accessed at <http://www.rnib.org.uk/about-rnib-who-we-are/history-rnib> on 26 June 2014.
British Deaf Association, 'BDA - History', BDA website, accessed at <http://www.bda.org.uk/About_Us/BDA_-_History> on 26 June 2014.

Before the twentieth century provision of charity for disabled people was provided by sub-national jurisdictions, such as ecclesiastical parishes, civil parishes, Poor Law unions and county councils. Those unable to work and provide for themselves or their families were initially assisted under the Poor Laws, which have a long history. Parish collections for the poor were first required by law (rather than by voluntary donation) by an Act of 1536, with parish authorities then distributing the funds collected to those in need.[205] This machinery was further refined in 1572 by a law requiring justices of the peace to survey the poor in each parish under their jurisdiction, to assess and tax those able to pay, and to appoint collectors and overseers to handle and distribute the funds. At a higher administrative level, Thomas Gilbert's Act of 1782 authorised adjacent parishes to combine into Poor Law Unions and to build workhouses for the sick and infirm.[206] The *Poor Law Amendment Act* of 1834 then established the Poor Law Commission with the power to unite parishes into Poor Law Unions, each Union administered by a local Board of Guardians.[207] Royal commissions were held into the Poor Laws in 1893-1895 and again in 1905-1909, resulting in the *Pensions Act* of 1908.[208] This provided pensions to a limited section of the older population.

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[205] Paul Slack, *The English Poor Law 1531-1782*, Cambridge UP, 1995, p. 10.

[206] Paul Slack 1995, pp. 35-36.

[207] Peter Higginbotham, 'The History of Poor Law Unions,' The Workhouse website, 2014, at <http://www.workhouses.org.uk/unions/>
UK Parliament, 'Poor Law reform', Living Heritage website, UK Parliament 2014 at <http://www.parliament.uk/about/living- heritage/transformingsociety/ livinglearning/19thcentury/overview/poorlaw/>

[208] National Archives (UK), 'Records created or inherited by the Ministry of Pensions and National Insurance, and of related, predecessor and successor bodies', date range 1854-1998, the National Archives, Kew, 2014, accessed at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C227-records-created-or-inherited-by-the-ministry-of-details> on 10 July 2014.
Antoine Bozio, Rowena Crawford and Gemma Tetlow, *The history of state pensions in the UK: 1948 to 2010*, Economic & Social Research Council / Institute for Fiscal Studies, London, 2010, p. 7, briefing note downloaded from IFS at <http://www.ifs.org.uk/publications/5000> on 27 June 2014.

During the First World War, in 1917, a Ministry of Pensions was established to administer the pensions of disabled veterans.[209] The Great Depression and the Second World War were the catalyst for further social policies. In June 1941, the government appointed Sir William Beveridge to head an inquiry into the country's provision of social security.[210] The resultant report, the *Beveridge Report*, was published in December 1942.[211] Coming in the middle of the War, the Report anticipated a time of post-war peace in which the sacrifices of both soldiers and civilians would be recognised. Amongst the legislation resulting from the Report were the *Disabled Persons (Employment) Act 1944*, the first piece of legislation to cover disabled people in general, the *National Health Service Act 1946* setting up the NHS, and the *National Insurance Act of 1946*, which set up a universal contributory state pension.[212] These and similar measures laid the foundation for the modern welfare state in Britain.[213] Despite this, there were no specific financial benefits for disabled people until the 1970s, when

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[209] du Feu, J. 'Factors influencing rehabilitation of British soldiers after World War I', in *Historia Medicinæ*, vol. 2, no. 1. E10, pp. 1-5, downloaded from <http://www.medicinae.org/e10> on 27 June 2014. This was under the *Ministry of Pensions Act 1916* and tranferred some functions from the War Office, Chelsea Hospital and the Central Army Pensions Issue Office

[210] J. C. Brown, *Victims or Villains? Social Security Benefits in Unemployment*, Policy Studies Institute, University of Westminster, London, 1990, p. 21, book downloaded from PSI at <http://www.psi.org.uk/site/publication_detail/741/> on 01 July 2014.
Mercer, G. and Barnes, C. 'Changing Disability Policies in Britain', in Barnes, C. and Mercer G. (eds.), Disability Policy and Practice: Applying the Social Model, The Disability Press, Leeds, 2004, p. 2. The book is out of print, but the chapter is available from the University of Leeds at <http://disability-studies.leeds.ac.uk/publications/disability-policy-and-practice/>

[211] Officially the the *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* —National Archives (UK), 'The welfare state', one of several webpages on Citizenship, 1066-2003, the National Archives, Kew, accessed at <http://www.nationalarchives.gov.uk/pathways/citizenship/brave_new_world/welfare.htm> on 01 July 2014.

[212] National Archives (UK), 'Records created or inherited by the Ministry of Pensions …', above.
Geof Mercer and Colin Barnes, 'Changing Disability Policies in Britain', in C. Barnes and G. Mercer (eds.), *Disability Policy and Practice: Applying the Social Model*, The Disability Press, Leeds, 2004, p. 3. The book is out of print, but the chapter is available from the University of Leeds at <http://disability-studies.leeds.ac.uk/publications/disability-policy-and-practice/>
Michael Oliver and Gerry Zarb, 'The Politics of Disability: A New Approach', in *Disability, Handicap & Society*, vol. 4, no. 3, 1989, p. 224.

[213] Sonali Shah and Mark Priestley, *Disability and Social Change — Private Lives and Public Policies*, The Policy Press, University of Bristol, 2011, p. 6.

disability campaigners both as organisations and as individuals forced the government to reconsider the scope of its responsibilities.

4.3 Disability activism in the UK from the 1960s to the 1980s

The first disability rights organisation in the UK created *by* people with disabilities was the Disablement Income Group (DIG), formed in 1965.[214] DIG collected anecdotal evidence about the lives of disabled people and data from government sources to show how people with disabilities were neglected by the welfare state.[215] Their efforts made disability into a policy issue and compelled the Department of Health and Social Security to undertake its own analysis, which led to the introduction of benefits specifically for disabled people.[216] An Invalidity Benefit (IVB) was introduced in the *National Insurance Act 1971* for those unable to work due to sickness or disability who had insufficient National Insurance contributions. Then the *Social Security Act 1975* established a Non-Contributory Invalidity Pension for those who had been completely unable to contribute to national insurance.[217]

The reconceptualisation of disability as a policy issue is also seen in the *Chronically Sick and Disabled Persons Act (CSDA) 1970*, which revolutionised the provision of services for

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[214] Gareth Millward, 'Disability and Voluntarism in British Policymaking', Voluntary Action History Society blog, 27 February 2012, accessed at <http://www.vahs.org.uk/2012/02/disability-millward/> on 03 July 2014. The author is from the London School of Hygiene and Tropical Medicine.

[215] Millward 2012 above; Tom Shakespeare, *Disability rights and wrongs revisited*, 2nd edn., Routledge, Abingdon, Oxfordshire, 2014, p. 14.

[216] According to Mark Bendall and Brian Howman, *Decoding Discrimination*, Chester Academic Press, 2006, p. 163 DIG chose to cooperate with government rather than confront it due to the fact that the UK had no written constitution, no human rights legislation (as yet) and the NGO sector was dominated by disability charities and voluntary organisations wedded to the paternalistic approach.

[217] A.P. Thomas, M.C.O. Bax, and D.P.L. Smyth, *The Health and Social Needs of Young Adults with Physical Disabilities*, Mac Keith Press (The Spastics Society), London, 1989, p. 99.
Tania Burchardt, *The Evolution of Disability Benefits in the UK: Re-weighting the basket*, Centre for Analysis of Social Exclusion, London School of Economics, June 1999, p. 5, monograph downloaded from LSE at <http://eprints.lse.ac.uk/6490/> on 27 June 2014.

disabled people. The Act obliges Local Authorities to provide disabled people with home based care, including meals, help with housekeeping, specialised equipment, transport to educational facilities and even holidays.[218] In this case the driving force behind the Act was a disability activist, Alf Morris. Alf Morris's father had been gassed in WWI and died when Alf was six, while his mother suffered from crippling arthritis. Morris joined the Labour Party at 16 and eventually became MP for a Manchester constituency. In 1970, given the opportunity to propose a private member's bill, he compiled the *Chronically Sick and Disabled Persons Bill* in just ten days.[219]

The proposals within it were radical, including measures requiring Local Authorities to register all disabled people in their areas; send them regular bulletins on available assistance; provide sheltered housing, home adaptations and recreational facilities; extend concessions on public transport; improve wheelchair access to public buildings and provide disabled toilet facilities; and keep young disabled people out of geriatric wards.[220]

The Bill received bipartisan support in the Commons, while in the House of Lords it was welcomed by four peers speaking from their wheelchairs. The Bill was passed in May 1970, just before the general election of that year, which saw the Wilson Labour government replaced by the Heath Conservative government. By establishing the idea that making the

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[218] Mercer and Barnes 2004 (above), p. 5.
Cheshire East Council, 'Chronically Sick and Disabled Persons Act 1970', an example of the website of a typical local authority, accessed at <http://www.cheshireeast.gov.uk/social_care_and_health/adult_social_care/policies_and_performance/social_care_legislation/chronically_sick_disabled_act.aspx> on 09 July 2014.

[219] Assisted by like-minded colleagues - see section 4.4.

[220] Peter White, 'What needs to be done to end disability discrimination?', BBC Disability Affairs, 29 November 2010, accessed at <http://www.bbc.co.uk/news/mobile/health-11857490> on 09 July 2014.
The Telegraph (UK), 'Lord Morris of Manchester', Obituaries, *The Telegraph*, 14 Aug 2012, accessed at <http://www.telegraph.co.uk/news/obituaries/9475885/Lord-Morris-of-Manchester.html> on 09 July 2014. Alf Morris was knighted by the British and also received an Order of Australia.

environment accessible to disabled people was the responsibility of local councils, Morris provided a practical mechanism by which disabled people could benefit from home-based care, rather than being confined to institutions. As in America, the concept of independent living was gaining momentum, with its vision of greater social inclusion of disabled people.

While DIG continued to work closely with government, other newer activist groups took a more critical view.[221] These were the Union of Physically Impaired Against Segregation (UPIAS), formed in 1972, and the Disability Alliance, founded in 1974.[222] The Disability Alliance was led by social policy researcher Peter Townsend and like DIG campaigned on the issue of social security benefits, while UPIAS campaigned on a wider platform, initially the reform of residential institutions.[223] The founder of UPIAS, Paul Hunt, was a resident in such an institution, had researched the independent living movement in the USA, and wanted to form a consumer group for institutional residents. He was joined by Vic Finkelstein, a psychologist with a spinal injury, who had been expelled from South Africa because of his anti-apartheid views. Together Paul Hunt and Vic Finkelstein founded UPIAS, with Finkelstein bringing to the organisation a civil rights perspective.[224]

By November 1975 UPIAS was in dialogue with the Disability Alliance. To facilitate discussion, Paul Hunt published the *Fundamental Principles of Disability*, a document which provides the earliest surviving record of what we now call the social model of disability:

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[221] Gareth Millward, 'Feature: The Influence of Disability Organisations', Voluntary Action History Society blog, 27 February 2013, accessed at <http://www.vahs.org.uk/2013/10/feature-10/> on 03 July 2014.

[222] Millward 2012 above; Millward 2013 above.
Tom Shakespeare, *Disability rights and wrongs revisited*, 2nd edn., Routledge, Abingdon, Oxfordshire, 2014, p. 3-17.

[223] Millward 2012 above; Shakespeare 2014 above, p. 15.
Tom Clark, 'Peter Townsend', obituary, *The Guardian*, Tuesday 9 June 2009, at <http://www.theguardian.com/society/2009/ jun/09/obituary-peter-townsend>

[224] Shakespeare 2014 above, p. 14.

> In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society.[225]

Paul Hunt and UPIAS can thus be credited with initially formulating disability in social constructionist terms.[226] Academic Michael Oliver became familiar with Hunt's concept while assembling material for the first postgraduate course in what would come be called disability studies, at the University of Kent, material published in 1981 in the course reader *Handicap in a Social World*.[227] In 1983 Oliver labelled the concept 'the social model of disability' and created the dichotomy between this and the 'medical model'.[228] Michael Oliver's social model of disability became the intellectual foundation for modern disability studies. While doctors and physiotherapists worked to alleviate the medical impairments of their patients, the

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[225] Paul Hunt, *Fundamental Principles of Disability*, a summary of the discussion held on 22nd November, 1975 between UPIAS and the Disability Alliance, p. 3, downloaded from University of Leeds at <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf> on 10 July 2014.
The circumstances are discussed by Shakespeare 2014, p. 12 and theoretical implications in Raymond Lang, *The Development and Critique of the Social Model of Disability*, Leonard Cheshire Disability and Inclusive Development Centre, University College London, 2007, pp. 6-22, downloaded from UCL at <http://www.ucl.ac.uk/lc-ccr/centrepublications/workingpapers/WP03_Development_Critique.pdf> on 02 July 2014.

[226] Anastasiou, D. and Kauffman, J.M. 'A Social Constructionist Approach to Disability: Implications for Special Education', in *Exceptional Children*, vol. 77, no. 3, p. 367.

[227] Michael Oliver, 'Disability, adjustment and family life: some theoretical considerations', in Ann Brechin and Penny Liddiard (eds.), *Handicap in a Social World: a Reader*, Hodder and Stoughton, Sevenoaks, Kent, 1981.

[228] Michael Oliver, 'The social model of disability: thirty years on', in *Disability & Society*, vol. 28, no. 7, 2013, p. 1024. For discussion of an economic model of disability, see section 6.3.5. See also Michael Oliver, 'The Social Model in Action: if I had a hammer', in Barnes, C and Mercer G. (eds.), *Disability Policy and Practice: Applying the Social Model*, The Disability Press, Leeds, 2004, pp. 2-3. The book is out of print, but the chapter is available from the University of Leeds at <http://disability-studies.leeds.ac.uk/publications/disability-policy-and-practice/>

medical profession was not always aware of the structural barriers in society preventing people with disabilities from receiving adequate services and benefits.[229]

The understanding of disability as a social construct was hugely appealing to the disability rights movement, which continued to grow throughout the 1970s and 1980s into a spectrum of organisations of various degrees of radicalism. Initially there was little coordination amongst the activist groups set up by disabled people, or between these groups and the established traditional charities for disabled people. Then in 1981 the British Council of Organisations of Disabled People (BCODP) was formed, bringing together many of the activist organisations run by disabled people. They did not have the field to themselves. On the more radical side stood such groups as the Liberation Network of People with Disabilities, also founded in 1981, and the Disabled People's Direct Action Network, while on the more conservative side stood another umbrella organisation, the Royal Association for Disability and Rehabilitation (RADAR, founded in 1977), receiving funding from the government and the large charities such as the Spastic Society, representative of the organisations run for (rather than by) people with disabilities.[230] A significant step was taken in 1985 when Steven Bradshaw of the Spinal Injuries Association set up the committee of Voluntary Organisations for Anti-Discrimination Legislation (VOADL), a new group of the 'of' and 'for'

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[229] Ironically, widespread adoption of the social model of disability can have an unintended consequence. The disability rights movement, focussed on challenging societal barriers, has neglected addressing health care policy and 'finds itself uninvolved in many discussions of reform in the health care system which could benefit people with disabilities' — Jerry Alan Winter, 'The Development of the Disability Rights Movement as a Social Problem Solver', *Disability Studies Quarterly*, Winter 2003, Volume 23, No. 1, page 16 (of pdf version).

[230] Mary Wilkinson, *Defying Disability: the Lives and Legacies of Nine Disabled Leaders*, Jessica Kingsley Publishers, London, 2009, pp. 65-68.

The history of these organisations is covered in detail by Shakespeare 2014 and by Millward 2012 and 2013. RADAR merged in January 2012 with the Disability Alliance (DA) to form Disability Rights UK, and BCODP is now the United Kingdom Disabled People's Council (UKDPC).

organisations, which later became Rights Now!.[231] Given the wide spectrum of philosophical positions advocated by these various groups, and range of tactics they espoused, unsurprisingly there was initially little coordination between activists in the community and those within Parliament.[232]

4.4 Legislation in the 1990s and the *Disability Discrimination Act 1995*

Within Parliament Alf Morris was far from being the only institutional campaigner for disability rights. Two other names that stand out are Jack Ashley, a profoundly deaf Labour MP, and Peter Large, who was confined to a wheelchair after contracting polio.[233] Both assisted Morris, and later all three would be knighted. In 1969 Jack Ashley had set up the All-Party Disability Group (APDG), bringing together parliamentarians of every political persuasion, to support Morris with his 1970 bill. The Group was instrumental in delivering bipartisan support for the passage of that bill.[234] At the same time Peter Large had assisted, drafting the sections on wheelchair access.

In 1979 Alf Morris, as Minister for Disabled People, asked Peter Large to set up and chair a committee to investigate discrimination against disabled people. This was CORAD, the

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[231] Colin Barnes, *Disabled People in Britain and Discrimination: A case for anti-discrimination legislation*, C. Hurst and Co., London 1991, p. 6. Chapter 1 is available from the University of Leeds at <http://disability-studies.leeds.ac.uk/files/library/Barnes-disabled-people-and-discrim-ch1.pdf>; also Millward 2012, above.

[232] Elizabeth Lightfoot, 'A Comparative Study of Social Policy Transfer', in *The Social Policy Journal*, vol. 1, no. 4, 2002, p. 9.

[233] Sunil Peck, 'Lord Ashley jacks it in', DisabilityNow website, accessed at <http://www.disabilitynow.org.uk/article/lord-ashley-jacks-it> on 03 July 2014.
The Independent (UK), 'Sir Peter Large, Champion of the rights of disabled people', in *The Independent*, Wednesday 26 January 2005, accessed at <http://www.independent.co.uk/news/obituaries/sir-peter-large-6153919.html> on 03 July 2014.
The Telegraph (UK), 'Sir Peter Large', in Obituaries, *The Telegraph*, 27 January 2005, accessed at <http://www.telegraph.co.uk/news/obituaries/1482069/Sir-Peter-Large.html> on 03 July 2014.

[234] Wilkinson 2009, pp. 35-56. Also Lightfoot 2002, p. 9; the APDG is now the All-Party *Parliamentary* Disability Group (APPDG).

Committee on Restrictions Against Disabled People, which reported in February 1982.[235] The report recommended anti-discrimination legislation covering employment, education, the provision of goods, facilities and services, insurance, transport, property rights, occupational pension schemes, membership of associations and clubs, and civic duties and functions.[236] The Conservative government of Margaret Thatcher chose not to implement the report.

Undeterred, the APDG persisted, making six attempts between 1983 and 1989 to introduce anti-discrimination legislation. With the passage of the ADA in the US in 1990 and then the success of the DDA legislation in Australia in 1992, the parliamentary disability group looked to these acts as models. The bills proposed in 1992, 1993 and 1994 were closely patterned on the American and Australian legislation, and were also drafted in consultation with disability groups, unlike earlier bills.[237] The fourteenth attempt was the *Civil Rights (Disabled Persons) Bill* of 1994, proposed as a private member's bill by Dr. Roger Berry as Secretary and Co-Chair of the All Party Parliamentary Disability Group (APPDG, as it was now known). The bill had cross-party support and attracted a good deal of publicity.[238] While the bill was being debated in May 1994, members of the Disabled People's Direct Action Network protested outside Parliament, handcuffing themselves to buses or throwing themselves from their

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[235] *The Telegraph* 2005, above.

[236] UK Parliament, 'Memorandum from Sir Peter Large CBE (DDB 91)', dated 27 May 2004, relating to the Joint Committee on the Draft Disability Discrimination Bill and the Committee on Restrictions Against Disabled People (CORAD), accessed at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtdisab/82/82we77.htm> on 03 July 2014.

[237] Lightfoot 2002, above, p. 10.

[238] Disability Rights UK, 'Our Trustees — Roger Berry', Disability Rights UK, 2012, pp. 1-5, accessed at <http://www.disabilityrightsuk.org/about-us/our-team/trustees> on 09 July 2014.
Jo Roll, *Civil Rights (Disabled Persons) Bill* [Bill 12 of 1994-95], Research Paper 95/18, Education & Social Services Section, House of Commons Library, 6 February 1995, downloaded from <www.parliament.uk/briefing-papers/RP95-18.pdf> on 30 June 2014.

wheelchairs onto the road.[239] Their anger was aimed at the Conservative government of John Major, whose party was opposed to disability discrimination legislation, viewing it as impractical, costly and at odds with their aim of reducing government regulation and spending.[240] Government MPs employed delaying tactics to kill the bill, tactics which succeeded.[241]

A second attempt, proposing a modified version of the bill, was made in December 1994, advanced by Berry's colleague Harry Barnes, again as a private member's bill. Realising that there was considerable pressure both within Parliament and in the electorate for an anti-discrimination bill, the Conservative government chose a novel tactic, proposing their own *Disability Discrimination Bill* as a rival to the Berry/Barnes Bill. Like the APPDG's proposal, the Government bill was modelled on the ADA, but was far less ambitious. It failed to cover transport, education or small business, and initially had no enforcement mechanism.[242] Furthermore, it did not protect against indirect discrimination and it allowed 'justifiable discrimination' in cases where employers or service providers could argue a variety of grounds to refuse to accommodate people with disabilities. The legislation was very much a compromise by a government who hoped to appease the voices demanding legislation and the business community who feared its consequences.[243] The Bill passed both Houses of

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[239] The Independent, 'Disabled people demonstrate to save civil rights Bill', in *The Independent*, Thursday 19 May 1994, accessed at <http://www.independent.co.uk/news/uk/politics/disabled-people-demonstrate-to-save-civil-rights-bill-1436959.html> on 09 July 2014. Also covered by Lightfoot 2002, p. 9-11.

[240] Lightfoot 2002, p. 18.

[241] Carol Woodhams and Susan Corby, 'Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995', in *Journal of Social Policy*, vol. 32, no. 2, 2003 p. 160. Also Roll 1995, p. 5 and Lightfoot 2002, p. 11.

[242] Lightfoot 2002, p. 15.

[243] Jennifer Hamilton, ''Disability' and 'Discrimination' in the Context of Disability Discrimination Legislation: The UK and Australian Acts Compared', in *International Journal of Discrimination and the Law*, vol. 4, 2000, p. 233.

Parliament, its erstwhile critics conceding that a weak bill was better than no bill at all, and received Royal Assent on 8 November 1995.[244]

Arguably the least satisfactory aspect of the new Act was its definition of disability as an impairment which has a substantial or long term adverse effect on the ability to perform normal daily activities.[245] Work did not qualify as a normal daily activity, as decided in the case of *Quinlan v B & Q Plc*, argued in London in January 1998. Mr Quinlan, a garden centre worker, had undergone open-heart surgery and was refused reemployment because he was unable to lift heavy loads. At the preliminary hearing it was ruled that 'the Applicant was not a person with a disability, for the purposes of the Disability Discrimination Act 1995', dismissing his complaint.[246] This was not an isolated case. In 2007 Özcan Konur published a judicial outcome analysis of decisions made by appellate courts, replicating for the DDA 1995 the study Ruth Colker had undertaken on the ADA. He found that in 63 percent of cases the decision favoured employers over employees.[247]

Some of the deficiencies of the DDA 1995 were corrected by subsequent legislation, such as the *Special Educational Needs and Disability Act 2001* (SENDA), which extended disability discrimination coverage to education, and the *Disability Discrimination Act 2005*

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[244] National Archives, Disability Discrimination Act 1995, legislation.gov.uk website managed by the National Archives, Kew, accessed at <http://www.legislation.gov.uk/ukpga/1995/50/introduction>. Passage of the Tories' bill rather than the Berry/Barnes bill could be seen as a critical juncture, with downstream effects.

[245] Hamilton 2000, p. 210-212.

[246] vLex United Kingdom, *Quinlan v B & Q Plc*, Court of Appeal - United Kingdom Employment Appeal Tribunal, January 27, 1998, [1998] UKEAT 1386_97_2701, accessed at <http://case-law.vlex.co.uk/vid/-56157438> on 10 July 2014.
The case is also discussed by Woodhams and Corby 2003, p. 168.

[247] Özcan Konur, 'A judicial outcome analysis of the Disability Discrimination Act: a windfall for employers?', in *Disability & Society*, vol. 22, no. 2, pp. 187-204. A full table of findings is on p. 194.

which incorporated public transport, rental properties and private clubs into its provisions.[248] As time went on, the shortcomings of the Act became increasingly apparent. Furthermore, it failed to incorporate Britain's growing commitments to human rights under UN and European conventions.

4.5 Britain's growing commitment to human rights

Formed after the Second World War, the Council of Europe is the continent's leading human rights body, encompassing 47 member states, including the United Kingdom, which was a founding member.[249] The central instrument of the Council is the *European Convention on Human Rights* (ECHR), opened for signature on 4 November 1950, and signed by the UK on 8 March 1951, the first country to do so.[250] Despite this early start however, the ECHR remained largely a dormant issue in the UK where common law was seen as an adequate guarantor of individual rights.[251]

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[248] Theophilus Tambi, 'The Special Educational Needs and disability Act (SENDA) 2001: A Neoliberal Appraisal', in Marie Lall (ed.), *Policy, Discourse and Rhetoric: How New Labour Challenged Social Justice and Democracy*, Sense Publishers, Amsterdam, 2012, pp. 59–78.
National Archives, *Disability Discrimination Act 2005*, legislation.gov.uk website managed by the National Archives, Kew, accessed at <http://www.legislation.gov.uk/ukpga/2005/13/contents>
The Disability Discrimination Act 2005 is discussed further in section 4.6.

[249] Council of Europe, 'Who we are', Council of Europe website, accessed at <http://www.coe.int/aboutcoe/index.asp?page=quisommesnous&l=en> on 10 July 2014. The Council dates back to the Congress of Europe conference chaired by Sir Winston Churchill in The Hague in 1948 — Anita Prettenthaler-Ziegerhofer, 'Richard Nikolaus Coudenhove-Kalergi, Founder of the Pan-European Union, and the Birth of a 'New' Europe', in *Europe in crisis: intellectuals and the European idea*, 1917-1957, Mark Hewitson and Matthew D'Auria (eds), Berghahn Books, New York, 2012.

[250] Michael Kirby, 'Australia's Growing Debt to the European Court of Human Rights', in *Monash University Law Review*, vol. 34, no. 2, 2008, p. 240.
Council of Europe, 'List of the treaties coming from the subject-matter: Human Rights', with a link to the Treaty and its protocols, Council of Europe website, accessed at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> on 10 July 2014.

[251] Kirby 2008, p. 240.

Then however, Labour leader Tony Blair, campaigning for the general election of 1997, promised to incorporate the EHCR into domestic law. Once elected, he proposed a *Human Rights Bill* for the UK. Although opposed by the leadership of the Conservative party (now in opposition), the Bill was supported by a number of eminent Conservative backbenchers and by 'a formidable body of jurists on the cross-benches'.[252] It was enacted in November 1998 as the *Human Rights Act (HRA) 1998*.

Unlike the constitutionally entrenched US *Bill of Rights*, the HRA was passed as a normal statute. This means it is Parliament rather than the courts which have the final say. It does however establish a dialogue between the legislature and the judiciary. During the second reading of a bill, the Minister must state that the bill is compatible with the ECHR, or that the government will proceed with the bill without making such a declaration. The courts have a duty to interpret legislation in a manner consistent with the rights set out in the ECHR.[253] If the courts find the legislation incompatible with the provisions of the ECHR, they can't strike the legislation down as in the US, but they can make a declaration of incompatibility. This does not affect the validity of the legislation, but it does compel the responsible Minister to offer a defence of the legislation or to amend it. This is known as the 'dialogue model'.[254]

In 2006 the HRA was reviewed by the UK Department for Constitutional Affairs, which concluded that the Act 'has had a significant, but beneficial, effect upon the development of

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[252] Kirby 2008, p. 240.

[253] Eliza Kaczynska-Nay, *The Human Rights Act 1998: The UK 'Dialogue' Model of Human Rights Protection*, National Europe Centre Briefing Paper Series, ANU College of Arts and Social Sciences, vol. 1, no. 1, July 2009, p. 8, downloaded from <www.anu.edu.au/NEC/publications/briefing_papers/Nay.pdf> on 07 July 2014.
Emily Grabham, *Substantive Equality: A Comparative Analysis of UK, EC and Canadian Law*, Master of Laws Thesis, Queen's University Kingston, Ontario, 2000, pp. 4, 150-158.

[254] Kaczynska-Nay 2009, p. 2. The 'dialogue model' has also been adopted in NZ, Victoria and the ACT.

policy by central Government', making it more responsive to the 'needs of all members of the UK's increasingly diverse population'. It had 'improved transparency and Parliamentary accountability' without significantly altering 'the constitutional balance between Parliament, the Executive and the Judiciary'.[255] The *Human Rights Act 1998* thus makes consideration of human rights a central aspect of drafting legislation in Parliament and interpreting it in the courts. The last Act dealt with in this chapter is even more ambitious, being part of a wide government strategy to make considerations of human rights and equality central to the operations of British society. This is the *Equality Act 2010*.

4.6 The long road to the *Equality Act 2010*

Shortly before the 1997 election Anthony Lester, a Liberal Democrat member of the House of Lords, and Sir Bob Hepple, Emeritus Professor of Law at the University of Cambridge, brought together a group of human rights specialists to examine Britain's anti-discrimination legislation. After the election, won by the Labour Party under Tony Blair, they approached the new Home Secretary, Jack Straw.[256] The Home Secretary was sympathetic and provided funding for an independent review, conducted by the Centre for Public Law of the University of Cambridge.

The Cambridge Review published its report (known as the *Hepple Report*) in 2000.[257] It found the existing patchwork of legislation 'outdated, fragmented, inconsistent, inadequate,

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[255] Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act*, DCA, London, July 2006, , p. 1, downloaded from <http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf> on 07 July 2014.

[256] Bob Hepple, 'The New Single Equality Act in Britain', in *The Equal Rights Review*, vol. 5, 2010, p. 13-14.

[257] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation ('the Hepple Report')*, Hart Publishing, Oxford, 2000.

and at times incomprehensible'[258] and recommended that 'there should be a single Equality Act in Britain, supplemented by regulations and codes of practice, written in plain language.[259] The new act would promote equality across society on a wide range of characteristics, rather than simply reacting to discrimination based on race, sex and disability. The Report acknowledged that Britain's political and legal culture was changing due to a need to keep up with EU law and with the passage of the *Human Rights Act* in 1998.[260]

The Labour government was slow to react to the Report, prompting Lord Lester to introduce a private member's bill in 2003. The bill attracted considerable support, but still failed in the House of Commons.[261] One month before the May 2005 elections, a revised *Disability Discrimination Act 2005* was passed, extending provisions to public transport, rental properties and private clubs. Importantly, it required the public sector to promote equality of opportunity for disabled people, an approach termed the Public Equality Duty.[262] In their election manifestos both Labour and the Liberal Democrats pledged to introduce a single *Equality Act*.[263]

Returned for a second term, the Labour government (initially under Tony Blair and from June 2007 under Gordon Brown) made minimal efforts towards the promised *Equality Act*. A

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[258] *Hepple Report* 2000, p. 5.

[259] *Hepple Report* 2000, p. xiv.

[260] *Hepple Report* 2000, p. iii.

[261] Hepple 2010, p. 14.

[262] Sandra Fredman, 'The Public Sector Equality Duty', in *Industrial Law Journal*, vol. 40, no. 4, 2011, pp. 405-427;
Randall J. Owen, *Disability Rights, Employment and Welfare: People with Disabilities in Liberal Welfare States*, Thesis for Doctor of Philosophy in Disability Studies, University of Illinois, 2011, p. 254.

[263] Hepple 2010, p. 14; Liberal Democrats (UK), Liberal Democrats - *The Real Alternative*, Manifesto for the 2005 General Election, Liberal Democrats, London 2005, p. 9, downloaded from <http://ucrel.lancs.ac.uk/wmatrix/tutorial/libdem%20manifesto%202005.pdf>

less ambitious *Equality Act 2006* was passed, making minor extensions to the provisions of the various existing anti-discrimination acts and establishing a single Equality and Human Rights Commission to replace individual commissions dealing with racial, sexual and disability discrimination.[264] As if to confirm what they already knew, two government papers were produced. The 2008 White Paper *Framework for a fairer future: The Equality Bill* emphasised the need to de-clutter the law and to extend the new Public Equality Duty to all the equality strands, while the 2009 paper, *New Opportunities: Fair chance for the Future*, stressed the need to target inequalities that restricted social mobility and to free the potential of all citizens to participate in society.[265] The need for change was reinforced as the international context continued to evolve, with the UK ratifying the UN *Convention on the Rights of Persons with Disabilities* (CPRD) on 8 June 2009.[266]

The *Equality Bill* was finally presented to Parliament in April 2009 by Harriet Harman, Deputy Leader of the Labour Party and Minister for Women and Equalities.[267] Importantly, it was supported by all three parties, with Lynne Featherstone, Liberal Democrat spokesperson

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[264] National Archives, *Equality Act 2006*, legislation.gov.uk website managed by the National Archives, Kew, accessed at <http://www.legislation.gov.uk/ukpga/2006/3/contents>

[265] Government Equalities Office (UK), *Framework for a Fairer Future – The Equality Bill*, The Stationery Office, London, June 2008, White Paper downloaded from <https://www.gov.uk/government/publications/framework-for-a-fairer-future-the-equality-bill-june-2008> on 07 July 2014.
Cabinet Office (UK), N*ew Opportunities: Fair chance for the Future*, The Stationery Office, London, January 2009, White Paper downloaded from <http://www.hmg.gov.uk/media/9102/NewOpportunities.pdf> on 11 July 2014.
Sue Ashtiany, 'The Equality Act 2010: Main Concepts', in *International Journal of Discrimination and the Law*, vol. 11, no. 29, 2011, p. 64.

[266] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?', in *Industrial Law Journal*, vol. 40, no. 4, December 2011, p. 428.

[267] Hepple 2010, p. 13.

on equality affairs actively promoting it.[268] The Conservatives held reservations about compulsory equal pay reporting and the need for public authorities to commit to measures to end socio-economic disadvantage, but allowed the Bill passage, knowing they could wind these aspects back if they won government.[269] Passage of the Bill took a year, lasting into the final days of the Gordon Brown government. Lord Lester urged his fellow peers to rein in debate, to allow the Bill to pass before the election, held in May 2010.[270] The Bill was granted royal assent on 8 April 2010. Implementation of the *Equality Act 2010* would be a matter for the incoming government of David Cameron.

4.7 Implementation of the *Equality Act 2010*

Critically, in order to form government David Cameron's Conservatives needed to enter into coalition with the more progressive Liberal Democrats. The *Equality Act 2010* would thus be implemented by a very different government to the one that diluted the effects of the *Disability Discrimination Act 1995*.

Harriet Harman's successor as Minister for Women and Equalities was Theresa May, who was (and is) also Home Secretary. In opposition she had opposed much of the Act as too bureaucratic and expensive, but in government proceeded with implementation;[271] bringing some 90 percent of the *Equality Act* into force in October 2010.[272] As expected, two aspects

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[268] Lynne Featherstone, Search results for 'Equality Act', blog of Lynne Featherstone, MP for Hornsey and Wood Green, search conducted 11 July 2014 with results at <http://www.lynnefeatherstone.org/?s=Equality+Act>

[269] Adam Wagner, 'Major new equality laws under threat from new government', UK Human Rights blog, accessed at <http://ukhumanrightsblog.com/2010/06/18/equality-act-under-threat-from-new-government/> on 29 June 2014.

[270] Hepple 2010, p. 14.

[271] BBC News, 'Coalition to stick with Labour's Equality Act', British Broadcasting Corporation, 3 July 2010, accessed at <http://www.bbc.co.uk/news/10496993> on 9 July 2014.

[272] BBC News, 17 Nov 2010, above.

were dropped. The 'social-economic' duty requiring councils and health authorities to tackle deprivation was abandoned, and the plan to require companies to report on their gender pay differences was rendered voluntary.[273]

In March 2013 the Conservatives also attempted to scrap the 'general duty' on the Equality and Human Rights Commission to promote good race relations, but faced opposition from their coalition partners, the Liberal Democrats. This opposition was centred on the Ethnic Minority Liberal Democrats (EMLD), who, allied with the Liberal Democrat Disability Association (LDDA), lobbied their party peers to retain the general duty. The result was a defeat for the government in the House of Lords, with six Liberal Democrats crossing the floor to vote with the Opposition.[274]

The *Equality Act 2010* thus stands implemented largely as originally intended. It replaces nine previous pieces of legislation and gives effect to four European Union Directives on human rights. Running to 239 pages, it is supplemented by regulations in secondary legislation, and guidance in codes of practice.[275] It addresses intersectional discrimination (involving two characteristics, such as being Afro-Caribbean and disabled), extends the provision of indirect discrimination to disabilities and now includes age, gender reassignment,

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[273] BBC News, 'Gender pay disclosure plans eased by coalition', British Broadcasting Corporation, 2 Dec 2010, accessed at <http://www.bbc.co.uk/news/business-11900104> on 09 July 2014.
Ashtiany 2010, p. 39.

[274] Ethnic Minority Liberal Democrats (EMLD), 'EMLD lobby Lords over repeal of equalities laws', EMLD blog, 03 March 2013, accessed at <http://emlibdems.org.uk/emld-lobby-lords-over-repeal-of-equalities-laws/> on 09 July 2014.
Ethnic Minority Liberal Democrats (EMLD), 'Lords victory to save equalities mission statement', EMLD blog, 06 March 2013, accessed at <http://emlibdems.org.uk/lords-victory-to-save-equalities-mission-statement/> on 09 July 2014.
Lester Holloway, 'Lib Dems unite to save equalities mission statement', webpage of Lester Holloway, Liberal Democrat councillor for the city of Manchester, communications manager and advocate of equality rights for racial minorities, 06 March 2013, accessed at <http://cllrlesterholloway.wordpress.com/2013/03/06/lib-dems-unite-to-save-equalities-mission-statement/> on 10 July 2014.

[275] Hepple 2010, p. 15; Ashtiany 2010, p. 29.

pregnancy and maternity, religion or belief, and sexual orientation as protected characteristics alongside the previous race, sex and disability.[276]

Arguably the most revolutionary aspect of anti-discrimination policy in the UK in recent times has been the gradual extension of the the Public Equality Duty. Originating in affirmative action policies in race, sex and disability legislation, the concept was extended to all protected characteristics in the *Equality Act 2010*. It is now the central idea in a wide-ranging Equality Strategy, promoted by the Inter Ministerial Group on Equalities, chaired by Theresa May.[277] Moreover, it is promoted in the same social constructivist terms we saw in the social model of disability, now extended to all sources of social inequality. Thus the current UK government is …

> committed to work together to tear down the barriers to social mobility and equal opportunities in Britain, and build a fairer society.[278]

This is admittedly within the neoliberal context of increasing national productivity by harnessing the talents of all members of society:

> We need to address outright discrimination in the workplace and tackle persistent cultural attitudes that place barriers to individuals entering and progressing in the workplace …[279]

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[276] National Archives, 'Chapter 1 Protected characteristics' and 'Chapter 2 Prohibited conduct' in *Equality Act 2010*, legislation.gov.uk website managed by the National Archives, Kew,, accessed at <http://www.legislation.gov.uk/ukpga/2010/15/contents>

[277] Government Equalities Office (UK), *The Equality Strategy - Building a Fairer Britain*, December 2010, pp. 1-5, policy document downloaded from <https://www.gov.uk/government/publications/equality-strategy> on 24 June 2014.

[278] *Equality Strategy* 2010, above, p. 6.

[279] *Equality Strategy* 2010, above, p. 14. See section 3.5 and 6.3.5 for further discussion of neoliberalism.

The Equality Strategy is then complemented by other measures to combat disadvantage. These include a Social Mobility Strategy, a Child Poverty Strategy (both in April 2011), and a Social Justice Strategy (March 2012).[280] These initiatives were then followed by specific measures on disabilities. In July 2013 a detailed plan entitled *Fulfilling Potential: Making It Happen* was published, in which Government would 'work with disabled people and their organisations to bring about the societal changes needed to have a real and lasting effect on the day-to-day lives of disabled people'.[281] This was followed by a Disability and Health Employment Strategy launched in December 2013, which is still in its discussion phase.[282] Before these measures are dismissed as hopelessly idealistic or even so much political 'spin', it should be noted that Westminster appears to be following its own policy. The May 2012 *Progress Report* on the Equality Strategy notes that the proportion of women and ethnic minorities has increased in Parliament, but 'disabled people and other groups are still under-represented in our democratic structures'. Accordingly an Access to Elected Office program has been set up, 'a dedicated fund to help individual candidates with disability related costs, new training and development opportunities'.[283] It would seem that there is a vision shared by all political parties, regardless of their fundamental ideologies, of Britain becoming a fairer

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[280] Government Equalities Office (UK), *The Equality Strategy - Building a Fairer Britain: Progress Report*, 22 May 2012 (Equality Strategy Progress Report), p. 4, policy document downloaded from <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85307/progress-report.pdf> on 24 June 2014.

[281] Department for Work and Pensions (UK), *The disability and health employment strategy: the discussion so far,* DWP, London, 17 December 2013, p. 9, policy paper downloaded from <https://www.gov.uk/government/publications/the-disability-and-health-employment-strategy-the-discussion-so-far> on 08 July 2014.

[282] Department for Work and Pensions (UK), *Disability and health employment strategy launched*, Press release 17 December 2013, London Press Office, accessed at <https://www.gov.uk/government/news/disability-and-health-employment-strategy-launched> on 11 July 2014.

[283] Equality Strategy Progress Report 2012, p. 8.

and more democratic society. This clarity of vision is matched by a clear means of execution, a single Act that applies throughout Britain.[284]

[284] Here 'Britain' but not 'United Kingdom'. The *Equality Act* does not apply in Northern Ireland (where the DDA 1995 still applies) or on the Isle of Man (where the Manx *Disability Discrimination Act 2006* applies). For Northern Ireland, see Hepple 2010, p. 11. The Isle of Man legislature, the Tynwald, is considering legislation similar to the British *Equality Act 2010* — Isle of Man Government, 'Disability Discrimination Act - Update', Department of Social Care, Douglas, 10 December 2013, at <http://www.gov.im/news/2013/dec/10/disability-discrimination-act-update/> viewed 29 July 2014.

5. Canada

5.1 Human rights under the Canadian constitution

In contrast to Britain's single *Equality Act*, Canada has a variety of legislation, largely due to federalism, but also due to the distinctive history of this policy area in Canada. First, human rights in Canada are protected under Section 15(1) of the *Canadian Charter of Rights and Freedoms 1982*, which states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Charter is a bill of rights entrenched in the Constitution of Canada, and is part of the *Constitution Act 1982*. All other legislation must be drafted and interpreted to be consistent with the Charter.[285] The Charter protects certain individual political and civil rights, but only in dealings with government.

In other contexts the *Canadian Human Rights Act 1977* applies, along with the various provincial and territorial human rights acts.[286] In this case the federal *Human Rights Act* applies (as ordinary legislation) to federally regulated activities such as federal government departments, interprovincial transport and phone companies, while each province and territory has its own legislation which applies in such areas as employment, tenancy, and the delivery of services. Canada is a highly decentralised federal state, consisting of ten provinces and

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[285] Patricia Thornton and Neil Lunt, *Employment Policies for Disabled People in Eighteen Countries: A Review*, Cornell University ILR School, 1 January 1997, p. 78, downloaded from <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1158&context=gladnetcollect> on 25 July 2014.

[286] Thornton and Lunt 1997, pp. 78-80.

three territories, and disability services are a provincial or territorial responsibility.[287] Thus for example the Ontario Disability Support Program is managed by that province's Ministry of Community and Social Services, with similar provisions in other jurisdictions.[288]

An examination of legislation in subnational jurisdictions is beyond the scope of this chapter, which will concentrate on the processes which led to the *Canadian Charter of Rights and Freedoms 1982* and the *Canadian Human Rights Act 1977*. These acts were preceded by an earlier non-entrenched *Bill of Rights 1960*.

5.2 The early development of human rights law in Canada

After the Seven Years' War gave the British supremacy in North America, the task of uniting British colonies and French settlements into a coherent social unit required the recognition and protection of the rights of both communities. The fact that such disparate communities were being united by the British for strategic reasons would dictate that the future Canada would be a loose confederation, with the primacy of the provinces preserved. Britain's *Quebec Act of 1774* was passed to allow Quebec's French-speaking Roman Catholic citizens to retain their own language, religion and civil laws in that colony.[289] These measures were repeated in 1867, when the four provinces of Ontario, Quebec, New Brunswick and Nova Scotia united as the nucleus of the future nation. The instrument of Confederation, the *British North American Act 1867*, once more protected the languages, religious rights and

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[287] Thornton and Lunt 1997, p. 69.

[288] Ministry of Community and Social Services (Ontario), 'Ontario Disability Support Program', *Social Assistance* website, accessed at <http://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/> on 25 July 2014.

[289] Pierre Elliott Trudeau, 'Some Obstacles to Democracy in Quebec', in *The Canadian Journal of Economics and Political Science / la Revue canadienne d'Economique et de Science politique*, vol. 24, no. 3 August 1958, p. 305; Michel Morin, 'The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774', in *The Dalhousie Law Journal*, vol. 36, 2013, p. 581.

civil laws of both communities, and, now known as the *Constitution Act 1867*, is one of some 30 constitutional texts that form the Constitution of Canada.[290]

Like the Seven Years' War, the construction of a Canadian identity was also aided by the American Revolution and the War of 1812.[291] These conflicts helped define a Canada that was Loyalist and British, to such a point that the Canadian Constitution lay in Westminster's hands into the 1980s. The distinct society in Quebec forms another strand to this identity, torn between integration and calls for independence. Finally there are Canada's Aboriginal peoples; the least powerful entity, they received the fewest constitutional accommodations of any group. Paralleling a similar situation in Australia, the *Indian Act* of 1876 allowed Indian Agents to regulate the movement of people on and off reserves (until 1951), and denied these Aboriginal peoples voting rights (until the 1960s).[292]

Given the role of the provinces, it was there that anti-discrimination legislation made its first appearance, rather than at federal level, beginning in the late 1940s. As elsewhere, the

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[290] University of Ottawa, 'Constitutional Texts of Canada', and 'The Constitution Act of 1867 and the Language Question', linked webpages at the *Official Languages and Bilingualism Institute* (OLBI) website, accessed at <http://www.slmc.uottawa.ca/?q=constitutional_texts> on 25 July 2014. There were four British acts: the two mentioned here, an earlier *Constitutional Act 1791* and the *Act of Union 1840*, which united the provinces of Upper and Lower Canada under one legislature. Confederation had been opposed by elite groups and the British government in 1858, but encouraged only a few years later; the change of policy was sparked by Union victory in the American Civil War and the prospect that the Americans could be encouraged to expand northwards — Jörg Broschek, 'Historical Institutionalism and the Varieties of Federalism in Germany and Canada', *Publius: The Journal of Federalism*, vol. 42, no. 4, 2011 p. 672.

[291] Tensions could still arise as late as 1839, when the bloodless 'Aroostook War' broke out along the undefined boundary between Maine and New Brunswick — Barry M. Gough, 'Aroostook War', in *Historical Dictionary of Canada*, 2nd edn., Scarecrow Press, Lanham Maryland 2011, pp. 71-72. War was also successfully avoided during the Trent Crisis of 1861, provoked when a Union ship intercepted a British mail packet carrying two diplomats from the Confederacy — Jörg Broschek, cited above.

[292] Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada*, Research Paper for the National Centre for First Nations Governance, May 2008, pp. 3-4, downloaded from <http://fngovernance.org/ncfng_research/coates.pdf> on 25 July 2014. A welcome reversal of the old paternalism is the creation of the Territory of Nunavut in the Arctic North in 1999.

new focus on human rights was sparked by the spectre of first fascist and then communist totalitarianism engulfing parts of Europe. The first comprehensive bills of rights were enacted in Alberta and Saskatchewan in 1946 and 1947 respectively; for the other provinces and territories, see Table 5.1 below. Significantly, the preamble to the Alberta *Bill of Rights 1946* declares:

> … the second world war, like the first, will have been fought in vain unless, having defeated the forces of military tyranny, the Canadian people now proceed to win the peace by so ordering their internal economy that the freedom and security for which they fought may be experienced in reality by all of our citizens …[293]

There was an apprehension that excessive measures by Canadian authorities could send Canada down the path towards a police state. Thus the driving force behind the Saskatchewan *Bill of Rights 1947* was Tommy Douglas, Saskatchewan Premier between 1944 and 1961 and member of the left-leaning Co-operative Commonwealth Federation. At the age of 15 he had witnessed heavy-handed police action during the Winnipeg General Strike of 1919, an experience reinforced by similar events during the Estevan coal miners' riot in 1930 and the Regina Riot in 1935.[294]

Following the early lead established by Alberta and Saskatchewan, the federal government enacted the *Canadian Bill of Rights* in 1960. This federal act was largely due to one man, Prime Minister John Diefenbaker.

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[293] Alberta Parliament, *Bill of Rights 1946*, downloaded from <http://www.historyofrights.com/docs_statutes.html> on 25 July 2014.

[294] Brett Quiring, 'Douglas, Thomas Clement (1904-86)', in *Encyclopedia of Saskatchewan*, a project of University of Regina, Government of Saskatchewan and the Canadian Plains Research Center; Tommy Douglas was named as 'the greatest Canadian' in a Canadian Broadcasting Corporation poll, — Margaret Conrad, 'Canada's History, History Idol: Tommy Douglas' at *Canada's History* website <http://www.canadashistory.ca/Magazine/Online-Exclusive/Articles/History-Idol--Tommy-Douglas.aspx>. The website is the online version of Canada's History magazine, a project partially funded by the federal Department of Canadian Heritage. The author is an honorary research professor at the University of New Brunswick.

5.3 John Diefenbaker and the *Canadian Bill of Rights 1960*

John Diefenbaker was a Saskatchewan lawyer of German background and had experienced discrimination because of his name, while in his law practice he gained a reputation as the defender of the rights of the individual.[295] He was elected to federal Parliament in 1940, a member of the Progressive Conservative Party (PC).[296] Diefenbaker initially called for a Bill of Rights in a speech to the Commons in March 1946, proposing it as part of the citizenship bill being debated at the time. His proposal gained the backing of a number of civil liberties organisations, such as the Ottawa Civil Liberties Association (founded in May 1946). However, ideological differences prevented these provincial organisations from forming a national movement, and they played little role in the development of the bill of rights.[297]

In November 1946 Diefenbaker (in opposition) called on the Liberal government of W.L. Mackenzie King to set up a parliamentary committee on human rights, which they did in January 1947. This sparked discussion of rights issues amongst academics and in the press.[298] The King government and successive Liberal governments argued against a Bill of Rights, saying that the Westminster tradition was a sufficient safeguard against human rights abuses; that the supremacy of Parliament should not be constrained; that the power to legislate on property and civil rights lay with the provinces, not the Dominion; and that, since the Canadian constitution was an act of the British parliament, an entrenched bill of rights would deliver power to London, rather than Ottawa.[299]

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[295] Christopher MacLennan, *Towards the Charter: Canadians and the demand for a national bill of rights, 1929-1960*, McGill-Queen's University Press, Montreal and Kingston, 2003, p. 44.

[296] MacLennan 2003, p. 45.

[297] MacLennan 2003, p. 49-50. The main contentious issue was the degree of acceptance of Communism.

[298] MacLennan 2003, p. 53-54.

[299] MacLennan 2003, pp. 55-58.

This stalemate changed with the federal election of 1957, which ended the Liberals' 22 year reign, and instated a government led by John Diefenbaker.[300] On 5 September 1958 Diefenbaker proposed a bill for 'the Recognition and Preservation of Human Rights and Fundamental Freedoms', now usually referred to as the *Diefenbaker Bill of Rights*.[301] After its first reading the bill was deliberately withdrawn to allow for public comment. Much of the public reaction centred on the bill's narrow focus, simply concentrating on traditional political freedoms and legal entitlements rather than addressing social and economic rights. This was the position of the Canadian Labour Congress, the peak trade union body.[302]

The bill was reintroduced to parliament, with minor amendments, on 27 June 1960. On 7 July 1960 the government appointed a Special House of Commons Committee on Human Rights and Fundamental Freedoms to hear public submissions about the bill. That month also saw the 1960 Dominion-Provincial Conference, at which the newly elected Liberal premier of Quebec, Jean Lesage, argued that the proposed bill of rights needed to be constitutionally entrenched, a position backed by the other provincial premiers.[303] Diefenbaker argued that before entrenching a bill of rights, Canada's foundational document, the *British North America Act* (BNA) would need to be patriated, and that passing the current bill in statute form was a necessary first step.[304] Ultimately, this was the course of action taken. The Commons returned to debate the bill on 1 August 1960, passing it unanimously three days

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[300] Initially Diefenbaker formed a minority government, but a snap election in 1958 gave him a majority.

[301] MacLennan 2003, p. 132.

[302] MacLennan 2003, pp 133-134.

[303] MacLennan, pp. 146-147; from 1974 the Dominion-Provincial Conferences are known as Conferences of First Ministers of Canada (CFMC), and are analogous to Council of Australian Governments (COAG) meetings in Australia.

[304] MacLennan 2003, pp. 147-148.

later.[305] However, change at a constitutional level would not be possible as long as the BNA remained an act of the British rather than Canadian parliament. There would be no further progress on this matter for another 22 years. In this period however, the provinces were moving ahead.

5.4 Provincial and territorial legislation

The 1960s and 1970s saw the formation of disability advocacy groups in Canada, as we have encountered elsewhere, groups whose tactics included public protests. Studying such protests, Barnartt (2008) has shown that only about 8 percent of these events targeted the federal government, the majority of them being directed towards provincial or municipal authorities.[306] As we saw in Section 5.1, legislation relating to discrimination and services relating to disability in Canada are predominantly a provincial or territorial matter. Many of these protests were about local issues, such as the 1967 petition delivered by disability advocates to the Hamilton, Ontario, city council demanding disability access to City Hall and polling places, or the 1977 strike by blind workers in an Edmonton sheltered workshop demanding better wages and working conditions.[307]

As we saw earlier, the provinces led the way in human rights legislation, beginning with Alberta and Saskatchewan in the late 1940s. By the end of 1975 all the provinces (though not the territories) had their first generation of human rights legislation in place, as shown in table 5.1.

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[305] MacLennan 2003, pp. 148.

[306] Sharon N. Barnartt, 'Social Movement Diffusion? The Case of Disability Protests in the US and Canada', in *Disability Studies Quarterly*, vol. 28, no.1, Winter 2008, p. 7, downloaded from <http://dsq-sds.org/article/view/70/70> on 25 July 2014.

[307] Barnartt 2008, pp. 4-5.

Provincial or territorial legislation	Year enacted
Alberta Bill of Rights	1946
Saskatchewan Bill of Rights	1947
Ontario Human Rights Code	1962
Nova Scotia Human Rights Act	1963
Alberta Human Rights Act	1966
New Brunswick Human Rights Act	1967
Prince Edward Island Human Rights Act	1968
Newfoundland Human Rights Code	1969
British Columbia Human Rights Act	1969
Manitoba Human Rights Act	1970
Quebec Charter of Human Rights and Freedoms	1975
Saskatchewan Human Rights Code	1979
Alberta Individuals Rights Protection Act	1980
Yukon Human Rights Act	1987
Nunavut Human Rights Act	2003
Northwest Territories Human Rights Act	2002; in force 2004

Table 5.1. Canadian provincial and territorial human rights legislation with year of enactment.[308]

These pieces of legislation protect human rights and prohibit discrimination in employment and in public services and facilities, such as hospitals and schools. At the federal level the statutory *Bill of Rights 1960* was looking increasingly irrelevant. It 'led to no sustained judicial attention' to human rights issues, with ten years passing before a *Bill of Rights* case

308 Government of Canada, 'Consolidated Acts' (search page), *Justice Laws* website, accessed at <http://laws.justice.gc.ca/eng/acts/> on 25 July 2014;
Thornton and Lunt 1997, p. 80;
Canadian Legal Information Institute (CanLII), homepage at <https://www.canlii.org/en/index.html> and dependent pages;
Dominique Clément, 'Canadian Statutes and International Declarations' at *Canada's Human Rights History*, at <http://www.historyofrights.com/docs_statutes.html> and linked pages;
Canadian Human Rights Commission, 'Human Rights in Canada: A Historical Perspective', accessed at <http://www.chrc-ccdp.ca/en/timePortals/1950.asp> and linked pages, viewed 25 July 2014.

reached the Supreme Court.[309] In fact, federalism itself was under attack as the provinces increasingly demanded devolution, with the most radical demands being made by the separatist movement in Quebec.[310] Ottawa's weakness was compounded by the *British North America Act* of 1867. Technically the Constitution was in British hands, with any amendment needing the approval of the UK Parliament.[311]

These constitutional issues — the balance of power between the Dominion and the provinces, the patriation of the Constitution and need for enhanced human rights legislation at the federal level — were interdependent and increasingly in need of a solution.[312] The man to provide that solution was Pierre Elliott Trudeau.

5.5 Pierre Trudeau and reshaping the Canadian Constitution

Born in Montreal in 1919, the son of a French speaking father and an English speaking mother, Pierre Trudeau enjoyed the benefits of a bilingual and bicultural childhood.[313] In the

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[309] Charles R. Epp, *The Rights Revolution*, University of Chicago Press, Chicago, 1998, p. 156 (quotation);
Robert Bothwell, Ian Drummond and John English, *Canada since 1945*, revised edition, University of Toronto Press, Toronto, 1989, p. 188.

[310] Bothwell, p. 388. The separatist movement emerged quite strongly after the Second World War, fostered by the Union Nationale government of Premier Maurice Duplessis — Daniel Béland and André Lecours, 'The Ideational Dimension of Federalism: The 'Australian Model' and the Politics of Equalisation in Canada', in *Australian Journal of Political Science*, vol. 46, no. 2, 2011, p. 204.

[311] The Statute of Westminster in 1931 had given Canada and other dominions the power to repeal or amend imperial statutes applying to them, but Canada at the time insisted that the home country retain control over the BNA and its amendments - Peter W. Hogg, 'Formal Amendment of the Constitution of Canada', in *Law and Contemporary Problems*, vol. 55, no. 1, 1992, pp. 253-254, downloaded from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4131&context=lcp>. Before becoming a Canadian province in 1949, the Dominion of Newfoundland had faced a budgetary crisis resulting in the suspension of responsible government in 1933 and a reversion to direct British rule; for details see Jeff A. Webb, 'Collapse of Responsible Government, 1929-1934', *Government and Politics* (of Newfoundland) website, a project of the Memorial University of Newfoundland, 2001, accessed at <http://www.heritage.nf.ca/law/collapse_responsible_gov.html> on 25 July 2014.

[312] Ian Greene, *The Charter of Rights*, James Lorimer & Company, Toronto, 1989, pp. 37-38.

[313] John English, *Citizen of the World, the Life of Pierre Elliott Trudeau, volume one: 1919-1968*, Vintage Canada/Random House of Canada, Toronto, 2007, p. 8-9.

late 1960s Trudeau served as Justice Minister in the Liberal government of Lester Pearson.[314] At the annual meeting of the Canadian Bar Association in 1967 he announced his plans for a charter of rights and freedoms, arguing that by recognising linguistic and cultural diversity and difference within Canada, the threat of Quebec separatism could be avoided and federalism strengthened.[315] This proposal was further elaborated in his 1968 policy paper, *A Canadian Charter of Human Rights*, and a 1969 white paper, *The Constitution and the People of Canada*, this latter paper published after Trudeau had replaced Pearson as Prime Minister on 6 April 1968.[316] Indeed, in the televised statement on the afternoon he assumed power, he again pressed home the need for patriation of the Constitution and for a Charter of Rights.[317]

In 1977 Trudeau's government passed the *Canadian Human Rights Act*. This was not the promised constitutionally entrenched charter, but simply federal legislation to complement that passed by the provinces, offering equality rights in dealing with federal departments and in inter-provincial transport and communications.

Out of power for nine months in 1979 while the PC Party under Joe Clark formed a minority (and ultimately unstable) government, Trudeau was re-elected on 3 March 1980 — with the Quebec referendum on separation a little over two months away.[318] Campaigning against separation, Trudeau promised Quebec constitutional protection of minority language

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[314] Epp 1998, p. 159-160.

[315] MacLennan 2003, p. 158-159.

[316] John English, *Just Watch Me, the Life of Pierre Elliott Trudeau, volume two: 1968-2000*, Knopf Canada/Random House of Canada, Toronto, 2009, p. 480-481;
Michael D. Behiels, *Canada's Francophone Minority Communities*, McGill-Queen's University Press, Montreal and Kingston, 2004, p. 22;
I. Greene 1989, p. 38.

[317] English 2009, p. 480-481.

[318] William Boyce et al., *A Seat at the Table — Persons with Disabilities and Policy Making*, McGill-Queen's University Press, Montreal and Kingston, 2001, p. 47.

rights if it stayed within the Dominion.[319] Quebec voted 60:40 against secession, and Trudeau's government now worked towards the promised constitutional changes.[320]

Two parliamentary committees were set up, one to examine the constitution and the other to examine disability rights. The Special Joint Committee on the Constitution of Canada, or Hays-Joyal Committee, travelled across Canada during 1980-1981, meeting with individual citizens and advocacy groups, hearing 100 oral submissions and receiving over 1200 written submissions.[321] Women's groups and Canada's Aboriginal peoples mounted particularly effective campaigns to have their voices heard.[322] Three disability advocacy groups made representations, the Coalition of Provincial Organisations of the Handicapped (COPOH), the Canadian Association for the Mentally Retarded and the Canadian National Institute for the Blind.[323] The equality rights of people with disabilities entered the discussion for the first time, and on 18 January 1981 the Committee added 'mental or physical disability' to the provisions of section 15(1) of the proposed Charter.[324]

Meanwhile the Parliamentary Special Committee on the Handicapped had also been set up, not in direct response to the constitutional issue, but to plan Canada's reaction to the United Nations having designated 1981 as the International Year of Disabled Persons, with the theme

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[319] I. Greene 1989, pp. 39-40.

[320] Ben Smith, *The Quebec referendums*, Research Paper 13/47, (UK) House of Commons Library, London, 25 July 2013, p. 8, downloaded from <www.parliament.uk/briefing-papers/RP13-47.pdf> on 28 July 2014.

[321] Boyce 2001, p. 51; also Bothwell 1989, p. 388; and Barbara Perry, 'The role of popular mobilizations in the struggle for the Canadian Charter of Rights and Freedoms', in *Crime, Law & Social Change*, vol. 22, 1995, p. 189.

[322] Perry 1995, throughout.

[323] Boyce 2001, p. 52.

[324] Boyce 2001, p. 50. This fact never made it to the newspapers. Also mentioned by I. Greene 1989, p. 40. COPOH also used street protest. Fourteen of its members staged a noisy demonstration on Parliament Hill in 1980, demanding inclusion of disabled people in Section 15 — Barnartt 2008, p. 5.

of 'Equality and Full Participation'.[325] The committee released their report *Obstacles* on 16 February 1981, which made 130 recommendations, covering such policy issues as assistive technology, transport and communications, but also income security and human rights. Critically, it concluded that people with disabilities constitute a disadvantaged minority group and that policy should aim at their full integration into society. It recommended that:

> If Parliament decides to enshrine human rights in the patriated Constitution, the Committee feels that complete and equal protection should be extended to persons suffering from physical and mental handicap.[326]

While these proceedings were relatively straight forward, negotiations between the Dominion and the provinces were far more tortuous. One of the most keenly debated points was the 'amending formula', the mechanism by which Canada, once having patriated the Constitution, would make future amendments to it. Following an impasse at the September 1980 Conference of First Ministers, the Dominion decided to go it alone, asking the UK Parliament to legislate a Charter of Rights into the Canadian constitution. This was not an unusual step, since the *BNA* Act had been amended 22 times since Confederation, without the involvement of the provinces.[327]

Three of the provinces which were opposed to unilateral patriation (Newfoundland, Quebec and Manitoba) referred the matter to their respective provincial courts of appeal.[328]

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[325] Boyce 2001, p. 51

[326] Boyce 2001, p. 51; full reference to the source is: House of Commons, Special Parliamentary Committee on the Disabled and the Handicapped, *Obstacles*, 1st Session, 32nd Parliament, February 1981, listed but not linked on Parliament website 'Overview of Studies Related to Persons with Disabilities, House of Commons 1981–2012' at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-84-e.htm#ftn3>. The downloadable pdf details the subsequent history of the committee to the present day.

[327] I. Greene 1989, p. 40.

[328] These were reference cases, seeking the legal interpretation of the courts, rather than legal challenges.

The decisions were inconclusive and the matter was referred to the Supreme Court of Canada, which decided in September 1981 that a convention of 'substantial provincial consent' existed, but since it was a mere convention, the Dominion was within its powers to seek unilateral patriation.[329] At the next meeting of the first ministers in November 1981 agreement was reached between Ottawa and the provinces on patriation and the charter of rights, with only René Lévesque of Quebec in disagreement.[330]

Despite Quebec's objections, the Canadian Parliament passed a resolution requesting Westminster to amend the Canadian Constitution for a final time. On 29 March 1982 the UK Parliament passed the *Canada Act 1982*, adding the *Constitution Act 1982* to Canada's Constitution. The *Constitution Act* contains the *Charter of Rights and Freedoms*.[331] Royal Assent was a more formal occasion than usual, with Queen Elizabeth signing the *Canada Act* in a ceremony on Parliament Hill, Ottawa on 17 April 1982.[332] This marked Canada's final step towards independence from the United Kingdom.

It also marked the adoption of quite a different understanding of the roles of the legislature and judiciary.[333] Until now Canada had followed the traditional British model of parliamentary supremacy, but now with certain judicable rights entrenched in the constitution this was more akin to the US model, giving the courts a greater role in interpreting the constitution and in defending individual rights. As a compromise between the two models, the Canadian Parliament can override the provisions of the *Charter of Fundamental Rights and*

[329] I. Greene 1989, p. 41. This is known as the Patriation Reference Case. More details of these issues, Bothwell et al., p. 392. The court transcript is at the Judgments of the Supreme Court of Canada website, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2519/index.do>

[330] I. Greene 1989, p. 42.

[331] Hogg 1992, p. 257; I. Greene 1989, p. 43.

[332] I. Greene 1989, p. 43.

[333] Epp 1998, p. 171.

Freedoms by indicating that the proposed legislation will apply 'notwithstanding' the provisions of the Charter.[334] This override clause appears in Section 33(1) of the Charter, stating:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.[335]

This solution is termed the 'hybrid model' or 'dialogue model' and is also seen in other Commonwealth jurisdictions, such as New Zealand (*Bill of Rights Act 1990*), the ACT (*Human Rights Act 2004*) and Victoria (*Charter of Human Rights and Responsibilities Act 2006*).[336] As we saw in Section 4.5, even the British have abandoned absolute parliamentary supremacy, with UK courts able to challenge legislation with declarations of incompatibility. The case studies presented in these last four chapters have illustrated the responses by four national jurisdictions to the challenges of guaranteeing respect for equality rights. The way in which broad societal, structural and historical forces have shaped these institutions will be examined in the final chapter, which will offer a summation and analysis.

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[334] Eliza Kaczynska-Nay, *The Human Rights Act 1998: The UK 'Dialogue' Model of Human Rights Protection*, National Europe Centre Briefing Paper Series, ANU College of Arts and Social Sciences, vol. 1, no. 1, July 2009, p. 3, downloaded from <www.anu.edu.au/NEC/publications/briefing_papers/Nay.pdf> on 07 July 2014;
Vinoli Thampapillai, *A Bill of Rights for New South Wales and Australia*, The Law Society of New South Wales Discussion Paper, January 2005, pp. 12-14, downloaded from <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026544.pdf> on 25 July 2014.

[335] George Williams, 'Constructing a Community-Based Bill of Rights', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Institutions and Instruments*, Oxford University Press, Oxford, 2003, pp. 247-262. This gives the quotation but also valuable discussion.

[336] Mallesons Stephen Jaques Human Rights Law Group, *Submission to the National Human Rights Consultation*, 15 June 2009, p. 23, downloaded from <http://www.hrlrc.org.au/files/9950891_4-hrlg-national-consultation-su.pdf> on 25 July 2014. Ideally this monograph would have examined New Zealand, but a 20,000 word limit precluded that.

6. Summation and analysis

6.1 The aim of this chapter

This final chapter will offer a summation of the various factors that shape human rights and anti-discrimination legislation, made apparent in the case studies. First, an overview will be offered comparing the four jurisdictions, noting the origin of each piece of legislation, as well as the factors that promoted or inhibited it. Then, on a more general level, change will be examined as a result of changing social constructions. Next a historical institutionalist framework will be employed to investigate in more detail the factors producing change. The paper then concludes with some thoughts on further research.

6.2 Overview of the four case studies

The following table summarises the main features of the case studies.

Case study 1 — USA	
Legislation	ADA 1990
Catalysts	From 1970, student protests over accessible buildings and transport; 1978 establishment of National Council on the Handicapped within the federal Department of Education and its reports 1986, 1988; 1983-1985 academic activists Roth, Hahn and Longmore.
Promoting factors	Exemplar of Civil Rights Movement; co-option of activists into advisory roles; Rehabilitation Act 1973 recognising Vietnam Vets; drafting by both Democrats and Republicans; bipartisan support in Congress; presidential support (George Bush)
Inhibiting factors	Judiciary applying policy science model analysis to Title I cases, until resolved by ADA Amendment Act 2008.
Case study 2 — Australia	
Legislation	DDA 1992
Catalysts	1983 establishment of the Disability Advisory Council of Australia by the Hawke government and chaired by Graeme Innes; policy program of increasing employment and productivity.

Promoting factors	Exemplar of ADA 1990 in US and of the federal Racial Discrimination Act 1975 and Sex Discrimination Act 1984; expertise of Chris Ronalds; 1991 community consultation undertaken by Disability Anti-Discrimination Legislation Committee; bipartisan support.
Inhibiting factors	Resistance from the private sector means the Standards for Employment will likely never be written.
Case study 3 — United Kingdom	
Legislation (1)	DDA 1995
Catalysts	Pressure from activist groups such as DIG, BCODP, RADAR, VOADL; parliamentary activists such as Alf Morris, Jack Ashley, Peter Large and the APDG; academic activists such as Mike Oliver.
Promoting factors	Policy environment established by Beveridge Report 1942 and NHS 1946; existence of activists within parliament (see previous); exemplar of the ADA 1990 in the US.
Inhibiting factors	Conservative government were ideologically opposed to the bill, therefore passed a weak form of legislation.
Legislation (2)	Equality Act 2010
Catalysts	MP Anthony Lester and academic Bob Hepple; need to incorporate EU law and the CPRD 2009.
Promoting factors	Passage of Human Rights Act (HRA) 1998 incorporating European Convention on Human Rights (ECHR) into law; implementation by Conservative government needing support from coalition partners the Lib-Dems.
Inhibiting factors	No huge inhibiting factors.
Case study 4 — Canada	
Legislation (1)	Canadian Bill of Rights 1960
Catalyst	John Diefenbaker
Promoting factors	Exemplar of provincial bills of rights; passage as a statutory not entrenched bill of rights to avoid the patriation problem.
Inhibiting factors	Weak federalism and desire of provinces to retain control; Canadian constitution not yet patriated.
Legislation (2)	Canadian Human Rights Act 1977
Catalysts	Ineffectiveness of Bill of Rights; Quebec separatism; Pierre Trudeau's bicultural background.

Promoting factors	Complementarity with provincial legislation.
Inhibiting factors	No huge inhibiting factors.
Legislation (3)	Canadian Charter of Rights and Freedoms 1982
Catalysts	Pierre Trudeau; Hays-Joyal Committee and testimony by advocacy groups.
Promoting factors	Support of Supreme Court; enactment as part of a new Constitution
Inhibiting factors	Opposition of the provinces

Table 6.1. Overview of the four case studies

The most salient point of contrast between the four jurisdictions is between the US, Australia and Canada on the one hand and the UK on the other. In the former three countries the national jurisdiction has the task of sharing power and competencies with subnational jurisdictions, and this has implications for human rights legislation implemented at the federal level. This contrasts with the UK, a unitary state, but with its sovereignty now constrained by membership of the European Union. These issues are examined more fully below. The jurisdictions also differ in the way in which the political elites interacted with activist groups, and the nature of the activist groups themselves, whether student protest movements, academic and disability activists outside government, academic and disability activists co-opted by government or disability activists from within the legislature itself.

These interactions were often conditioned by the nature of the institutional venues offered in that country.[337] In Canada, for example, with its weak federalism, activism tended to be located at the local level; in contrast, in the UK activism was directed strongly at Westminster, both from the street and from inside parliament itself. In the USA disability activism was pioneering new ground, following the model of civil rights activists a decade before; in

[337] The occurrence of multiple institutional venues in federal polities is discussed by Paul Pierson 2004, p. 163.

contrast, in Australia a range of state anti-discrimination statutes were already in place, as well as sex and race anti-discrimination laws federally, rendering enactment of the federal disability anti-discrimination act uncontested. Beyond these contrasts there is much in the four case studies that betrays the common 'Washminster' origins of their political systems, operating within the constraints of party politics. These commonalities allow us to generalise about historical changes in the social construction of marginalised groups (discussed below in Section 6.3) and about the factors that drive the evolution of institutions (dealt with in Section 6.4).

6.3 Changing social constructions

A major underlying driver of change is the shifting social constructions of human rights issues, marginalised groups and the role of governments (factor 4a above). This half century of change is part of a longer view, the details of which have been traced out in the individual chapters of this monograph. Two trends are discernible in all of the Anglo-American countries studied, particularly evident over the past century or more, but with elements reaching back to the British *Bill of Rights* of 1689 and even back to the *Magna Carta* of 1215. These trends are:

- a gradual extension of rights to the ordinary citizen and eventually to groups on the fringes of society; and
- increasing involvement by various level of government in providing support for the less fortunate.

There has been a slow shift in the central issues of international law. After the Napoleonic Wars the Congress of Vienna was primarily concerned with the balance of power between the major nations of Europe. The treaty of Versailles after the First World War allowed the right of self-determination to many of the peoples of the old empires, such as the Czechs and Poles.

The atrocities committed during the Second World War by the Nazis against ethnic, religious, sexual and disability minorities shifted the emphasis once more, with the United Nations proposing nine key international covenants or conventions between 1965 and 2006 dealing with the civil, political, economic, social and cultural rights of the individual, and with freedom from discrimination.[338] For our purposes the most significant of these is the *Convention on the Rights of Persons with Disabilities* (CRPD), examined in more detail below in 6.3.5 on ideational factors.

As we have seen in the individual chapters, the World Wars were also a catalyst for extensions of the right to vote, the reception of pensions and services for people with disabilities. War veterans were the initial recipients of these benefits, but in time they were extended to the general population. Ideationally, the world has been transformed. Although old attitudes persist in some dark corners, the individual is now less confined by an identity based on race, class, gender, sexuality or (dis)ability, compared with a century ago. The dominant social construction in the Anglo-American countries is that of an individual with rights. This has entailed a corresponding redefinition of the responsibilities of governments, and a re-examination of the role of our fundamental institutions in guaranteeing those individual rights. Ideational change has led to institutional change.[339]

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[338] These covenants and conventions are listed by the United Nation Office of the High Commissioner for Human Rights, 'The core international human rights instruments and their monitoring bodies' at the *United Nations Human Rights* website, accessed at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> on 7 August 2014.

[339] This should not be construed as an argument based on historical determinism. Ideational change has occurred within liberal democracies, but leaves various other polities untouched, such as the Kim dynasty in North Korea and the continued occupation of the Kremlin by autocrats of varying political hues and degrees of commitment to a grip on power. Various historical contingencies can be cited to dispel the illusion of determinism; we would not be discussing universal human rights if Oswald Mosley had succeeded in Britain, if the New Guard been influential in Australia, or if Hitler had invaded Britain rather than Russia. In a Fascist alternative world this thesis may have been about the virtues of dictatorial regimes and racial harmony.

6.4 The evolution of institutions

In terms of level of analysis this study has focussed on a policy framework, that of human rights and anti-discrimination legislation in four jurisdictions.[340] The case studies have elucidated a variety of factors that bear on the evolution of institutions.

6.4.1 Institutional factors within a country

The case studies have shown these factors to include the nature of the constitution and whether human rights are constitutionally entrenched;[341] whether the legislature or the judiciary has the final say when legislation clashes with entrenched human rights;[342] the judicial interpretation of legislation;[343] whether legislation is subjected to review;[344] and whether the national jurisdiction is a federation or unitary state, and if federal, the ability of the national government to dictate to subnational jurisdictions.[345]

These factors, relating to the constitution, separation of powers, division of competences and the administration and interpretation of legislation tend more towards inertia than towards change. Institutionally designed to protect the long term stability of a polity, these structures tend to produce path dependence. It would appear that change at a constitutional level is difficult, although still possible. The earlier constitutional structures are put in place, the more resistant they are to change, and the more strongly deterministic they are.

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[340] The terminology used in this discussion is introduced in section 1.3 Historical institutionalism.

[341] Examples in Sections 2.1, 2.5, 3.1, 3.2, 4.1, 4.5, 5.1, 5.2, 5.3, 5.4, 5.5.

[342] Examples in Sections 2.3, 2.5, 3.1, 3.2, 3.7, 4.5, 5.5.

[343] Examples in Sections 2.3, 2.5, 4.4, 4.5, 5.5.

[344] Example in Section 3.7.

[345] Examaples in Sections 2.3, 3.1, 5.1, 5.2, 5.5.

This is especially evident with the US, where the constitutionally entrenched *Bill of Rights* takes precedent over any subsequent legislation, and tends to empower the judiciary at the expense of the legislature. In response to the American experience, the other jurisdictions have opted for either statutory rather than entrenched bills of rights or for none, thereby preserving parliamentary supremacy. Such preservation of long term extant structures is a strong case of path dependence.

Other path dependent phenomena occurred in the case studies. In Canada the system of weak federalism/strong provincialism established in 1867 — itself a response to the need to accommodate the province of Quebec arising from events a century earlier — has had an inhibiting impact on the development of federal institutions. In Australia the constitution was crafted by colonial politicians inspired by the need to bring the states together, rather than by revolutionary fervour, and the bar to amending the constitution by referendum was set high, producing its own path dependent effect. Constitutional change remains a minor issue in Australian politics, and even small constitutional changes proposed in referendums have failed.

Britain's constitutional structures exhibit a high degree of path dependence. Since the Glorious Revolution of 1688 the crown and parliament have co-evolved and adapted to widespread social changes, in particular the enactment of universal suffrage. The British polity has proven resilient against such exogenous shocks as the World Wars and the 1936 abdication crisis. On the other hand the human rights policy area in Britain has been transformed by the *Equality Act 2010*, an example of radical change. It would appear that the amorphous 'unwritten' nature of the British constitution has allowed such rapid innovation. More specifically, the UK's membership of the EU mandated compliance with certain judicable human rights standards, which were imported from the supranational jurisdiction.

Allegiance to such a supranational jurisdiction was made possible by what historical institutionalists term 'layering', as discussed in the next subsection.

6.4.2 Factors emanating from other jurisdictions

These factors include the ability of subnational, supranational and international jurisdictions to provide legislative models for national legislators, and their receptivity to these models;[346] geopolitical factors, such as Canada's need to accommodate Quebec and Britain's need to implement European conventions;[347] and the spread of human rights values, their manifestation as international treaties and their incorporation into national legislation.[348]

Rapid change in the UK has been accomplished by institutional layering, as European institutions of social justice are layered on top of existing British institutions, mandating compliance with EU policy.[349] The need to incorporate UN conventions into national legislation has also led to policy evolution, as we saw in Australia's development of the DDA 1992, which was also the result of using a model borrowed from another jurisdiction. The most precipitous change is initiated by the factors discussed in the next subsection.

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[346] Examples in Sections 2.1, 3.6, 4.7, 5.4.

[347] Sections 4.1, 5.2, 5.3, 5.4, 5.5.

[348] Examples in Sections 3.5, 3.6, 3.7, 4.5, 5.2. This is dealt with more fully under ideational factors, below.

[349] Layering and similar mechanisms are discussed by Mahoney and Thelen, 2010, pp. 15-18.

6.4.3 Factors producing rapid change

Critical junctures, introduced in Section 1.3, are a source of rapid change, particularly in the case of major historical events such as wars, [350] but also in less dramatic fashion. A society's institutions can be seen as existing within a matrix, nested within each other at various levels.[351] A critical juncture may occur at any level within the matrix, calling on policy makers to respond and chart a new direction for the institution effected. The present study has been one of successive critical junctures in each country, at various level of the polity. These may be foundational events such as the constitutional conventions that set out the American and Australian constitutions. Elections are also critical junctures, putting new policies on the table. Critical junctures may also occur at inter-jurisdictional meetings such as Conferences of First Ministers of Canada (CFMC) and Council of Australian Governments (COAG) meetings, as we saw in Canada. Exogenous shocks such as armed conflict are a major instrument of change, from the American Revolution giving rise to the US Bill of Rights, through to the Vietnam War entailing changes to the US *Rehabilitation Act* in 1973. We have seen the Canadian identity shaped by real or threatened conflict with its southern neighbour, and the World Wars were instrumental in producing supportive social policies initially for veterans and later for other disabled citizens.

6.4.4 Endogenous factors producing more measured change

Such endogenous sources of change include political parties, their ideologies and the range of diversity they encompass;[352] the extent of bipartisanship;[353] the nature of a particular

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[350] Examples in Sections 2.2, 3.2, 4.2, 5.2.

[351] Thelen and Steinmo 1992, p. 8; Paul Pierson, *Politics in Time: History, Institutions and Social Analysis*, Princeton University Press, Princeton and Oxford, 2004, pp. 27, 47 and 150.

[352] Examples in Sections 3.2, 4.4.

[353] Examples in Sections 2.3, 4.3, 4.4.

historical parliament, such as parliamentary balance of power between parties, hung parliaments and unstable governments;[354] activist groups and how closely they work with government;[355] previous human rights legislation within the jurisdiction, and accepted conventions and principles dealing with human rights;[356] the effects of related items of legislation and of related policies;[357] and whether there is a single human rights bill, or a specific disability discrimination act.[358]

More specifically, the mix of institutions operating in a policy area is dynamic and interactive, and can create opportunities for change. An example of this is the rise of the disability rights movement, modelled on the civil rights movement, and the ensuing passage of disability discrimination legislation modelled on prior legislation dealing with racial and sexual discrimination. A major source of change stems from the actions of a nation's public and political institutions themselves, as political actors and activists promote or oppose new policy initiatives, their actions enhanced or constrained by institutional settings endemic to that place and time. A striking example of this is the sudden change of attitude towards equality legislation experienced by the UK Conservative Party once they came into coalition with the Liberal Democrats. As expected, change is promoted by unanimity. Any legislation with bipartisan support has easy passage, the ADA in the US and the DDA in Australia being examples. Likewise, the more closely activist groups can work with government, the more values and aims are shared, the more likely it becomes that legislation will be successful. This was also the case with the ADA in the US and the DDA in Australia, with government

[354] Examples in Sections 4.7, 5.5.

[355] Examples in Sections 2.3, 2.4, 2.5, 3.4, 3.5, 4.3, 5.3, 5.5.

[356] Examples in Sections 2.2, 3.1, 4.1, 4.4, 4.5, 5.2.

[357] Examples in Sections 2.2, 2.3, 3.3, 4.7, 5.1, 5.4.

[358] Examples in Sections 2.3, 3.7, 4.6, 5.1.

appointed activists playing a role. The legislative mix is relevant, as new bills are drafted to be consistent with past legislation, and are often modelled on existing acts, as in the US and Australia. Past legislation may also be a dead weight, to be cleared away, as with Britain's *Equality Act*.

6.4.5 Ideational factors

At a fundamental level of analysis change is ideational, engendered by such factors as the changing social constructions of human rights issues, marginalised groups and the role of governments;[359] the spread of human rights values, their manifestation as international treaties and their incorporation into national legislation;[360] global international movements such as the disability rights movement and the independent living movement;[361] global politico-economic philosophies such as neoliberalism;[362] and the characteristics of individual leaders and other political actors, the nature of the opposition (and Opposition) they face and their tactics in dealing with it.[363]

Change is ideational, since all institutions are fundamentally social constructs, based on accepted principles of social order and justice. It is here that out twin approaches of social constructivism and historical institutionalism converge. Ideational change may proceed on a broad front, as society accepts the new framing of an issue, as we have seen with the changing social construction of disability in general and disability rights in particular.

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[359] Examples in Sections 2.2, 3.4, 4.3 and examined above in 6.2.

[360] Examples in Sections 3.5, 3.6, 3.7, 4.5, 5.2.

[361] Examples in Sections 2.3, 3.5, 4.3.

[362] Examples in Sections 3.5, 4.7.

[363] Examples in Sections 2.3, 4.3, 4.4, 5.3, 5.5.

In recent times this policy area has felt the ideational change provoked by the adoption of neoliberalism, the defining characteristic of which is a preference for market solutions to government solutions in response to social problems.[364] The growing integration of the world's economies has exposed labour markets to increased competition, and in response the countries in our study have adopted policies that tighten welfare regimes and attempt to render labour more flexible.[365] Although there was no proof that these policies would address the problems of globalisation, they were widely accepted because of the way in which problem and solution were framed.[366] Once such a social and political construction of a policy problem gains currency, it may be resistant to reinterpretation and change.[367]

Starting in the late 1970s all four jurisdictions have adopted 'workfare' policies aimed at moving unemployed people with disabilities from welfare into work, often invoking the concept of mutual obligation. Such policies emphasise an individual's responsibility to work, but fail to provide the supports and services that could otherwise remove the structural barriers facing people with disabilities.[368] Indeed, a 2008 study by Crisp and Fletcher found that there was little evidence that workfare increases the likelihood of finding work, and that workfare is least effective for individuals who face multiple barriers.[369]

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[364] Sue Swenson, 'Neoliberalism and human services: threat and innovation', *Journal of Intellectual Disability Research*, vol. 52, part 7, p. 627.

[365] B. Guy Peters, Jon Pierre and Desmond S. King, 'The Politics of Path Dependence: Political Conflict in Historical Institutionalism', *Journal of Politics*, vol. 67, no. 4, 2005, p. 1291.

[366] Steinmo 2008, p. 132.

[367] Peters, Pierre and King 2005, p. 1284.

[368] Harris, Owen and Gould 2014, p. 823.

[369] Richard Crisp and Del Roy Fletcher, *A comparative review of workfare programmes in the United States, Canada and Australia*, Research Report No 533, Department for Work and Pensions (UK), 2008, pp. 1-2, 8-10, 15.

Such workfare policies are an attempt at normalisation, to return disabled people to the community as 'normal' citizens. Michael Oliver, utilising the critique of Marxist political economy (otherwise referred to as materialist theory) condemns these moves as the continued oppression of disabled people in capitalist societies.[370] While classical capitalism had been characterised by the factory system and the segregated institution, late capitalism (also termed the post-industrial society or simply post-modernity) attempts to integrate disabled people into society, but without changing the fundamental sources of oppression imbedded within that society, which are produced by the economic and social forces of capitalism itself. Services such as rehabilitation, and even disability itself, has been turned into a commodity, administered by middle class professionals, rather than by disabled people themselves. Oliver's critique is part of a significant body of work emerging from Marxist and political economic analysis of disability, which includes writers such as Paul Abberley, Colin Barnes, Vic Finkelstein, Brendan Gleeson, Peter Leonard and Mark Priestley.[371] While materialist writers see disability as structural characteristic of capitalist society that emerges in response to impairment, policy makers tend to see disability as an economic problem to be resolved within the confines of government budgets. This is thus a contestation between competing

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[370] Michael Oliver, 'Capitalism, disability and ideology: A materialist critique of the Normalization principle' in Robert J. Flynn and Raymond A. Lemay (eds.), *A Quarter-Century of Normalization and Social Role Valorization: Evolution and Impact*, University of Ottawa Press, Ottawa, 1999. Also available from the Independent Living Institute at <http://www.independentliving.org/docs3/oliver99.pdf> and viewed 01 December 2014.

[371] See in particular B.J. Gleeson, 'Disability Studies: A historical materialist view', *Disability & Society*, vol. 12, no. 2, 2010, pp. 179-202.
Also see Brendan Gleeson, *Geographies of Disability*, Routledge, London, 2001 (with further discussion of normalisation, historical materialist approaches and further bibliographies);
Paul Abberley, 'The Concept of Oppression and the Development of a Social Theory of Disability', *Disability, Handicap & Society*, vol. 2, no.1, 1987, pp. 5-19;
Mark Priestley, 'Constructions and Creations: Idealism, materialism and disability theory', *Disability & Society*, vol. 13, no. 1, 1998, pp. 75-94; and
Vanmala Hiranandani, 'Towards a Critical Theory of Disability in Social Work', *Critical Social Work*, vol. 6, no. 1, 2005, online journal hosted by the University of Windsor, Ontario, Canada, at <http://www1.uwindsor.ca/criticalsocialwork/towards-a-critical-theory-of-disability-in-social-work> and viewed 01 December 2014.

social constructions of human rights issues, marginalised groups and the role of governments, ultimately derived from two divergent sets of values, goals and ideas espoused by actors in various institutions within this policy framework.

Streeck and Thelen suggest that the advances of neoliberal policies in western democracies may derive from the nature of the liberal state itself, which privileges neoliberal ideologies over corporatist or socialist ones: freedom from government intervention in the political sphere within a pluralist democracy is carried over into non-interventionist policies in the economic sphere. According to these writers, the advance of neoliberalism is also due to the fact that 'it mainly moves forward only slowly', using the mechanisms of incremental institutional change, as outlined in recent historical institutionalist theory.[372] Sven Steinmo takes a longer term view, arguing that liberal democracies were forced to use interventionist policies to achieve victory in World War Two, and these policies were thus accepted as reasonable and normal in the war's aftermath, manifesting themselves as Britain's NHS, for example. By the early 1970s, Steinmo continues, better living standards and rising expectations were met with economic stagflation, calling into question accepted Keynesian practices of economic management. Both elite and public were then willing to listen to a different conception of the role of government in the economy, neoliberalism.[373] Thus neoliberalism becomes the new orthodoxy, espoused by such global organisations as the IMF, World Bank and World Trade Organisation, who promote neoliberalism-inspired development

[372] Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies', in Wolfgang Streeck and Kathleen Thelen (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford University Press, Oxford, 2005, p. 30. These mechanisms — displacement, layering, drift and conversion — are discussed in detail by Mahoney and Thelen, 2010, pp. 15-18.

[373] Steinmo 2008, pp. 131-132.

programs in the global South, resulting in detrimental impacts on both environment and on people with disabilities.[374]

A strong challenger to the widespread adoption of the doctrine of neoliberalism is the global spread of human rights values, manifested in international treaties. For our purposes the foremost of these is the *Convention on the Rights of Persons with Disabilities* (CRPD), adopted by the UN General Assembly on 13 December 2006 and entering into force on 03 May 2008.[375] The CRPD is the first legally-binding international instrument requiring signatory states to promote and enforce disability rights.[376] Even countries of the global South, with high levels of poverty, have signed the treaty — Gabon, Ethiopia and Colombia signed the same day as Australia[377] — but such countries may regard the treaty as 'aspirational and declaratory in nature' given their meagre resources.[378] The same strictures do not apply in the advanced polities examined in our case studies. Of these, we must conclude that the United Kingdom, with its public equality duty, has provided the most robust implementation of the treaty. Such implementation relies on a range of domestic factors, including the will of politicians and civil servants to promote the rights-based agenda on disability issues; a vibrant civil society that can hold states to account; systems of governance

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[374] Meekosha and Soldatic 2011, p. 1390.

[375] United Nations Organisation, 'Convention on the Rights of Persons with Disabilities', webpage maintained by the Secretariat for the Convention on the Rights of Persons with Disabilities, Department of Economic and Social Affairs, UNO, 2014, accessed at <http://www.un.org/disabilities/default.asp?id=150> on 23 September 2014

[376] Raymond Lang, 'The United Nations Convention on the Right and Dignities for Persons with Disability: A panacea for ending disability discrimination?', *ALTER, European Journal of Disability Research*, 3, 2009, p. 267.

[377] This was on 30 March 2007 — United Nations Organisation, 'Convention and Optional Protocol Signatures and Ratifications', webpage maintained by the Secretariat for the Convention on the Rights of Persons with Disabilities, Department of Economic and Social Affairs, UNO, 2014, accessed at <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> on 05 December 2014.

[378] Lang 2009, p. 282.

that that respect the principles of the rule of law, transparency, accountability and due process; and service delivery that is accessible and meets the needs of disabled people.[379] Sadly, the first of these prerequisites is often lacking, with disability policy drifting along path dependent course until seized upon by a motivated political actor.

Ideational change can also have highly individualistic origins, when institutional configurations allow the ideas of a key figure to gain prominence. Such was the case of Alf Morris and his proposal that the needs of disabled people be met by local government authorities in the UK. Also in the UK, Bob Hepple's vision of a more equitable society is being promoted by his institutional status as an expert academic, whose analysis has been accepted by key players in political institutions. More often than not in this policy area, the ideas promoted by an individual stem from that person's own experience of disability and discrimination. Many of the early activists were people with disabilities themselves, such as Michael Oliver and Paul K. Longmore. Senator Tom Harkin has been inspired by his deaf brother to fight for people with disabilities. Canada's John Diefenbaker had experienced discrimination himself, while Pierre Trudeau's bilingual and bicultural background inspired him to reconcile the country's cultures and attempt to end their mutual antagonism and discrimination. This basic individualistic ideational level of institutional change warrants further investigation.

6.5 Limitations of the current study and suggestions for future research

As a brief study aimed at demonstrating the broad sweep of changes in human rights policy, this project has taken a wide view historically and geographically, with the individual political player perceived against the background of events. Given the broad trends sketched

[379] Lang 2009, p. 282.

out here, those events seem almost inevitable, with the political actor merely acting out a role determined by the surrounding contemporary world of ideas and social constructions. Such a long view of history tends to privilege political and social trends over individual personalities. To counter this tendency, the current study has attempted to highlight the role of particular key players, who have manipulated the institutions that they have encountered to produce human rights policy advances, often in response to (or even utilising) critical junctures. Such notable political players have included Alf Morris, Jack Ashley, Peter Large, Roger Berry, Harry Barnes, Anthony Lester, Harriet Harman in the UK; Senators Tom Harkin and Lowell Palmer Weicker, and Congressman Tony Coelho in the US; Neal Blewett, Brian Howe and Michael Duffy in Australia; and John Diefenbaker and Pierre Trudeau in Canada. Equally important have been the academics, theorists and activists who have brought key ideas to prominence, and who include Michael Oliver, Paul Hunt, Vic Finkelstein, Liz Crow and Sir Bob Hepple in the UK; William Roth, Harlan Hahn, Irving K. Zola, Paul Longmore, Judith Heumann, Lex Frieden, Justin Dart and Eva Feder Kittay in the US; and Chris Ronalds in Australia. Concentrating on the broad view, this study has privileged the astute political actor, such as Pierre Trudeau, over the determined theorist and activist, such as Judy Heumann, who is relegated to a mere footnote. The continuation to this study envisaged for next year will correct this perspective, by attempting to trace the lineage of ideas from formulation by activists and theorists to implementation as policy by political actors.

This world of ideas is composed of varying frames of reference, moral templates and normative orientations that shape the responses of the individual political actor, [380] an

[380] Bell 2002, p. 8.

ideational universe that has been termed an actor's *cognitive frame*.[381] It should be recognised that political actors are not merely passive participants. Rather, they actively interpret the world of ideas around them, so that institutional and ideational environments interact.[382] However, despite the importance of this interaction between actors, their cognitive frame and the institutions surrounding them, historical institutionalism still lacks a clear and coherent understanding of this relationship.[383] Such an understanding is important, both for its own sake and for its role in explaining institutional change. Institutions are modified in response to changes in ideas held by political actors.[384] Together, cognitive frames and the mechanism of institutional change are at the forefront of the intellectual agenda of historical institutionalism.[385] While this project has taken a broad view of legislative history, highlighting long term historical trends, a more refined analysis of the role of individual actors and their cognitive frames will highlight the decisive role of critical junctures, an element of historical institutionalism only tangentially explored here.

It is therefore proposed that an extension of the current study would look more closely at the cognitive frames of individual political actors, in order to discern the role of such ideational factors in producing institutional change. The constructivist-institutionalist approach would be retained and extended, and research would utilise where possible primary

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[381] Sven Steinmo, 'Historical institutionalism and experimental methods', draft chapter for *Oxford Handbook on Historical Institutionalism*, Orfeo Fioretos, Tulia Falleti and Adam Sheingate, (eds), Oxford University Press, forthcoming, p. 9; draft is dated 31 March 2014 and was downloaded from <http://www.svensteinmo.com/articles/Steinmo_2014_Historical_Institutionalism_and_Experiments.pdf> on 11 August 2014. The host webpage is <http://www.svensteinmo.com/research.html#institutional>. The concept of 'cognitive frames' is introduced at this point as new theory point forward to the continuation study, rather than pointing back to the current study.

[382] Bell 2002, p. 8.

[383] Steinmo 2014, p. 11.

[384] Steinmo 2008, p. 169-173.

[385] Steinmo 2008, p. 167; Thelen and Steinmo 1992, 22-23; Bell 2002, p. 12.

sources, such as archival material, autobiographical works and elite interviews. This will potentially offer another window into the social and historical processes behind legislation which strives to recognise human difference and diversity and maximise equality.

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