

# Introduction

## I PRELIMINARY

### *A Core Thesis*

This monograph uses the disability human rights paradigm to critique the role that ableism has in the law of work. It will analyse international and national laws that regulate work relationships to illustrate how value judgments have resulted in a hierarchy of impairments, whereby the nature of an impairment is used to determine whether a worker is protected and supported, rather than the extent of impairment or capacity to work.

Ability diversity and disability are often associated with unfavourable economic and labour market outcomes. Some of these less favourable outcomes can be attributed to the requirement to have certain abilities to perform a job (e.g. sight is required to hold vehicle licenses), the economic factors which prevent all barriers to ability equality being removed (e.g. it would be prohibitively expensive to remove every set of stairs in the London underground) and the prejudice of lawmakers (e.g. the belief that people with certain impairments are less worthy of support).

There is a distinction between impairment and disability. Following the lead of the *UN Convention on the Rights of Persons with Disabilities (CRPD)*, impairments can conveniently be divided as follows: intellectual, which focuses on intelligence; mental, which focuses on all other medical conditions related to brain operation; sensory, which focuses on reduced sight, smell, hearing, taste or other sensory limitations; and physical, which focuses on reduced abilities that are not related to brain or sensory activities.<sup>1</sup> Disability is created when impairments interact with barriers in society.

<sup>1</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 30 May 2008) art 1.

There are a range of other terms adopted to define impairment categories and the disabilities which flow from these impairments. For the reasons described below, in this book the term 'psychosocial disability' is used to describe the disablement of people with mental impairments. The extent to which remedial laws create a hierarchy of impairments by treating mental impairments less favourably than physical and sensory impairments is critically analysed.

### B *Comparative Research Method*

This monograph identifies and analyses key themes in laws which impact upon the rights of workers with psychosocial disabilities at work. A legal doctrinal method will be adopted. This will primarily involve analysis of international and domestic laws and working documents, international and domestic judgments, observations and rulings, and engagement with secondary materials.

The international law research will focus upon the United Nations' human rights and labour rights regimes. The *CRPD*, along with its jurisprudence, is the most relevant body of international disability law. While the *CRPD* posits persons with disabilities right to work and employment in Article 27, the International Labour Organization (ILO) has a century of history setting workplace norms, hence the ILO will be analysed as far as it focuses on workers with disabilities.

The country comparison will primarily involve analysis of laws in Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States. It is crucial to consider the historical, social, economic, political, cultural, and psychological context which has impacted on the operation of the existing laws.<sup>2</sup> The fact that a law has successfully achieved its purposes in one jurisdiction does not mean that same regulatory model will achieve the same outcome in another jurisdiction. Montesquieu famously declared in 1748 that 'political and civil laws of each nation. . . should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another'.<sup>3</sup> Lord Denning has remarked on the problems of transplanting laws where His Honour observed that '[j]ust as with

<sup>2</sup> Paul Harpur, 'Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam' (2011) 36(4) *Employee Relations Law Journal* 79.

<sup>3</sup> Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (1748) reprinted.

an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending.<sup>4</sup>

Large comparative projects require particular attention to ensure sufficient detail is provided to understand regulatory themes, without providing so much detail as to turn the monograph into a long, descriptive comparison. The author has previously successfully performed comparative analysis of this nature when analysing workplace laws and laws that regulate disability more generally. The author has demonstrated the viability of this comparison in successfully comparing international law with the approaches in Australia, Canada, the United Kingdom and United States in his previous Cambridge University Press monograph.<sup>5</sup> The author has performed numerous other comparisons, including between different international labour laws,<sup>6</sup> different international disability laws,<sup>7</sup> and between state jurisdictions, including comparing Australia with Ireland,<sup>8</sup> with New Zealand,<sup>9</sup> with the United Kingdom<sup>10</sup>

<sup>4</sup> *Nyali Ltd. v. Attorney-General* [1956] 1 QB 16, 16–17.

<sup>5</sup> Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print Disabled* (2017) Cambridge University Press.

<sup>6</sup> Harpur, 'Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam' 79; Paul Harpur, Ivanka Mamic and Nick Beresnev, 'Multi-National Enterprises and Corporate Social Responsibility in Fiji and Pacific Island Countries: Disability and Gender Equality' (Final Report, International Labour Office, Bangkok and Suva, September 2015).

<sup>7</sup> Paul Harpur, '*Nothing About Us Without Us*: The UN Convention on the Rights of Persons with Disabilities' (2017) Oxford Research Encyclopaedia of Politics; Paul Harpur, 'Old Age Is Not Just Impairment: The Convention on the Rights of Persons with Disabilities and the Need for a Convention on Older Persons' (2016) 37(3) *University of Pennsylvania Journal of International Law* 1027; Paul Harpur and Michael Ashley Stein, 'Children with Disabilities, Human Rights, and Sustainable Development' in Claire Fenton-Glynn (ed), *Children's Rights and Sustainable Development: Implementing the UNCRC for Future Generations* (2017) Cambridge University Press; Paul Harpur 'Collective versus Individual Rights: The Able Worker and the Promotion of Precarious Work for Persons with Disabilities Under Conflicting International Law Regimes' (2017) 41 *Loyola Law School Los Angeles International & Comparative Law Review* 1, 51.

<sup>8</sup> Paul Harpur, Ursula Connolly and Peter Blanck, 'Socially Constructed Hierarchies of Impairments at Work: Example of the Australian and Irish Workers' Access to Compensation for Injuries' (2017) 27(4) *Journal of Occupational Rehabilitation*, 507.

<sup>9</sup> Tom Devine, Paul Harpur and David Lewis, 'Civil and Employment Law Remedies' in AJ Brown, David Lewis and Richard Moberly (eds) *International Handbook on Whistleblowing Research* (2014) Edward Elgar, chapter 18.

<sup>10</sup> Paul Harpur and Philip James, 'The Shift in Regulatory Focus from Employment to Work Relationships: Critiquing Reforms to Australian and UK Occupational Safety and Health Laws' (2014) 36(1) *Comparative Labor Law and Policy Journal* 111.

and with the United States,<sup>11</sup> as well as comparing the United States and the United Kingdom.<sup>12</sup>

### C A Note on Terminology: Mental Impairments and Psychosocial Disabilities

The language deployed to describe the social construct of disability is hotly contested.<sup>13</sup> There are large corporate interests vested in attempting to ‘cure’ impairments. Medical and pharmaceutical firms heavily lobby for the public to believe that their products and services should be purchased.<sup>14</sup> In these campaigns, persons with disabilities are used as marketing tools rather than as rights agents entitled to dignity and equality.

The CRPD operates on the basis of ‘nothing about us without us’.<sup>15</sup> Building upon the CRPD, the next generation norm goes further and calls for ‘nothing about us unless it is led by us’. The source for labels to describe disablement therefore should be the disability community itself. This, of course, is difficult as different groups take different perspectives. This can be evinced by the dispute between the ‘person-first’ or ‘rights-first’ debate.

Whether the person or disability is placed first has theoretical and practical significance.<sup>16</sup> Medical professionals describe people by reference

<sup>11</sup> Paul Harpur, Simon Bronitt, Peter Billings, Martie-Louise Verreyne and Nancy Pachana, ‘Regulating Fake Assistance Animals – A Comparative Review of Disability Law in Australia and the United States’ (2018) 24 *Animal Law Review* 1, 77.

<sup>12</sup> Paul Harpur, ‘From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age’ (2013) 40(3) *Northern Kentucky Law Review* 529.

<sup>13</sup> Paul Harpur, ‘From Disability to Ability: Changing the Phrasing of the Debate’ (2012) 27 *Disability and Society* 3, 325.

<sup>14</sup> Mayer Brezis, ‘Big Pharma and Health Care: Unsolvable Conflict of Interests between Private Enterprise and Public Health’ (2008) 45 *Israel Journal of Psychiatry and Related Sciences* 2, 83; Andrew Edgar, ‘The Dominance of Big Pharma: Power’ (2013) 16 *Medicine, Health Care and Philosophy* 2, 295; Paul D Jorgensen, ‘Pharmaceuticals, Political Money, and Public Policy: A Theoretical and Empirical Agenda’ (2013) 41 *The Journal of Law, Medicine & Ethics* 3, 561.

<sup>15</sup> Kerstin Braun, ‘“Nothing About Us Without Us”: The Legal Disenfranchisement of Voters with Disabilities in Germany and Its Compliance with International Human Rights Standards on Disabilities’ (2015) 30 *American University International Law Review* 315; Paul Harpur, ‘Nothing About Us Without Us: The UN Convention on the Rights of Persons with Disabilities’ (24 May 2017) *Oxford Research Encyclopedia of Politics*. <http://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-245>.

<sup>16</sup> Darcy Granello and Todd Gibbs, ‘The Power of Language and Labels: “The Mentally Ill” versus “People with Mental Illnesses”’ (2016) 94(1) *Journal of Counseling & Development* 31; Paul Harpur, ‘From Disability to Ability: Changing the Phrasing of the Debate’ (2012) 27(3) *Disability and Society* 325.

to their impairment, which frames the person as the problem in need of a cure.<sup>17</sup> Under this approach, a person with an impairment loses their humanity and are described as the ‘mentally-impaired person’ or, even worse, simply as ‘the mental case’.

To shift the focus away from the medical label and towards the role that society plays in disabling people with impairments, the social model advocates in the United Kingdom sought to emphasise that it is the way that society is structured that causes the disablement by adopting the ‘person with a disability’ terminology in disability rights discourse.<sup>18</sup> This social model approach, discussed further in Chapter 2, emphasises that the person is disabled by barriers in society.

The person-first approach is far more popular with advocates in Australia, Canada and the United States, where it is used to emphasise the humanity of the individual over the impairment.<sup>19</sup> The United Nations Convention on the Rights of Persons with Disabilities has enshrined a human rights model that reflects a wider civil rights model that places humanity first and uses the term ‘persons with disabilities’.<sup>20</sup> Despite the debates, Tom Shakespeare argues that ‘the person first is the politically progressive choice in America, Australia and other English speaking countries’.<sup>21</sup>

The author has previously argued for the person-first approach,<sup>22</sup> and will predominantly adopt the person with disabilities approach in this book. The author believes that in most situations it is more important to emphasise the humanity of the individual over focusing on the role society has in creating disability.

<sup>17</sup> Deborah Kaplan, ‘The Definition of Disability: Perspective of the Disability Community’ (2000) 3 *Journal of Health Care Law and Policy* 352–364; Laura Rovner, ‘Disability, Equality, and Identity’ (2004) 55 *Alabama Law Review* 1043–1105.

<sup>18</sup> Colin Barnes, *Disabling Imagery and the Media: An Exploration of the Principles for Media Representations of Disabled People* (1992) The British Council of Disabled People 43; Michael Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (1998) Longman, 18.

<sup>19</sup> Gerard Goggin and Christopher Newell, *Disability in Australia: Exposing a Social Apartheid* (2003) University of New South Wales Press, 25.

<sup>20</sup> Paul Harpur, ‘Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27(1) *Disability and Society* 1, 1.

<sup>21</sup> Tom Shakespeare, *Disability Rights and Wrongs Revisited* (2014) Routledge, 19.

<sup>22</sup> Paul Harpur, ‘From Disability to Ability: Changing the Phrasing of the Debate’ (2012) 27(3) *Disability and Society*, 325.

### D Why Psychosocial Disability?

The term ‘psychosocial disability’ is being increasingly adopted by advocacy groups and leading academics.<sup>23</sup> It has been argued that this term more explicitly recognises the social model explanation of the disablement of people with mental impairments.<sup>24</sup> The term psychosocial disability is now being widely used to replace terms such as mental disabilities or mental illnesses.<sup>25</sup>

While the *CRPD* does not use the term psychosocial disability, the body charged with monitoring the *CRPD*, the Committee on the Rights of Persons with Disabilities (*CRPD* Committee), has utilised this term in all of its six General Comments. The *CRPD* Committee uses the term psychosocial disability in General Comments 2 and 6 in a context that suggested the adoption and definition of the term was well established.<sup>26</sup> It is clear from the other general comments that the *CRPD* Committee is substituting the term ‘psychosocial’ for ‘mental’. In General Comment 3 the *CRPD* Committee defines impairments under the *CRPD* to include ‘physical, psychosocial, intellectual or sensory conditions’.<sup>27</sup> Later in General Comment 4, the *CRPD* Committee defines conditions that are not physical or sensory by reference to ‘psychosocial or intellectual impairments’.<sup>28</sup> Considering *CRPD* art 1 explains impairment by reference to ‘physical, mental, intellectual or sensory impairments’ it is clear that the *CRPD* Committee is using ‘psychosocial’ in substitution for ‘mental’. This approach is reinforced in General Comments 1 and 5 where the *CRPD* describes disablement by reference to, in General Comment 1, ‘cognitive or psychosocial disabilities’, and in General Comment 5, ‘psychosocial and/or intellectual disabilities’.<sup>29</sup> Accordingly, this monograph

<sup>23</sup> Paul Harpur and Michael Ashley Stein, ‘Indigenous Persons with Disabilities and the Convention on the Rights of Persons with Disabilities: An Identity without a Home?’ (2018) 7 *International Human Rights Law Review* 1.

<sup>24</sup> Mark Bell, ‘Mental Health at Work and the Duty to Make Reasonable Adjustments’ (2015) 44 *Industrial Law Journal* 2, 194.

<sup>25</sup> Christopher P. Guzelian, Michael Ashley Stein and Hagop S. Akiskal, ‘Credit Scores, Lending, and Psychosocial Disability’ (2015) 95 *Boston University Law Review* 1807.

<sup>26</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 2 (2014): Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014), 7; Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on Equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (9 March 2018), 72(b) and 72(p).

<sup>27</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on Women and girls with disabilities*, UN Doc CRPD/C/GC/3 (25 November 2016), 5.

<sup>28</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 4 (2016) Article 24: Right to inclusive education*, UN Doc CRPD/C/GC/4 (2 September 2016), 48.

<sup>29</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/h (19 May 2014), 9;

will follow the lead of the CRPD Committee and leading disability rights scholars, and adopt the term psychosocial, to explain the disablement of persons with mental impairments.

## II INEQUALITIES, OPPRESSION AND ABLEISM AT WORK

This section will analyse the extent to which persons with disabilities are able to exercise their right to work and then analyse how the disability is not a homogeneous group and that inequalities are experienced differently for different impairment categories.

Persons with disabilities have experienced substantial social stigma, economic exclusion and even have been prohibited from being seen in public due to their 'ugly' appearance.<sup>30</sup> They have been subjected to public policies which focus on 'curing' and treatment associated with eugenics,<sup>31</sup> brutal oppression,<sup>32</sup> policies that regard people with disabilities as requiring charity and pity,<sup>33</sup> and with medical interventions that often cause minimal medical improvements but substantial harm to the lives of people with disabilities.<sup>34</sup> Institutionalisation continues for millions across the Western world, where persons with disabilities are placed in abusive situations, often chemically or physically restrained, treated worse than convicted rapists or murderers, simply because society has not devoted appropriate resources to enable rights to be exercised. The United Nations Human Rights Council adopted a resolution in 2016 which expressed concern that persons with mental impairments who seek treatment are subject to, inter alia, widespread discrimination,

Committee on the Rights of Persons with Disabilities, *General Comment No. 5 (2017) on living independently and being included in the community*, UN Doc CRPD/C/GC/5 (27 October 2017), 97(g).

<sup>30</sup> Susan Schweik, *The Ugly Laws: Disability in Public* (2009) New York University Press.

<sup>31</sup> For an account in the United States see: Willie V Bryan, *The Social Perspectives and Political History of Disabilities and Rehabilitation in the United States* (2010) Charles C Thomas Publisher, 71–72; Marius Turda, *Modernism and Eugenics* (2010) Macmillan, 84–85.

<sup>32</sup> Ravi Malhotra, 'The Politics of the Disability Rights Movements' (2001) 7(3) *New Politics* 65.

<sup>33</sup> Thomas Hammarberg, 'Disability Rights: From Charity to Equality' (2011) 6 *European Human Rights Law Review* 638; Arlene Mayerson and Matthew Diller, 'The Supreme Court's Nearsighted View of the ADA' in Leslie Pickering Francis and Anita Silvers, et al. (eds), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* (2000) Routledge, 124 (courts have reinforced the notion of people with disabilities as objects of pity and charity).

<sup>34</sup> Some medical interventions are defined as 'soul-destroying': Michael Oliver, 'What's So Wonderful about Walking?' (Inaugural Professorial Lecture, University of Greenwich, London, 1993) 16–17, cited in Fiona Campbell, *Frontiers of Ableism* (2009) Palgrave Macmillan, chapter 9.

stigma, prejudice, violence, social exclusion and segregation, unlawful or arbitrary institutionalisation, overmedicalisation and treatment practices that fail to respect their autonomy, will and preferences.<sup>35,36</sup> Despite the substantial oppression and poor treatment of ability diversity in society, some people with disabilities navigate and cope with barriers in society to exercise many civil, cultural, economic, political and social rights, including the right to work.

It is beyond the scope of one monograph to tackle all of these critical questions, and this book deals with how law and society enables persons with disabilities to exercise one right: the right to work and employment. Work takes a person from charity and welfare to social status and economic independence. As Rhoda Howard and Jack Donnelly observe, without the right to work being realised, no social or economic rights can be realised, as a person without work is unable to participate in the economy.<sup>37</sup> More broadly, Philip Alston claims if economic rights are not realised, people will be denied many of the rights in the United Nations human rights system.<sup>38</sup>

### *A Are Persons with Disabilities Experiencing Inequalities in Exercising Their Right to Work?*

This section will analyse the extent to which ability inequalities occur in work relationships. Statistics indicate that millions of persons with disabilities have their rights to work denied and are excluded from full economic citizenship.<sup>39</sup> More persons with disabilities are excluded from the labour market in some countries.<sup>40</sup> According to the Australian Human Rights Commission, people

<sup>35</sup> The World Health Organization has estimated that over 450 million people worldwide live with psychosocial disabilities and has identified key human rights abuses against this group: World Health Organization, 'Mental disorders affect one in four people' (accessed 24 January 2019). [www.who.int/whr/2001/media\\_centre/press\\_release/en/](http://www.who.int/whr/2001/media_centre/press_release/en/); The WHO's estimate is likely to be a severe under-approximation: D Vigo, et al. 'Estimating the true global burden of mental illness' (2016) 3 *Lancet Psychiatry* 171–178.

<sup>36</sup> United Nations Human Rights Council: Resolution on Mental health and human rights. Adopted by the Human Rights Council on 1 July 2016 A/HRC/RES/32/18.

<sup>37</sup> Rhoda E. Howard and Jack Donnelly, 'Human Dignity, Human Rights, and Political Regimes' (1986) 40 *American Political Science Review* 3, 817.

<sup>38</sup> Philip Alston, 'Making Economic and Social Rights Count: A Strategy for the Future' (1997) 68 *Political Quarterly* 2, 188–195.

<sup>39</sup> Jody Heymann, Michael Ashley Stein and Gonzalo Moreno (eds), *Disability and Equity at Work* (2014) Oxford University Press.

<sup>40</sup> Lisa Waddington, Mark Priestley and Betül Yalcin, 'Equality of Opportunity in Employment? Disability Rights' in Peter Blanck and Eilíonóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (2016) Taylor and Francis, 72.



over 55 make up 25 per cent of the population but only 16 per cent of the workforce, and persons with disabilities experience significantly higher unemployment and underemployment.<sup>41</sup> Research performed by Richard Berthoud found that the probability of any disabled person securing employment is reduced by 40 per cent, with the likelihood for those with mental health disabilities even lower.<sup>42</sup>

While there is a natural correlation between abilities and the capacity to succeed, laws and practices distort the impact of ability diversity to create inequalities where no such inequalities need exist. Ability diversity will result in diversity of success; not every person can be a professional sports star, surgeon, professor, truck driver or electrician. This monograph will critique laws and practices which interpret ability differences in ways which create and perpetuate inequalities rather than enabling people to succeed in the labour market according to their capacity and potential. The social model focuses on how decision makers in society make decisions that disable certain people. For example, a person in a wheelchair or who can walk can work in an office. This statement does not disturb any natural order. If building laws enable narrow doorways and steps to be built in the office, then key decision makers have distorted who can work in that office by electing to create a building that prevents people with a certain range of abilities from work opportunities. In this scenario the inequalities experienced by the person in a wheelchair are not caused by the natural order of abilities, but instead by how key decision makers approach ability diversity.

The physical barriers associated with a wheelchair are often used to illustrate the social model. Removing the barriers for all impairments is far more complex. It can be difficult to identify all physical barriers. Open plan offices, for example, are a barrier to ability diversity. Open plan offices can make it hard for people with low hearing to communicate on phones; be distracting for those with print disabilities that use screen readers to have the screen communicated to them in an audio form; reduce the efficiency of people with autism who struggle with distractions.<sup>43</sup>

Beyond physical and digital barriers, persons with disabilities confront erroneous negative stereotypes. Elizabeth Emens observes a 'striking gap

<sup>41</sup> Australian Human Rights Commission, 'Willing to Work' Report (2016). [www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination](http://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination).

<sup>42</sup> Richard Berthoud, 'The Employment Rates of Disabled People' (Research Report No 298, Department for Work and Pensions, 2006).

<sup>43</sup> Janine Booth, *Autism Equality in the Workplace: Removing Barriers and Challenging Discrimination* (2016) Jessica Kingsley Publishers, 43.

between the ideas about disability pervasive in mainstream society. . . and the ideas about disability common in the disability community.<sup>44</sup> As analysed throughout this monograph, these negative views can manifest around the stigma of the impairment, such as addiction, that impairment is not safe (such as certain psychiatric conditions), that some impairments are not worthy of protection (such as episodic impairments), or that people with disabilities are inefficient.

Employers continue to doubt the capacity of workers with disabilities.<sup>45</sup> Rebutting presumptions of inability can be exceptionally challenging for persons with disabilities. It is possible to prove capacity through having contact with stakeholders.<sup>46</sup> However, there are tens of millions of companies – and even more supervisors and line managers in those entities – who make decisions on hiring, firing, deciding who will be workers and what their physical, sensory, mental and intellectual capacities are and how they will operate in the workplace, and a range of other decisions that impact on disability inclusion.

Primary research has identified that managers are reluctant to hire people with disabilities, even where they have equal qualifications to those of applicants without disabilities.<sup>47</sup> Overall it can be concluded that businesses often embrace negative attitudinal perceptions of persons with disabilities when making human resource decisions.<sup>48</sup>

Even where a person with disability secures work, studies show that work processes and prejudices reduce their prospects of receiving equal opportunities as workers without disabilities.<sup>49</sup> In addition to being overlooked for

<sup>44</sup> Elizabeth F. Emens, 'Framing Disability' (2012) *University of Illinois Law Review* 1383.

<sup>45</sup> R. Fevre, et al., 'The Ill-Treatment of Employees with Disabilities in British Workplaces' (2013) 27(2) *Work, Employment & Society* 288.

<sup>46</sup> Paul Harpur, 'Combating Prejudice in the Workplace with Contact Theory: The Lived Experiences of Professionals with Disabilities' (2014) 34 *Disability Studies Quarterly* 1.

<sup>47</sup> Mason Ameri, Lisa Schur, Meera Adya, Scott Bentley, Patrick McKay and Douglas Kruse, 'The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior' (Working Paper No. 21560, National Bureau of Economic Research, 2015); S Baert, 'Wage Subsidies and Hiring Chances for the Disabled: Some Causal Evidence' (2014) 17 *The European Journal of Health Economics* 71.

<sup>48</sup> A. Duff, J. Ferguson and K. Gilmore, 'Issues Concerning the Employment and Employability of Disabled People in UK Accounting Firms: An Analysis of the Views of Human Resource Managers as Employment Gatekeepers' (2007) 39 *British Accounting Review* 1, 15; C. Woodhams and A. Danieli, 'Disability and Diversity – A Difference Too Far?' (2000) 29 *Personnel Review* 3, 402.

<sup>49</sup> Lisa Schur, Douglas Kruse and Peter Blanck, *People with Disabilities: Sidelined or Mainstreamed?* (2013) Cambridge University Press; Lisa Schur, Douglas Kruse, Joseph Blasi and Peter Blanck, 'Is Disability Disabling in All Workplaces? Workplace Disparities and Corporate Culture' (2009) 48 *Industrial Relations* 381.

opportunities, workers with disabilities are exposed to greater job insecurity and precariousness at work than workers without disabilities. Sophie Mitra and Douglas Kruse documented the gap in job displacement rates across disability status using the Displaced Worker Supplements of the Current Population Survey.<sup>50</sup> They found that men and women with disabilities are, respectively, 75 and 89 per cent more likely to experience an involuntary job loss than men and women without disabilities over the same period.

The stigma against psychosocial disabilities has a direct impact upon the capacity of this group to exercise their right to work.<sup>51</sup> Research demonstrates that employers report negative attitudes about hiring persons with disabilities generally, and that these attitudes are more negative when it comes to hiring job applicants with psychiatric disabilities.<sup>52</sup> Workers with psychosocial disabilities are discriminated at work by a lack of information about impairment and the perceived inability of supervisors to manage the impact of psychosocial disabilities in the workplace.<sup>53</sup> Professors Simon Darcy, Tracy Taylor and Jenny Green found that there are statistically significant differences in the proportion of discrimination based on disability type, with persons with mental impairments and HIV being the most discriminated against at work.<sup>54</sup> Research performed by MacDonald-Wilson and others involved a multisite qualitative study of 191 workers with psychiatric conditions across the United States. More than 50 per cent of the respondents of this study were unemployed within 12 months of appointment.<sup>55</sup> The operation of stigma is most apparent where the group's ability diversity has a number of beneficial aspects. For example, neurological research has demonstrated that workers

<sup>50</sup> Sophie Mitra and Douglas Kruse, 'Are Workers with Disabilities More Likely to Be Displaced?' (2016) 27 *International Journal of Human Resource Management* 14, 1550.

<sup>51</sup> Jillian Cavanagh, Timothy Bartram, Hannah Meacham, Christine Bigby, Jodi Oakman and Ellie Fossey, 'Supporting Workers with Disabilities: A Scoping Review of the Role of Human Resource Management in Contemporary Organisations' (2007) 55 *Asia Pacific Journal of Human Resources* 1, 6.

<sup>52</sup> Judith A Cook, 'Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission' (2006) 57 *Psychiatric Services* 1391, 1395.

<sup>53</sup> A Martorell, P Gutierrez-Recacha, A Pereda and J L Ayuso-Mateos, 'Identification of Personal Factors that Determine Work Outcomes for Adults with Intellectual Disability' (2008) 52(12) *Journal of Intellectual Disability Research* 1091.

<sup>54</sup> Simon Darcy, Tracy Taylor and Jenny Green, 'But I Can Do the Job': Examining Disability Employment Practice through Human Rights Complaint Cases' (2016) 31(9) *Disability and Society* 1242.

<sup>55</sup> Kim L MacDonald-Wilson, E. Sally Rogers, Joseph M Massaro, Asya Lyass and Tim Crean, 'An Investigation of Reasonable Workplace Accommodations for People with Psychiatric Disabilities: Quantitative Findings from a Multi-Site Study' (2002) 38 *Community Mental Health Journal* 35.

with high functioning autism can display above-average intelligence, increased attention focus, and high visual-spatial abilities.<sup>56</sup>

### III THEORISING HIERARCHIES OF IMPAIRMENT

#### *A Understanding Hierarchies of Impairment and Prejudice at Work*

Ability diversity is a fact: some people are tall, and some are short; some can run and some use wheelchairs; some can write computer algorithms and some struggle to keep a personal budget with a calculator. Ability meritocracies are created which result in persons with certain abilities succeeding in the labour market. The decision to hire a candidate with university qualifications and work experience over one without these qualifications is simply a merit-based decision. . . right? What are the invisible mechanisms of ability privileges that result from actions and decisions that deny people the capacity to exercise their rights to health, education and work, which results in one job candidate having highly-ranked university qualifications and work experience and the other candidate none?

There are discourses of natural entitlement where a person succeeds in the labour market due to their abilities. These discourses are then used to legitimize the inequalities experienced by people with different abilities. There are a range of unearned benefits flowing from having abilities within the 'normal' range. For example:

- When applying for a job, employers are more likely to hire people with exceptional physical, mental and intellectual abilities and less likely to hire a person with a disability or who has an undesirable physical appearance.
- When starting a job, a person with different abilities may require accommodations or adjustments to the digital or physical environments due to decisions made when purchasing and designing workplace furniture, hardware and software.
- A person with standard abilities can be reasonably assured they do not have to answer personal medical questions about their capacity or deal with harmful stereotypes in order to be considered for a position.

<sup>56</sup> W Hill, et al., 'Age-Dependent Pleiotropy between General Cognitive Function and Major Psychiatric Disorders' (2016) 84 *Biological Psychiatry* 4, 266; S Hagnaars et al., 'Shared Genetic Aetiology between Cognitive Functions and Physical and Mental Health in UK Biobank (N = 112 151) and 24 GWAS Consortia' (2016) 21 *Molecular Psychiatry* 11, 1624; B J Crespi, 'Autism as a Disorder of High Intelligence' (2016) 10 *Frontiers in Neuroscience*, 300.

It is important to undo privilege;<sup>57</sup> particularly the privilege attributed to ability.

### B How Sites of Oppression Are Constructed between Impairment Categories

Understanding hierarchies of impairments requires an analysis of the different processes through which sites of oppression are constructed. The binary between the able and disabled are not the only means through which impairment is turned into disability. It is well established that hostility and conflict exists at times between different impairment identities.<sup>58</sup> Even though members of the same overarching identity, being disability, should combat ableism of other impairment categories as a means to combat ableism against their own impairment category, otherising, competition over resources and prejudice can lead to ableism within the disability community itself.<sup>59</sup> Of course, not all members of any identity, whether it be able or disabled, empower or oppress others. In addition to all this, there are issues of individuals experiencing multiple impairment categories and intersecting human rights attributes.<sup>60</sup>

Scholars have theorised how different abilities should be understood. Carol Thomas employs the label ‘disablism’ to describe the social manifestations that turn different abilities into disabilities.<sup>61</sup> A more widely used ‘ism’ has emerged called ‘ableism’.<sup>62</sup> Fiona Campbell adopts the term ‘ableism’ to describe the

<sup>57</sup> Bob Pease, *Undoing Privilege: Unearned Advantage in a Divided World* (2010) Zed Books; Michael L Perlin, ‘On “Sanism”’ (1992) 46 *Southern Methodist University Law Review* 373.

<sup>58</sup> Thomas Shakespeare, Kath Gillespie-Sells and Dominic Davies, *The Sexual Politics of Disability: Untold Stories* (1996) Casell, 71.

<sup>59</sup> Mark Deal, ‘Disabled People’s Attitudes toward Other Impairment Groups: A Hierarchy of Impairments’ (2003) 18 *Disability & Society* 7, 897.

<sup>60</sup> Such as child and disability: Paul Harpur and Michael Ashley Stein, ‘Children with Disabilities, Human Rights, and Sustainable Development’ in Claire Fenton-Glynn (ed), *Children’s Rights and Sustainable Development: Implementing the UNCRC for Future Generations* (2019) Cambridge University Press; old age and disability: Paul Harpur, ‘Old Age is Not Just Impairment: The Convention on the Rights of Persons with Disabilities and the Need for a Convention on Older Persons’ (2016) 37(3) *University of Pennsylvania Journal of International Law* 1027; survivor of domestic violence and disability: Heather Douglas and Paul Harpur, ‘Intellectual Disabilities, Domestic Violence and Legal Engagement’ (2015) 31(3) *Disability and Society* 305; or indigeneity and disability: Paul Harpur and Michael Ashley Stein, ‘Indigenous Persons with Disabilities and the Convention on the Rights of Persons with Disabilities: An Identity without a Home?’ (2018) 7 *International Human Rights Law Review* 1.

<sup>61</sup> Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (1999) Open University Press.

<sup>62</sup> Paul Harpur, ‘Sexism and Racism, Why Not Ableism? Calling for a Cultural Shift in the Approach to Disability Discrimination’ (2009) 34(3) *Alternative Law Journal* 163.

‘network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human.’<sup>63</sup> Paul Harpur explains that ableism could be defined as ‘discriminatory or abusive conduct towards people based upon their physical or cognitive abilities’.<sup>64</sup>

Ultimately, ableism is the network of beliefs, processes and practices that assign values to certain ranges of abilities. One range of abilities is constructed as perfect and ideal, another as disabled but worthy of protection and support, and another range of abilities as defective and less worthy of help and perhaps even subject to blame and sanction. This book adopts the position. All else equal, where attitudes about disability cause one impairment group to suffer disadvantage relative to others, then in that situation an impairment hierarchy is created.

### C *Prejudice against Psychosocial Disabilities*

An impairment category can become especially vulnerable where significant percentages of persons with and without disabilities are hostile or disinterested towards how that group is disabled.<sup>65</sup> Law and policymakers are arguably influenced by where impairments are ranked on hierarchies of impairments when determining how to provide protection and support. There is arguably deeply embedded prejudice against people with mental disabilities, particularly as compared to other disability categories.<sup>66</sup> The generally negative construction of mental impairment has been discussed by others in terms of social stigma as well as the significant consequences it poses for ability equality in society.<sup>67</sup> The distinction between physical and sensory impairments on one hand, and mental on the other, is reflected in how laws have responded to the existence of different forms of impairments.<sup>68</sup>

<sup>63</sup> Fiona Campbell, *Frontiers of Ableism* (2009) Palgrave Macmillan, 19.

<sup>64</sup> Paul Harpur, ‘From Disability to Ability: Changing the Phrasing of the Debate’ (2012) 27(3) *Disability and Society* 325.

<sup>65</sup> Faraaz Mahomed and Michael Ashley Stein, ‘De-Stigmatising Psychosocial Disability in South Africa’ (2017) 5 *African Disability Rights Yearbook* 64.

<sup>66</sup> Michael L Perlin, ‘On “Sanism”’ (1992) 46 *Southern Methodist University Law Review* 373.

<sup>67</sup> Larry Logue and Peter Blanck, *Race, Ethnicity, and Disability: Veterans and Benefits in Post-Civil War America* (2010) Cambridge University Press; United Nations flagship report on disability and development (3 December 2018). [www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/12/UN-Flagship-Report-Disability.pdf](http://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/12/UN-Flagship-Report-Disability.pdf), 250.

<sup>68</sup> Peter Blanck and Michael Millender, ‘Before Civil Rights: Civil War Pensions and the Politics of Disability in America’ (2000) 52 *Alabama Law Review* 1.

Professor Michael Perlin has adopted the term ‘sanism’ to explain prejudice against people with mental disabilities.<sup>69</sup> He argues that sanism is an irrational prejudice of the same quality and character of ableism.<sup>70</sup> The combination of sanism, with the ‘common-sense’ view that manifestations of this impairment is a choice, means that it is widely seen as acceptable to treat people who have a mental impairment less favourably than people whose mental abilities fall within a ‘normal’ range.<sup>71</sup>

For example, while it might be acceptable to limit a person in a wheelchair’s capacity to access a building by having only one entrance with a ramp, it would not be legally or socially acceptable to drag that wheelchair user out of the building and detain them. A person with a mental disability may be excluded and detained by police when their impairment causes them to act in a way that is deemed unacceptable by society.

There has been a range of responses to attempts to reverse the prejudice against mental diversity.<sup>72</sup> Neurodiversity was first used to advocate for the rights of people experiencing disorders on the autism spectrum.<sup>73</sup> The concept has been expanded and embraced by groups representing other neurologically based impairments.<sup>74</sup> Neurodiversity now refers to diversity related to ‘variations in brain structure, behaviour, and social functioning’.<sup>75</sup> Neurodiversity ‘suggests that these disabilities are a natural variation in brain

<sup>69</sup> Perlin, ‘On “Sanism”’ 373; Michael L Perlin, ‘The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?’ (1994) 8 *Journal of Law and Health*, 15; Michael L Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (2013) Ashgate.

<sup>70</sup> Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law*, 2.

<sup>71</sup> Michael Perlin and Alison Lynch, *Sexuality, Disability, and the Law: Beyond the Last Frontier?* (2016) Springer, 14–19.

<sup>72</sup> The use of language is another important measure used to combat prejudice against people experience mental diversity: D. Granello and T. Gibbs, ‘The Power of Language and Labels: “The Mentally Ill” versus “People with Mental Illnesses”’ (2016) 94 *Journal of Counseling & Development* 1, 31.

<sup>73</sup> Michael Orsini, ‘Autism, Neurodiversity and the Welfare State: The Challenges of Accommodating Neurological Difference’ (2012) 45(4) *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 805.

<sup>74</sup> Kenneth E. Sumner and Theresa J. Brown, ‘Neurodiversity and Human Resource Management: Employer Challenges for Applicants and Employees with Learning Disabilities’ (2015) 18(2) *The Psychologist-Manager Journal* 77.

<sup>75</sup> Thomas Armstrong, *The Power of Neurodiversity* (2011) De Capo Lifelong Books, 8; Dana Lee Baker, *The Politics of Neurodiversity: Why Public Policy Matters* (2011) Lynne Rienner Publishers, 17; Susan D Carle, ‘Analyzing Social Impairments under Title I of the *Americans with Disabilities Act*’ (2017) 50 *U.C. Davis Law Review* 1109.

differences and that the workplace should adapt to them'.<sup>76</sup> According to such scholars, natural, and often immutable, neurological differences should not be constructed as innately negative and undesirable by society or workplaces.

## CONCLUSION

The way in which laws respond to impairment hierarchies at work will form the primary focus of this work. Overall, this book can be divided into three parts. Chapters 2–4 analyse how international law posits and develops norms to promote the human rights paradigm and oppose the presence of hierarchies of impairments at work. Chapter 2 analyses how the *CRPD* has shifted international disability work norms by supplanting existing human rights regimes and the International Labour Organization as the leading authority on how disability is regulated at work.

Chapter 3 then analyses how the committee that monitors the *CRPD*, the Committee on the Rights of Persons with Disabilities (*CRPD* Committee), opposes the hierarchy of impairments at work. Chapter 4 then analyses how the international law regime manages the complicated question of sheltered work arrangements. While these arrangements reduce the working rights of certain persons with disabilities, these models are aimed at providing people work who are highly improbable to find work in the open labour market. As workers with psychosocial disabilities make up the workforce in such arrangements, these issues will disproportionately impact upon this group.

Chapters 5–7 will then apply these international law norms to domestic anti-discrimination regimes. Chapters 5 and 6 will analyse how workers with psychosocial disabilities have their capacity to access anti-discrimination law support substantially limited. Chapter 5 will analyse how mental impairments are often episodic and how anti-discrimination laws often do not regard such impairments as disabilities. Chapter 6 will then analyse how anti-discrimination laws expressly exclude people with certain psychosocial disabilities from such laws and how governments seek to stigmatise aspects of the underlying impairments. After analysing how workers with psychosocial disabilities are often excluded from anti-discrimination law protections, Chapter 7 will analyse how hierarchies of impairments diminishes the transformational impact of reasonable accommodation laws.

<sup>76</sup> Kenneth Sumner and Theresa Brown, 'Neurodiversity and Human Resource Management: Employer Challenges for Applicants and Employees with Learning Disabilities' (2015) 18(2) *The Psychologist-Manager Journal* 77.



Chapters 8–10 will then focus on the presence of hierarchies of impairments in national laws which focus on regulating work and employment relationships. Chapter 8 will analyse how occupational safety and health laws and bullying interact with anti-discrimination laws to produce discriminatory outcomes. This chapter identifies that employers have a duty to protect their workers' mental and psychological health, and that this duty could be used to further combat the unfavourable treatment experienced by workers with psychosocial disabilities.

When workers are injured at work, Chapter 9 analyses how workers with mental injuries are discriminated against when compared to workers with physical or sensory injuries. Workers' compensation laws employ a range of arbitrary means to reduce the capacity of workers with mental injuries from bringing claims. Where workers are able to bring a claim for compensation, workers' compensation laws expressly require that workers with mental injuries are provided less compensation than workers with other injuries. Discrimination is also present when workers seek compensation through the law of tort. Tort law has a long and sustained history of regarding mental injuries as less worthy of support when compared to other injuries.

Finally, Chapter 10 moves away from identifying regulatory gaps and proposing reforms, and instead seeks to analyse how existing termination protection laws could provide some form of remedy for workers with psychosocial disabilities. While this is an imperfect option, for many workers it can afford a remedy where the cost of using anti-discrimination laws would be too high, both in terms of emotionally coming out as having a disability, and professionally, as stigma damages future work prospects.

The problem of ableism against workers with psychosocial disabilities is not confined to a single jurisdiction and permeate across all jurisdictions analysed in this monograph. The stigma, exclusion and devaluing of worth is not caused by rogue workers or invisible social forces, but by lawmakers who turn bills into statutes and by courts who silently apply ableist norms and discriminate against workers because of their impairment type. This monograph highlights an unacceptable truth: to live with ability diversity is to live with adversity.