Searching for the Absent Citizen:
Negotiating Citizenship, Human Rights and Social Justice for People with Disabilities in International and Domestic Legislation and Policy

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Thesis submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy

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April 2007
DECLARATION

No part of this thesis has been submitted for a higher degree to any other university or tertiary institution. To the best of my knowledge, any theories or research that are not my own have been acknowledged in the text.
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References
This thesis is an examination of the extent to which international and domestic policy discourses and practices facilitate or impede parity of participation and citizenship rights of people with disabilities. It explores how the United Nations (UN) and two nation-states (Australia and the United States) accommodate human rights and social justice for people with disabilities in three key policy domains: (i) international rights-based instruments; (ii) domestic social security laws/policies; and (iii) domestic anti-discrimination laws/policies. The key questions under consideration involved the following investigations:

- How might an enabling theory of citizenship which accounts for social justice and human rights be envisioned?
- To what extent do international and domestic disability policy discourses and practices constrain or facilitate parity of participation and citizenship for people with disabilities?
- What capacity do domestic legislation and policies have in redressing injustices at structural and status levels?
- To what extent does the emphasis on welfare-to-work (or ‘workfare’) policies exacerbate key tensions and contradictions in current federal disability policies in both Australia and the United States?

To answer these questions, this thesis uses Nancy Fraser’s theory of social justice as a framework for locating the three key policy domains under investigation. Although Fraser does not specifically refer to disability in her work, her work is developed here to take into account the circumstances of people with disabilities. In particular, Fraser’s two-dimensional conception of justice (embodying the twin policy principles of redistribution and recognition) is used to highlight the ways in which international and domestic discourse and legislative/policy practices must begin by redressing injustices simultaneously at the structural and status levels, if people with disabilities are to have greater possibilities of equality in all socio-cultural and political-economic realms.
ACKNOWLEDGEMENTS

❖ To my supervisor Professor Bettina Cass, who is without a doubt the perfect mentor that everyone wishes for! Thank you for offering to me your incredible intellect and advice; for giving your time, energy and wisdom; for guiding me through all the landmines; and for constantly reminding me of the motto, ‘never panic!’ You have been my rock of support and are truly an inspirational supervisor, writer, lecturer, and woman. I am honoured and lucky to have worked with you on this thesis.

❖ To my associate supervisor Professor Terry Carney who has offered such valuable feedback and advice throughout. Thank you for your astute insights, your support, and for steering me through the complex literature.

❖ Thank you to the University of Sydney Sociology Department and to the SPRC for offering sound advice and providing me with the resources, support and patience while I complete.

❖ Thank you to Joel Handler and Ted Benjamin for all your support during my year at UCLA.

❖ Thanks to my editor Denise Thompson (and in earlier days Frances Parker) for thoroughly paying attention to all the details.

❖ To the women and men with disabilities who started me on this journey; thank you for telling me how it was; for opening my eyes to how it still is; and then encouraging me to do something about it (in particular, Leigh, Clare, Geoff, Dawn and Maureen).

❖ To Mum and Dad, the two most intelligent people I know – without you this would have never been possible (and I don’t just mean in the biological sense!) Thank you for surrounding me with array of books when I was young; for teaching me to question all truths; and for encouraging me to explore all possibilities. Thank you for unconditionally supporting all my choices over the years (McDonald’s Manager to Academic - who would have thought!) There are a billion other things I could say here, but in a nutshell: thank you for my good looks, my big brain and for giving me lots and lots of money!

❖ To my brother Tim, for attempting to read my stuff (that one time) and finally admitting that your little sister is smarter than you!

❖ To my colleagues and friends; Jane Mears for your unwavering positive energy – thanks for all the lunches, conversations and encouragement, and for sharing this journey with me (as we always say, we are so lucky to have Bettina!) Dr. SP1, for the countless hours of support and understanding, and for helping me pack and unpack in every move! Dr. John, for giving me all the philosophical discussions and coffee I so desperately needed.

❖ Special thanks goes out to my friends and tribe: Lynn Rosenthal, Dr. Tim, Dr. Al, Alistair, Kate OB and Kate P – each of you have uniquely been part of this chapter of my life: luffing and amusing me; counselling and listening to me; partying and playing with me; and most importantly, distracting me when needed (and usually when not!)

❖ The Grammy for best Female Vocalist goes to Ingrid Butler for sharing in the loudest laughs; the longest whines; the silliest of moods; the best nights out (the worst hangovers!); and most importantly, for reminding me every single day that there is life beyond a thesis – we’ll always have Vegas baby!

❖ The Golden Globe for best Female Supporting Cast jointly goes to Pooja and Yuvisti for being the greatest uter in this planet! Thanks for creating a space where we can hysterically laugh and cry; be smart and dumb; talk shallow and deep; work and play; and above all else, never apologise for who or what we are.

❖ I would like to give the Oscar for Outstanding Support (and Good Looks) to Dr. Pol McCann, who has travelled with me from the very beginning of this ten year journey – sharing in all the intelligent (and not so smart!) times. So much to say, so little time (will this thesis end already!!), so a simple thanks for being that one person who has been by my side through all the very best and all the very worst of conditions.

❖ Finally, to Sir William Adinkwuye for changing my life when I least expected it. Thank you for your inspiration, encouragement, unconditional love, support and understanding. It’s nice to finally be home.
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<td>ACOSS</td>
<td>Australian Council of Social Service</td>
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<td>ADA</td>
<td>Americans with Disabilities Act</td>
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<tr>
<td>AIHW</td>
<td>Australian Institute of Health and Welfare</td>
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<tr>
<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights (UN)</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRIPA</td>
<td>Civil Rights of Institutionalized Persons Act (US)</td>
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<td>CSTDA</td>
<td>Commonwealth State/territory Disability Agreement (Australia)</td>
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<td>DDA</td>
<td>Disability Discrimination Act (Australia)</td>
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<tr>
<td>DEST</td>
<td>Department of Education, Science and Training (Australia)</td>
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<td>DEWR</td>
<td>Department of Employment and Workplace Relations (Australia)</td>
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<td>DI</td>
<td>Disability Insurance (US)</td>
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<td>DSA</td>
<td>Disability Services Act (Australia)</td>
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<td>DSaRI</td>
<td>Disability Studies and Research Institute (Australia)</td>
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<td>DSP</td>
<td>Disability Support Pension (Australia)</td>
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<td>FaCS</td>
<td>Department of Family and Community Services (Australia)</td>
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<td>HRC</td>
<td>Human Rights Committee (UN)</td>
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<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission (Australia)</td>
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<td>ICCPR</td>
<td>International Covenant of Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant of Economic, Social and Cultural Rights</td>
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<td>ICF</td>
<td>International Classification of Functioning, Disability and Health</td>
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<td>ICIDH</td>
<td>International Classification of Impairments, Disabilities and Handicaps</td>
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<tr>
<td>ILO</td>
<td>International Labor Organisation</td>
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<tr>
<td>LHPDC</td>
<td>Law, Health Policy and Disability Center (US)</td>
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<td>NATSEMM</td>
<td>National Centre for Social and Economic Modelling (Australia)</td>
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<td>NCD</td>
<td>National Council for Disability (US)</td>
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<tr>
<td>NCH</td>
<td>National Council on the Handicapped (US, now named NCD)</td>
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<tr>
<td>OECD</td>
<td>Organisation of Economic Cooperation Development</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights (UN)</td>
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<td>OPCS</td>
<td>Office of Population Censuses and Surveys (United Kingdom)</td>
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<td>PDCA</td>
<td>Physical Disability Council of Australia</td>
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<td>People with Disability Australia</td>
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<td>Social Security Administration (US)</td>
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<td>Ticket to Work and Work Incentives Improvements Act (US)</td>
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<td>United Nations</td>
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<td>UPIAS</td>
<td>Union of the Physically Impaired Against Segregation (United Kingdom)</td>
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<td>US</td>
<td>United States</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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<td>WPA</td>
<td>World Program of Action Concerning Disabled Persons (UN)</td>
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<td>WWDA</td>
<td>Women with Disabilities Australia</td>
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Dedicated to my parents
INTRODUCTION
INTRODUCTION

[The study of citizenship is about] addressing injustices suffered by any people around the world, making these injustices appear in the public sphere, enabling these groups to articulate these injustices as claims for recognition, and enacting them in national as well as transnational laws and practices, and thus bringing about fundamental change ( Isn and Turner, 2002: 2).

It is estimated that across the world there are at least 650 million persons with disabilities, or approximately 10 per cent of the global population (United Nations, 2005b). In the majority of countries, at least one out of ten people has a physical, mental or sensory impairment (Despouy, 1993). Millions of people with disabilities experience profound socio-cultural and political-economic exclusion in a number of human rights areas. These include: high rates of poverty (Bradbury, Norris and Abello, 2001; Morris, 2004; Saunders, 2006); disadvantages in employment and labour market programs (Oliver, 1990; Barnes, 2000; O'Reilly, 2003; Wilkins, 2003), inadequate social security benefits (Dixon and Hyde, 2000; Parker and Cass, 2005; Carney, 2006); transportation and housing barriers (Zarb, 1995; Wittenburg, 2003); discriminatory social attitudes (Davis, 1997a; Barnes, 1991; Abberley, 1993; Longmore, 2003), disadvantages in international and national legal systems (Jones and Marks 1999; Carney, 2000; Meekosha, 2000; Parker, 2006); and higher vulnerability to abuse, institutionalisation and imprisonment (Marks, 1999; Thomas, 1999; Longmore and Umansky, 2001; Frohmader, 2002; Block, 2002; Dowse, 2004).

In sum, across the world people with disabilities remain one of the most marginalised and disadvantaged groups in all areas of daily living.

Quantification alone is not a sufficient basis to analyse the problems that people with disabilities face. International literature has concluded it is systemic barriers in socio-cultural and political-economic realms that have led to conditions of marginalisation and disablement (Oliver, 1996a; Hahn, 1997; Fleischer and Zames, 2001; Waddington, 2001; Pawlick and Stroick, 2004; Barnes and Mercer, 2005). These issues have been placed within wider debates of citizenship, human rights and social justice. While conceptions of and policies for disability in the post World-War II period have shifted from a paternalistic welfare approach to an acknowledgement that people with disabilities have full and equal rights, they remain less than full and equal.
citizens. People with disabilities are denied both the status of equal citizenship, and the means and opportunities of equal citizenship as well. This occurs in both international and national policy/legislative discourse and practice. At the international level, despite over fifty years of an entrenched rhetoric of rights by the United Nations, the principles underpinning human rights discourses are often implicitly steeped in disablist assumptions; that is, discriminatory, oppressive or abusive behaviour arising from the belief that people with disabilities are inferior to others. Unlike sexism or racism, the word 'disablism' is not part of policy discourse. Yet it describes an all-too-real issue. Even in advanced liberal welfare states like Australia and the United States, federal disability policies are entrenched in contradictions and tensions, and impede rather than facilitate social and economic participation (Diller, 1998; Wittenburg and Favreault, 2003; Parker and Cass, 2005; Carney, 2006c).

This thesis is an examination of the extent to which international and domestic policy discourse and practices facilitate or impede parity of participation and citizenship rights of people with disabilities. It explores how the UN and two nation-states (Australia and the United States) accommodate human rights and social justice for differently-abled individuals in a number of interrelated policy domains. Since the genesis of the post-war welfare state, there have been a number of distinct developments in international and domestic disability policy, along with shifting notions of rights and justice, and the repositioning of what it means to be a citizen. This thesis traces these developments in three key policy domains that offer potential for facilitating parity of participation and citizenship: (i) international UN rights-based instruments; (ii) domestic social security laws/policies; and (iii) domestic anti-discrimination laws/policies. In addition to analysing the extent to which international instruments enable human rights and social justice for people with disabilities to become embedded in policy and practice at the level of the nation state, the thesis undertakes a comparative analysis between Australia and the United States, highlighting how neo-liberal reforms in liberal welfare regimes have further
constrained participation opportunities for people with disabilities in all socio-cultural and political-economic realms.¹

The Development of Liberal Welfare Regimes

Although there are significant differences in the development of the post-war welfare state in Australia and the United States, it has become customary in some comparative literature to accept Esping-Andersen’s (1990) categorisation of Australia and United States as liberal welfare regimes, denoting minimal intervention by governments in market arrangements (particularly labour market arrangements) and lack of provision of comprehensive systems of social protection based on the welfare principle of social right. Liberal welfare regimes are characterised by dependence on means-tested social assistance; a needs-based conferral of entitlements; constructing a work-welfare dualism; and a minimal emphasis on decommodification. Esping-Andersen (1990) linked the provision of social rights with what he termed the decommodification of labour, whereby services are provided as a right of citizenship and a person can maintain a livelihood without reliance upon market participation. He argued that the extent to which the rights embodied in social programs promote a decommodification of labour varies across welfare states. Traditionally, liberal regimes limit it by providing limited benefits subject to means-tests (as in Australia), or social insurance-type contributions based on market work as the legitimised, most generous tier, accompanied by much less generous, means-tested social assistance for low income people (as in the US) (Orloff, 1993). However, contemporary changes in liberal welfare states have repositioned the social rights of individuals (including those with a disability). These reforms embody a recommodification of labour; that is, a prioritising of market participation as the only or main route to both welfare support and recognition as a social citizen, and the tightening of eligibility rules and cutting of benefits (Sainsbury, 2001; Shaver, 2002). As well as Australia and the United States, Esping-Andersen (1990) classifies New Zealand, Canada and the United Kingdom as being part of a liberal welfare regime.

While an examination of welfare regimes is beyond the scope of this thesis, it is important to note briefly here that a number of prominent analysts have argued that,

¹Socio-cultural realm refers to the domains of human experience, social relationships and cultural understanding; political-economic realm relate to the politics of income and resource distribution.
although Esping-Andersen's typology highlights the similarities of countries clustering in the same regime, his earlier work does not clarify the significant and important differences between individual welfare states, in particular between the Australian and US welfare states (e.g. Castles, 1996; Myles, 1996). However, this issue is acknowledged in his later work (1999), where he notes that the prototype which he drew upon for the liberal welfare regime was the United States, and that other countries, in particular Australia, have differed in many respects from the American market-driven norm of liberalism in its welfare state arrangements. O'Connor, Orloff and Shaver (1999), while maintaining that there are important differences between liberal nation-states, argue that liberalism can be viewed as a collective set of ideologies and institutional arrangements that have over time shaped current patterns of policies. They suggest that liberal welfare states have a number of commonalities in terms of the social, economic and political factors that influence the development of social policy. This includes a common British cultural and political heritage; strong individualistic currents in the cultures; distinctive family arrangements and strong affirmation of women's independence; preference for private over state provisions; and strong liberal ideologies in political parties. O'Connor et al (1999:39) therefore maintain that liberal states, including Australia and the United States, share "impressive similarities in terms of the political factors found to be significant for contemporary policy outcomes that distinguish them from other western countries with democratic institutions, capitalist economies and high standards of living".

Although analysis of the convergence (and divergence) of welfare states within and between welfare typologies is a valuable area for consideration, this thesis will not engage in such debates. The focus of the comparative analysis contained here is not about welfare regime analysis per se, but a comparative analysis of the extent to which domestic legislation and policies facilitate parity of participation, citizenship, social justice and human rights for people with disabilities. Therefore, it is maintained here that, while Australia does not necessarily adhere in all respects to a strict liberal regime prototype, it does in many salient ways remain part of the liberal welfare regime as outlined by Esping-Andersen (1990) and O'Connor et al (1999), and both Australia and the United States will be referred to as such throughout this thesis.
It is also important to note briefly that Esping-Andersen's categorisation has been widely criticised for not paying sufficient attention to a gendered analysis of welfare regimes (e.g. Orloff, 1993; Sainsbury, 1996; O'Connor et al, 1999). O'Connor et al (1999:2) outline how state programs and social policies impede the citizenship of women; for example, systems of social provision reward those individuals who engage in the paid labour market more than those engaged in unpaid care giving; workplace policies ignore workers' caregiving responsibilities; and laws refuse women the capacity to control their reproductive lives or fail to protect them from systematic violence. Institutionalised welfare state discourse and policies that impede citizen rights are problematic, not only when looking at social citizenship of women, but also for women and men with disabilities, as these groups all have unequal access to social, political and civil rights. While a wide range of valuable contributions have been made to an analysis of gender and the welfare state (e.g. Orloff, 1993; Lewis, 1992; Sainsbury, 1996; O'Connor et al, 1999; Siim, 2000; Lister, 2003), there is limited systematic analysis of the welfare state and disability. The welfare state is embedded in institutionalised sexist and disablist structures and attitudes, and insufficient attention has been given to policy discourse and practices that facilitate or impede the parity of participation and citizenship of people with disabilities in liberal welfare states.

**National Case Studies: the Australian and US Welfare States**

Welfare state policies and practices developed in liberal welfare regimes after World War II were not concerned first and foremost with welfare or social security, but with the macro-economic and cross-national regulatory controls and agreements which would generate and maintain full employment. In particular, the basis of modern welfare states was not only full employment, but a male breadwinner model of employment (Sainsbury 1996; O'Connor et al, 1999; Cass, 2003) predicated upon an able-bodied individual, usually a male, participating in the labour market. The modern welfare state was characterised as being part of the post-war 'Golden Age', which was purported to be an era of prosperity, equality and full employment (Esping-Andersen, 1996:1).

The Australian post-war welfare state as it applied to people of workforce age was seen by Prime-Minister Chifley as a 'safety net' which would be required to support
working men and their families only during short-term unemployment periods. The introduction of unemployment and sickness benefits in the period of post-war Reconstruction (1942-1947) built significantly on the foundations of the Australian social security system set down originally in the first, nation-building decade of the twentieth century following Federation, when age and invalid pensions were introduced. This system has remained a non-contributory, income-tested needs-based system, which is underpinned by the principle of redistribution from consolidated tax revenue (Cass, 2003). This was later, from the late 1980s, augmented by contributory employment-based superannuation, taking retirement incomes policy increasingly away from needs-based redistribution through public age pension and towards an employment-based contributory system (Shaver, 2001).

The social security and welfare systems in the United States began quite differently from the Australian system — as a two-part contributory social security system accompanied by a much more residual means-tested welfare system. The US Social Security Act of 1935 set up a two-track system of citizenship: the first being social security, i.e. old-age and short-term unemployment insurance, which required a strong and secure history of workforce participation; and the second being social assistance for families with dependents, which had much less generous benefits than social security (Myles, 1996). During the post-war boom from the 1940s to the 1970s, the market was the main source of welfare and security. Unlike Australia — where social security provision was established as a social entitlement provided for by the federal government — the federal government in the United States during the post-war period encouraged American unions to establish private social security benefits (Myles, 1996). This meant that social security was not thought of in the popular consciousness as ‘welfare’ or even as part of the welfare state at all, but rather as contribution- and earnings-related benefits. Gordon (1992) notes that US social security was seen as ‘respectable’ and comprising a right or entitlement to be safeguarded and defended; welfare on the other hand, as a mean-tested system of social assistance or ‘workfare’ programs for very low income people, was (and remains) residual, discretionary and stigmatising.

Since the 1970s there has been a slow erosion of the principles underpinning modern welfare states, evident in Australia and the United States, both of which have seen a
significant shift in welfare discourse and practices. Policy responses by various
governments since the 1980s have shifted definitions of citizenship until they have
become fully equated with market participation. Castles (1996) argues that, despite
similar economic objectives, governments in various welfare states have sought to
achieve their ends by quite distinctive policy means. He importantly notes that this
implies that the future trajectory of welfare state development is shaped, not only by
broad societal and economic developments, but also by political choice and agency.
Nevertheless, under conservative federal governments in both Australia and the
United States, there has been a move towards a ‘post-welfare’ policy environment.
Federal governments have replaced notions of welfare with ‘workfare’, advocated
new policy principles, particularly the recommodification of labour for most sections
of the working age population including people with disabilities, and promoted an
individualised model of citizenship that systematically ignores the social, economic
and labour market conditions in which people with disabilities are obligated to seek
employment. It is argued in this thesis that this ‘new welfare’, rather than
ameliorating discrimination and injustices, is embedding structural disadvantage.

The Focus of this Inquiry

This thesis is an examination of the ways in which international and domestic policy
discourse and practices facilitate or impede parity of participation and citizenship of
people with disabilities. To do this, it engages with Nancy Fraser’s (1997, 1998,
2003) theory of social justice: used here as a framework for locating the disability
policy domains of UN rights-based instruments, and domestic social security and anti-
discrimination legislation and policies. Although Fraser does not specifically refer to
disability in her work, her theory of social justice (embodying the twin policy
principles of redistribution and recognition) can nonetheless be used to highlight the
multiple (and at times contradictory) sources of discrimination and marginalisation
that people with disabilities face in all socio-cultural and political-economic realms.
Key questions under consideration throughout this thesis involve:

- How might an enabling theory of citizenship which accounts for social justice and
  human rights be envisioned?
- To what extent do international and domestic disability policy discourses and
  practices constrain or facilitate parity of participation and citizenship for people with
  disabilities?
- What capacity do domestic legislation and policies have to redress injustices at
  structural and status levels?
• To what extent does the emphasis on welfare-to-work (or 'workfare') policies exacerbate key tensions and contradictions in current federal disability policies in both Australia and the United States?

It is argued in this thesis that, if people with disabilities are to achieve parity of participation and citizenship, Fraser's twin principles of recognition (via policies which recognise and respect difference) and redistribution (via policies which promote social equality) are simultaneously necessary. This can be potentially problematic for both international and domestic policy discourse and practices. People with disabilities continue to experience maldistribution and misrecognition in all socio-cultural and political-economic spheres – for example, in the areas of employment, housing, federal policies and cultural discrimination (more detailed concrete examples of these issues will be elaborated on throughout this thesis) – and affirmative action policy strategies (e.g. UN rights-based instruments; and social security and anti-discrimination policies), while necessary, are insufficient in themselves if they fail to also address the underlying root-causes that generate such injustices in the first place.

Methodological Approach

This thesis utilises a comparative policy analysis methodology to investigate the key questions under consideration. Through an examination of the theoretical literature on disability models, social justice, human rights and citizenship, it was found that this method offers the most valuable framework in which to locate a comparative analysis of international and domestic legislation and policies pertaining to people with disabilities: in particular, to explore how the UN and Australia and the United States facilitate citizenship, rights and social justice for differently-abled individuals in a number of interrelated policy domains. A systematic review of international and domestic government documents and reports, as well as an analysis of the theoretical literature on human rights, disability and citizenship, was undertaken to assess the extent to which three key policy domains offer potential for facilitating parity of participation and citizenship. The first domain (international UN rights-based treaties/instruments) was selected because international conventions have been drawn upon to accord symbolic and material rights for people with disabilities both internationally and domestically. The second domain (domestic social security laws/policies) has been chosen because income support is a fundamental social right
and may enable equal participation in society, at least if provided with respect for
difference and at levels which allow for an adequate standard of living. The third
domain (domestic anti-discrimination laws/policies) has been selected because
equality of opportunity for people with disabilities requires the amelioration or
outlawing of discrimination in key areas of participation (particularly in the labour
market) to achieve social citizenship. As noted earlier, millions of people with
disabilities across the world experience profound socio-cultural and political-
economic exclusion in a number of human rights areas. Therefore a transnational and
cross-national comparative analysis of key policy domains is most useful for
understanding the circumstances of people with disabilities under different policy
settings.

**Defining Disability**

Definitions of disability are deeply contested, a contestation which has significant
implication for policies. Conceptions of disability have changed since the post-war
period, shifting from notions of disability as a status involving isolation and
segregation, to recognition of equal rights and participation. Two models of disability
- the medical model and the social model - have been highly influential in both the
definition and conception of disability. The medical model situates disability as
inherent in the individual, and as a personal tragedy or illness. The social model is the
antithesis of the medical model in that it focuses on a disabling environment and
oppressive structural barriers, rather than on an impaired individual (Barnes, Mercer
and Shakespeare, 1999). The differing conceptions of disability contained within
these two models have been operationalised in international and national disability
policies, programs and legislation.

One of the most commonly drawn upon international classifications in national policy
making is that offered by the World Health Organization (WHO). In 1976, the World
Health Assembly of WHO approved for publication a classificatory instrument
incorporating a version of the social model. The result, eventually published in 1980
for trial purposes, was the International Classification of Impairments, Disabilities and
Handicaps (ICIDH) (WHO, 1980). The ICIDH was originally proposed to describe
the effects of chronic conditions such as arthritis and the long-term effects of
rehabilitation. By the time of its 1993 reprint, the ICIDH had been translated into 13
languages and was used in dozens of contexts for a wide variety of purposes, e.g. health outcomes research, population surveys, codifying health information, vocational assessment, and as an organisational basis for social policy (Bichenbach et al, 1999). However, some strong criticism was levelled at the ICIDH, both from people with disabilities and from many organisations and professionals representing them, who were critical of the inadequate recognition given to the role of the environment in the creation of disability (AIHW, 2003). Seven years of revision and testing ensued, and in May 2001 the new International Classification of Functioning, Disability and Health (ICF) was endorsed by the World Health Assembly. The ICF has been developed for use in describing functioning and disability as multi-dimensional concepts relating to the body functions and structures of people, the activities they do, the life areas in which they participate, and the factors in their environment which affect these life experiences. In the ICF, a person's functioning or disability is conceived as a dynamic interaction between health conditions and environmental and personal factors (WHO, 2001). Disability is the umbrella term for any or all of: an impairment of body structure or function (e.g. spinal chord injury); a limitation in activities (e.g. difficulty in mobility); and/or a restriction in participation (e.g. employment). The key definitions of the ICF components are:

- **Body functions**: Physiological functions of body systems (including psychological functions).
- **Body structures**: Anatomical parts of the body such as organs, limbs and their components.
- **Impairments**: Problems in body function and structure such as significant deviation or loss.
- **Activity**: Execution of a task or action by an individual.
- **Participation**: Involvement in a life situation.
- **Activity limitations**: Difficulties an individual may have in executing activities.
- **Participation restrictions**: Problems an individual may experience in involvement in life situations.
- **Environmental factors**: Physical, social and attitudinal environment in which people live and conduct their lives. These are either barriers to or facilitators of the person's functioning (AIHW, 2003:6).

The ICF provides a framework for the description of human functioning on a continuum, and not just at the extremes. Importantly, unlike its predecessor, it combines the major models of disability. As well as the relevance of underlying health conditions and their effects, it recognises the role of environmental factors in
the creation of disability, and it acknowledges the importance of social and economic participation as a desired outcome. The ICF is intended for use in a wide range of areas including insurance, social security, employment, education, economic life, social policy, legislation and environmental modification. Furthermore, it is accepted as one of the UN’s social classifications, and incorporated into The Standard Rules on the Equalization of Opportunities for People with Disabilities (the Standard Rules). The Australian Institute of Health and Welfare (AIHW) (2003) acknowledges the importance of having a broad, common framework of definitions and classifications in order to understand and improve policies and services designed to meet the needs of people with disabilities.

In both Australia and the United States, the ICF is operationalised (albeit to varying degrees) in legislation, policies and programs for people with disabilities, and is used within this thesis. In addition, the term (with some variations) ‘people with disabilities’ and/or ‘differently-abled’ people is used throughout this thesis. This adheres to the preferred language of the disability rights movement in both Australia and the United States, which places the individual before the disability and acknowledges that all individuals have differing abilities across their lifespan.

The Structure of the Analysis

The first chapter outlines the theoretical framework of this thesis, beginning with an examination of the dominant theories of disability. There is a particular focus on the two hegemonic models of disability mentioned above: the medical model and the social model. These models continue to have a significant influence on policy discourses and practices of disability, and underpin notions of participation and citizenship. The chapter will then move to an analysis of key citizenship theories, arguing that while citizenship theories offer an influential framework for positioning human rights and social justice, as currently envisioned and practiced such theories are inadequate to promote the full and equal participation of people with disabilities. As already mentioned, Fraser’s (1997, 1998, 2003) theory of social justice is drawn upon, and it is suggested that this framework has the potential to offer an enabling theory of citizenship for differently-abled people. It is argued in this chapter that a two-dimensional conception of justice is imperative, as people with disabilities simultaneously experience misrecognition (e.g. marginalised status) and
maldistribution of resources (e.g. disabling structural barriers) in all socio-cultural and political-economic spheres.

The second chapter examines the extent to which UN rights-based instruments are in fact accommodating the rights and justice of a person with a disability. It offers an historical overview of disability within the UN system, beginning with an analysis of ‘binding’ rights-based treaties. The chapter explores the continued usefulness of such treaties in advancing human rights both internationally and domestically. Examples will be drawn from Australia, looking at how various governments have incorporated the international disability-relevant articles into their national human rights framework. The chapter will then turn to an analysis of the non-binding UN instruments specific to disability. It will demonstrate that, although not legally binding, such instruments continue to represent an important moral and political commitment to the rights and justice of people with disabilities. This chapter locates the UN rights-based instruments within Fraser’s framework of redistribution and recognition, arguing that incorporating the principles of redistribution and recognition into human rights discourses, would better facilitate the principles underpinning rights – alongside the practices of rights-based policies – to ameliorate injustices that impede participation of people with disabilities at both objective (structural) and intersubjective (status) levels. In closing, the future role of the UN human rights system is assessed in light of the new treaty on the rights of persons with disabilities, which was agreed upon by the UN Assembly in September 2006.

Chapter Three undertakes a comparative analysis of social security legislation and policies for people with disabilities in Australia and the United States, beginning with an overview of the historical development of disability income support arrangements culminating in the current period of welfare changes since 1990. It positions the Australian and the US social security systems internationally, and demonstrates that reforms to disability policies – while characterised as promoting incentives for social and economic participation – have instead systematically retreated from recognising and taking account of the wider conditions that influence the capacity for equality of opportunity in socio-cultural and political-economic realms. The chapter outlines the ways in which developments in policy and legislation have been underpinned by a belief that an individual with a disability is a ‘problem’ within the welfare system, a
belief that is reflected in significant tightening and restriction of the eligibility criteria and assessment procedures for disability income support. This chapter highlights the conflicting principles that underpin social security arrangements in Australia and the United States, locating these policy tensions once again within Fraser's framework of justice. It suggests that, if people with disabilities are to achieve parity of participation and citizenship, social security arrangements must contain both principles of recognition (via policies that recognise and respect difference) and redistribution (via policies which promote social equality). In closing, the chapter demonstrates that, under the current neo-liberal reform agenda of conservative federal governments, social security is in itself an insufficient policy response to ameliorate the discrimination and marginalisation that people with disabilities face.

Chapter Four provides a comparative analysis of anti-discrimination legislation in Australia and the United States: examining the extent to which the Disability Discrimination Act (DDA) in Australia and the Americans with Disabilities Act (ADA) in the United States facilitate equality of opportunity for people with disabilities. To gain an understanding of the extent to which domestic legislation embodies the principles and practices of human rights and social justice, the chapter outlines the political events that led to the enactment of this legislation in both countries, highlighting the critical role of the disability rights movement. The objective of drawing upon the ADA and the DDA is to demonstrate that, despite their stated aims (to reduce and eliminate discrimination), such pieces of legislation remain embedded in legislative and philosophical contradictions. As this chapter illustrates, it is the inherent contradictions in and between federal policies which hinder the full potential of progressive legislation for people with disabilities. Such contradictions have become further exposed over the past decade under conservative federal governments, as the advent of welfare reform in liberal regimes has shifted notions of citizenship, participation and equality. In closing, this chapter argues that national anti-discrimination laws remain a necessary, but insufficient, policy setting in themselves for parity of participation and citizenship.

In the final part of this thesis, there is a return to the key questions under consideration. The main issues from the previous four chapters are highlighted and brought together. It will be argued that if parity of participation, citizenship, human
rights and social justice is to be achieved in all socio-cultural and political-economic realms, then international and domestic legislation, policy and practice must begin by redressing injustices at the objective (structural) and intersubjective (status) levels *simultaneously*, via the twin policy principles of redistribution and recognition (as outlined in Fraser's theory of social justice). In closing, it is suggested that the restructuring of liberal welfare states under current conservative governments have further embedded disablist structures and attitudes, particularly as reforms in key policy domains pertaining to people with disabilities have failed to include measures to deal with the underlying root-causes that generate injustices in the first place. The trajectory of 'welfare reform' in liberal welfare states like Australia and the United States poses great challenges to the promise of equality, rights and justice for all citizens, including, and especially, those with a disability.

This thesis now turns to an examination of key theories of disability, establishing the theoretical framework in which to locate subsequent comparative analysis of international and national social policies for people with disabilities.
CHAPTER ONE
CHAPTER ONE

The Absent Citizen: Enabling and Disenabling Discourses of Disability

Disability is ubiquitous, in the obvious sense that human existence without disability is unimaginable (Bickenbach et al. 1999:1182).

In western nations from the beginnings of industrialisation to the present day, there has been a distinct shift in approaches to disability, from notions of isolation and segregation, to notions of inclusion and empowerment. By the same token, disability policy has shifted from a paternalistic welfare approach to an acknowledgment that people with disabilities have full and equal participation rights. Dominant theorising has centred around various models of disability, most of which have located the 'problem' at either extreme of a long continuum. Two prominent models, the medical model and the social model, have been crucial in contributing to contemporary conceptions of disability. The medical model locates disability within the individual, as a personal tragedy or illness. The social model is the antithesis of the medical model as it focuses on a disabling environment and oppressive structural barriers, rather than on an impaired individual (Barnes et al, 1999). While it is acknowledged that other models and theories of disability exist, it is the medical and social models which have been, and continue to be, the hegemonic discourses of disability. The recognition of the critical influence of these hegemonic models has resulted in an extensive history of analysis producing large volumes of valuable research (e.g. Abberly 1987; Barnes 1991, 1999, 2000; Corker and French 1999; Davis 1996, 1997; Oliver 1990, 1995, 1996; Shakespeare and Watson 2002; Thomas 1999, 2003, to name just a few), and while the debates are by no means exhausted, it is not the intention of this author to add another contribution within this area. While the medical and social models have been extremely influential in the theoretical analysis of disablement, such ideologies also underpin the social welfare policies resulting from the recent fundamental changes to concepts of disability and the treatment of people with disabilities (a point to be taken up further in Chapter Three).
Public policies demonstrate how particular nation states view their citizens, and while history has demonstrated a clear shift in attitudes about and policies for disability over the past few decades, a person with a disability remains less than a full and equal citizen.\(^2\) This has been exacerbated in recent years as western liberal welfare states have undergone significant changes. New policy discourses are being embraced, which have shifted traditional notions of participation and equality and have repositioned what it means to be a citizen (Parker and Cass, 2005). Citizenship discourses are powerful ways in which individuals with disabilities may be accorded or denied rights of recognition, redistribution and participation, but the links between citizenship and disability have been largely overlooked by many writers. Theories of citizenship have traditionally been predicated upon notions of the universal subject – a subject which presupposes a white, able, male body engaged in market participation. Citizenship discourses appear to offer very little to people with disabilities either theoretically or practically, as disability has been absent from almost all key citizenship debates. Dominant theories of liberal citizenship highlight individualism and rights (e.g. Marshall, 1963). Civic republicanism and communitarianism stress obligations, participation and community (e.g. Oldfield, 1990). These hegemonic ideologies of citizenship have offered a dichotomy of rights versus participation with space only for the able-bodied subject engaged in market participation. In response, feminist theories (e.g. Young, 1998; Pateman, 1992; Lister, 2003) have presented a variety of alternatives informed by themes of private versus public, inclusion versus exclusion, and have expanded the range of participation from the market to caregiving and attempted to offer a view of the subject as an embodied being. However, even in the most radical of reconstructions dichotomies remain, and the continuous reference point is always that of the ‘able’ body, leaving no space for disabled subjectivity.

Classical and contemporary citizenship discourses are underpinned by notions of identity politics which presuppose an equal citizenship based on achieving an equal identity. This is problematic for a person with a disability as he/she needs to be enabled access to equal rights not based upon identity politics – for this will result in disability identity being viewed as less worthy than that of the (temporarily) abled-

\(^2\) Full and equal citizenship in this thesis denotes the full inclusion of persons with disabilities as equal citizens and participants in all aspects of life (as outlined in the 2006 UN Draft Convention for people with disabilities).
bodied identity – but upon achieving equal social-cultural and political-economic rights. Given the relative absence of disability in citizenship debates, the question can be raised, can the pinnacle of justice for a person with a disability be realised through accomplishment of citizenship? Voet (1998:73) states, “Instead of seeing citizenship as the means to realise rights, we should see rights as one of the means to realise equal citizenship”. This is a critical point for people with disabilities and their advocates. Obtaining equal socio-cultural rights (for example, through full and equal human dignity attainable with adequate social security benefits), and obtaining equal political-economic rights (for example, through full and equal justice attainable with an accessible labour market), are mutual goals of disability policy, although they are currently constructed as contradictory. This is particularly evident in the liberal welfare regimes where federal disability policies are underpinned by discourses of disability bifurcated by dominant citizenship debates that revolve around participation versus rights, private versus public or inclusion versus exclusion. Within these models, a person with a disability is an oxymoron.

This chapter begins with a brief historical overview of the dominant discourses of disability theory – namely the medical model and the social model. It also offers a brief overview of the social constructionist approach to disability, and of the feminist approach to disability. The latter two approaches are not delineated to any great extent within this thesis; however an analysis of disability discourses would remain incomplete without acknowledgement of the valuable work which has been undertaken in both sociological and feminist writings. It is demonstrated that these approaches have been critical, each in a different way and to a different extent, in solidifying binary discourses of disability theory, in underpinning notions of social citizenship, and subsequently influencing social welfare provisions for people with disabilities. Helen Meekosha and Leanne Dowse (1997:67) pose the important question, “How do we begin to rewrite the story of what it means to be a disabled citizen?” The aim of this chapter is not to contribute further to debates of citizenship per se; rather the hegemonic citizenship theories are delineated only through the lens of disability, for this is an absent site of analysis. The intention of drawing upon these theories is to show that, while citizenship discourses offers an influential framework for positioning human rights and social justice, as currently envisioned and practiced
such discourses are inadequate to promote the full and equal participation of people with disabilities.

Fraser’s theory of social justice highlights the fact that multiple, and sometimes competing, sources of discrimination and marginalisation can be entrenched within the very fabric of society. The chapter argues that, in line with international literature (e.g. Oliver, 1996; Hahn, 1997; Meekosha and Jakubowicz, 1999; Fleischer and Zames, 2001; Waddington, 2001; Pawlick and Stroick, 2004; Barnes and Mercer, 2005), it is the systemic barriers in socio-cultural and political-economic realms that have led to profound marginalisation and disablement. In closing, it suggests that such barriers have been disenabling for the citizenship of people with disabilities, exacerbating social and economic exclusion rather than promoting participation.

**The Medical Model of Disability**

The hegemonic discourse of disability in the post-war western world has traditionally been underpinned by a medical conception of disability. The rise of the medicalisation of disability is well documented (e.g. Oliver, 1990, 1995, 1996; Hahn, 1997; Linton, 1998; Hancock et al, 2000; Llewellyn and Hogan, 2000; Paterson and Hughes, 2000; Braddock and Parish, 2001; Smart, 2001; Williams, 2001). This literature has attributed the genesis of the medicalisation of disability to a rise in prominence of the medical professions in the nineteenth century, which legitimised some groups as ‘deserving’ of assistance. Concurrent with this were the activities of religious groups and charitable organisations, and the rise of workhouses for the poor – which often included people with disabilities. The literature (as noted above) outlines how one of the consequences of professionalisation was that people with disabilities were labelled as ‘sick’ and placed in a variety of medical institutions. This institutionalised segregation in the nineteenth century grew rapidly, and care and treatment of people with disabilities became based on knowledge and scientific reason and the growing acceptance of natural science that marked the scientific exclusion of people with disabilities from mainstream life. Consequently, the medicalisation of disability resulted in a context of exclusionary structures that contributed to notions of people with disabilities as being unable to cope with ‘normal’ life, and thus becoming constructed as the ‘other’. Activists have noted that the aversion to and avoidance of people with disabilities became embedded in wider social, political, economic and
attitudinal structures and subsequently the medicalisation of disability became a dominant and hegemonic discourse of disability.

This discourse is commonly referred to as the ‘medical model’ (a term to be utilised by this author), however it is important to note here that some prominent disability writers (e.g. Oliver, 1996a) believe that, rather than a medical model per se, there is an individual model of disability which has medicalisation as a significant component. The medical model of disability assumes it is the individual who is the ‘problem’, and focuses on the presumed biological reality of impairment. The framework of the medical model is that disability is a disease leading to a condition that requires treatment. The traditional goal is to seek ways in which the performance of the individual approximates ‘normality’ (Parsons, 1951; Zola, 1972). Analysis and intervention is directed towards the functional limitations of the individual, with a focus on ‘fixing’ the individual (This can be seen through the prominence given to rehabilitation – a perspective which has been well articulated by Safilios-Rothschild (1970:74-78). She outlines that:

The rehabilitation model suggests that once a person with an impairment becomes aware of their condition they must accept it and learn how to live with it. This is achieved through the maximisation of existing abilities. Within this framework, individuals with impairments are obligated to assume as many ‘normal’ functions as quickly as possible. They are not exempt from social expectations or responsibilities but must adapt accordingly. Additionally, they should co-operate with professionals and innovate and ameliorate new methods of rehabilitation. Clearly the locus of responsibility is seen to rest with the person with an impairment.

An example of how the dominant ideology operates is found in ‘conductive’ education. Oliver (1990:55) notes how the aim is to teach children with cerebral palsy how to walk, talk and engage in all other activities in as nearly normal a way as possible. No weight is given to the idea that the environment could be changed instead of the individual, nor is it expected that differences in modes of communication and ambulation might become more acceptable to the general population.

The ideologies of the medical model continue to permeate welfare paradigms for people with disabilities. While the following issues will be addressed further in Chapter Three, it is important to note briefly here how current paradigm changes in western liberal nation-states have reinforced a medicalised model of the concept and
measurement of disability. Social policies are increasingly being underpinned by notions of an impaired 'asocial' body. While current governments across a range of liberal nation-states are espousing medical model ideologies as a means of framing income support policies, concurrently labour force participation policies and programmes for people with disabilities are also being embraced by an individualised approach – one that places the person with a disability as a 'problem' in the labour market. This approach erroneously excludes wider social and economic conditions. It is problematic to assume that treatment/cure, rehabilitation/therapy, pity/compensation or control – ideologies of the medical model – are appropriate responses to disability policies as it focuses entirely on the individual who requires 'fixing'. Oliver (1996:30) argues that in health terms disability is equivalent to pathology and in welfare terms disability is equivalent to a social problem. Therefore to have a disability is to have at least a two-fold problem.

The Social Constructionist Approach to Disability

There are alternatives to the medical model, however. It is now widely accepted that the category of disability is not just a medical phenomenon but a social one as well. Many theorists (e.g. Davis, 1997; Wendall, 1997; Shildrick and Price, 1999) have argued that the disabled body demands a rethinking of the boundaries of sameness and difference, and that in determining what is 'normal', the problem lies not with the individual who has a disability, but with the standards that prevail within a particular culture. Sociological theorising about disability stands in stark contrast to the medical model approach, and one of the key perspectives that sociology has used as a means for explaining disability has been social constructionism. The aim here is to turn our attention briefly to how sociology has engaged with disability, although this will not be an exhaustive analysis of sociological accounts. As will be demonstrated below, while such accounts expand disability discourse beyond that of the medical approach, sociological theorising of disability remains inadequate as a means for analysing welfare policies and discourses.

Turner (2001) defines social constructionism as an historical and sociological account of how certain conditions such as disease, disability and impairment become accepted over time by the medical profession and wider society. Furthermore, this historical process is shaped by political struggles and economic interest. The analysis of social
reactions towards disadvantaged minority groups such as people with disabilities was central for sociologists working within the traditions of symbolic interactionism during the 1960s (e.g. Blumer, 1969). The analytical emphasis was on meaning, identity and the process of labelling, as well as exploring the relationship between disablement and socially proscribed behaviours. One of the more prominent early theorists was Erving Goffman, who used the concept of ‘stigma’. This, he claimed, was a term used traditionally to refer to a mark or blemish denoting ‘moral inferiority’ necessitating avoidance by the rest of society. Goffman (1963) suggested that the ‘stigmatised’ such as ‘the dwarf, the blind man, the disfigured … and the ex-mental patient’ are generally viewed as not quite human. For Goffman, the application of stigma is the outcome of situational considerations and social interactions between the ‘normal’ and the ‘abnormal’.

Williams (2001) notes that since the mid 1970s the main themes of sociological theorising about disability concern the quality of the human experiences of symptoms, illness, impairments and suffering, and how these are formed by factors outside personal experience. Whilst the biomedical model focuses on disease or dysfunction of the individual, sociological approaches focus on illness as a social phenomenon whose meaning and reality varies according to individuals, groups of individuals and circumstance. Sociological research on disability looks at the experiences of impairment, the social situations in which people live, and the effects of the combination of experience and place in the social structure (Barnes et al, 1999). Although disability has certain unifying features, sociologists are interested in the subjective variation in response to the ‘same’ illness and impairment and variation in meaning.

Social constructionism challenges the dominant constructions of disability which have established a deviant status for people with disabilities as ‘other’. For example, Legge and Cant (1988:2) state that deviance is not a behaviour but an act that is temporary and culturally defined as deviant; and that, once defined as ‘sick’, the person finds that the label is hard to alter and the condition is seen as individual pathology. Disability results in social deviance due to its chronic persistence which has been explicated by Safilios-Rothschild (1970:114-15) who states:

The disabled can best be analysed and explained by means of the general theory of deviance. As with all other deviants, it is not so much their actual physical disability
that is the key, but rather society's reaction to it. The disabled are not intrinsically deviant because of their disability, but because those around them label them 'deviant' since they impute to them an undesirable difference. The resulting limitations render an individual more or less dependent - and therefore deviant - since he [sic] must break the norm of adult independence and self-reliance.

According to Smith (1975:147) there are two stages apparent in the basic labelling model of deviance. The first is the process that results in labelling which addresses issues of the definition of deviance, the role of disease, and the social response to illness behaviour. The second stage is the consequence of labelling and this includes the extent to which contingent factors impede or facilitate labelling and outcome. These contingencies can include type, degree, amount and visibility of the act, the power and social distance of the individual compared to the agents of social control, and the availability of alternative roles. For people with disabilities, contingencies such as the type and degree of disability refer to socially 'acceptable' disabilities, versus disabilities that are considered 'deviant'. For example, a person with cerebral palsy is 'less accepted' than a person who is deaf in one ear. The deafness may not be noticed, or if it is, they look 'normal' and thus a deaf person is considered merely different. The 'amount' of disability and its visual prominence has a significant impact on the construction of difference or deviance. Disability is viewed as the most important or the only aspect of the individual's identity and other traits such as race or gender are subsumed. For example, a wheelchair serves as a symbol of stigma, even though it is an effective mobility device that enhances an individual's independence. As Goffman (1963:43-4) states, a wheelchair is a:

sign which is especially effective in drawing attention to a debasing identity discrepancy, breaking up what would otherwise be a coherent overall picture, with a consequent reduction in our valuation of the individual.

Thus the degree of visibility, which is directly related to the type of disability, underpins the social label commonly attributed to the person with a disability.

Although leading to many important insights, sociological accounts have been widely criticised by a number of theorists (e.g. Asche and Fine, 1988; Oliver, 1996; Charlton, 2000; Meekoshia, 1998; Paterson and Hughes, 2000; Turner, 2001; Williams, 2001). The source of discontent is that sociology does not pay sufficient attention to the disability. These concerns are warranted. Mainstream sociology has not generated the same interest in disability as it has for class, gender or race. Concurrent with this is an assumption of homogeneity found in sociological accounts with notions of
difference within disability almost always missing. This issue has been addressed by feminist theorists, who have argued that while constructionism challenges the stigma of differences such as gender, race or disability, almost all research on people with disabilities appears to assume the irrelevance of class, gender, race, ethnicity, sexual orientation, social status and embodiment.

**Key Feminist Approaches to Disability**

Although disability is not a significant feature of mainstream feminist writing, there are a number of prominent writers (e.g. Asche and Fine, 1988; Morris, 1991, 1995; Garland-Thomson, 1997; Wendall, 1997; Meekosha, 1998; Thomas, 1999, 2003) who have made valuable contributions to our understandings of the disabled body through expanding notions of disability to incorporate constructions of difference within disability and the influence of gender and sexuality. This section does not engage in a comprehensive interrogation of feminist writings on disability. While it cannot be denied that this area retains a neglected status within mainstream feminist writing, the focus of this chapter is to provide briefly an overview of the contributions which some feminist theorists have made to discourses of disability.

Feminist writers on disability (e.g. Wendall, 1997) argue that that, like gender, disability is not a biological given but is socially constructed from a biological reality. A person with a disability is made the ‘other’ who symbolises failure of control and threat of pain, limitation, dependency and death. Our culture idealises the body and demands that we control it. However, the disabled body demands that we rethink boundaries of the body, of sameness and difference, and of self and other. A number of feminist theorists (e.g. Asch and Fine, 1988; Morris, 1991; Garland-Thomson, 1997; Meekosha, 1998) have demonstrated how women with disabilities face a double oppression. This literature notes that they are less likely than non-disabled people to fulfil roles traditionally reserved for either sex. They are seen as being exempt from both the ‘male’ productive role and the ‘female’ nurturing role. Motherhood is often seen as ‘compulsory’ for women, however women with disabilities have been constructed as a-sexual and unsuitable for, or incapable of, motherhood and thus denied access to or discouraged from forming sexual relationships. Women with disabilities have to ‘prove’ their sexuality as well as to counter the notion that their
bodies are unfit for motherhood. Being considered unable to be either market workers or carers, women with disabilities have been stereotyped as functionally ‘useless’.

In a patriarchal culture, women’s bodies are subjected to more judgment than men’s are, and this has resulted in women with disabilities feeling that they are not seen as ‘whole’ people, or as sexual people. Feminist disability research has demonstrated that parallels exist between the embodiment of disability and the embodiment of gender. Women’s bodies and disabled men’s bodies are reduced to their biological functioning, as deficient, as not able-bodied individuals. Furthermore, it has been shown how problems for women are not limited to the medical aspects of reproduction. Regardless of marital status, women with disabilities encounter discrimination in adoption, foster care and winning child custody after divorce. Women with disabilities are seen as open to a variety of inquisitorial comments, remarks and unwanted physical contact. In addition to this, if a woman with a disability has a partner, they too are often subjects of curiosity, scrutiny and public misunderstanding (Morris, 1995; Asche and Fine, 1997; Wendall, 1997; Meekosha, 1998).

While both social constructionism and feminist approaches to disability have contributed to a re-conceptualisation of disability as a social phenomenon, it has been disability studies which have been the most significant in bringing about a new conceptualisation of disability over the past two decades.

**The Social Model of Disability**

The social model of disability stems from the British disability movement and was given academic credibility via the work of Vic Finkelstein (1980), Colin Barnes (1991) and Michael Oliver (1990, 1996). The key framework that underpins this model is that a social theory of disability must be located within the experience of disabled people themselves, and must include their attempts to redefine disability. Such a redefinition of disability has been offered as a twofold classification:

- **Impairment** – lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body;
- **Disability** – the disadvantages or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities (UPIAS 1976:3-4).
Wendall (1997) notes how in defining 'impairment' in physical terms and 'disability' in cultural, physical and social terms, distinction is being made between the physical and social aspects of disability. The key features of the social model have been well documented by a number of writers (e.g. Zarb, 1995; Oliver, 1996; Abberley, 1998; Bickenbach et al, 1999; Swain and Cameron, 1999; Hancock et al, 2000; Paterson and Hughes, 2000; Braddock and Parish, 2001). There are three main points repeatedly cited about the social model which have been aptly summarised by Colin Barnes (2003):

1. In contrast to the individual medical model of disability, it is a deliberate attempt to switch the focus away from the functional limitations of impaired individuals onto the problems caused by disabling environments, barriers and cultures.
2. It is a holistic approach that explains specific problems experienced by people with disabilities in terms of the totality of disabling environments and cultures. This includes inaccessible education, information, communication systems, working environments, inadequate disability benefits, discriminatory health and social support service, inaccessible transport, houses and public buildings and amenities, and the devaluing of people with disabilities through negative images in the media.
3. A social model perspective does not deny the importance or value of appropriate individually based interventions in the lives of people with disabilities, whether they be medical, rehabilitative, educational or employment based, but draws attention to their limitations in terms of furthering their empowerment and inclusion in a society constructed by non-disabled people for non-disabled people.

The social model of disability shifted the definition of disability from a medical or individual problem to a civil rights issue. In a similar fashion to feminist consciousness-raising in the seventies, or the queer movement which enabled different sexualities to be embraced and empowered, the disability rights movement enabled people with disabilities to have access to collective mobilisation against oppression and enabled a forum for their voices to be expressed. The emphasis on shifting conceptions of disability away from the individual and onto society was a clear break from the totalising grip of the medical model. An interesting example of the disparate ideologies that underpin the social model and the medical model has been provided by Oliver in his reconstruction of a survey given to people with disabilities in the United Kingdom. The first sample questions are taken from the interview schedule used by Office of Population Censuses and Surveys (OPCS) in 1988 (cited in Oliver 1990:7-8).


- Can you tell me what is wrong with you?
- What complaint causes your difficulty in holding, gripping or turning things?
• Have you attended a special school because of a long term health problem or disability?
• Does your health problem/disability prevent you from going out as often or as far as you like?
• Does your health problem affect your work in any way at present?

These questions effectively locate causality in the functional limitations experienced by people with disabilities at the subjective level. Such questions are evidence of how pervasive medical discourses of disability are in wider discourse of welfare. Oliver (1990) argues that these questions could have been reformulated as follows:

**Alternative Questions – Oliver, 1990.**

• Can you tell me what is wrong with society?
• What defects in the design of everyday equipment like jars, bottles and tins causes you difficulty in holding, gripping or turning?
• Have you attended a special school because of your education authorities’ policy of sending people with your impairment to such places?
• What are the environmental constraints which make it difficult for you to get about in your immediate neighbourhood?
• Do you have problems at work because of the physical environment or the attitudes of others?

The alternative questions posed by Oliver locate the ‘problem’ in wider environmental, societal and attitudinal barriers. This is in stark contrast with the former set of questions. The latter set of questions, if used in policy-making, would influence and guide the ways in which people with disabilities could be enabled full and equal participation in society. In addition, it would be interesting to assess how utilising a particular set of policy ideologies (medical or social) influences the policy outcomes of income support and employment programmes for people with disabilities – a point to be addressed later in Chapter Three.

While the social model of disability has been linked with a variety of discourses that explain the social creation/construction of disability, it is generally linked to materialist accounts of disability.

**Materialist Accounts of Disability**

stems from these accounts has been valuable in contributing to an understanding of how historically, disability emerged as both a modern social relational category, and as a harsh reality of life for thousands of people in the long transitions from feudal to capitalist society. The materialist literature, predominantly stemming from the work of Michael Oliver, demonstrates how, within agriculture or small-scale industry, the majority of people with disabilities were not excluded from participation in the production process. Rather, they were regarded as individually unfortunate but not segregated from the rest of society. With the rise of capitalism and individualised wage labour in factories in the industrialised western nations, impaired people were put at a disadvantage. People with disabilities performed routine jobs not regarded by capitalists as justifying the payment of prevailing wages and were available to fill a void in the labour force only in periods of prosperity or in wartime. During the two world wars of the twentieth century, there was substantial use of people with disabilities within the workforce, however the purpose of paid labour during this time was not to maximise profit, but was organised around the principles of cooperation and collaboration for the war effort (Oliver, 1990). This was because of the scarcity of adult, able-bodied male labour, who were in the military. Within three years after the war, most of those with disabilities were out of a job, and others whose impairments were created by the war did not easily obtain access to the paid labour force.

Oliver (1995, 1996) argues that the economic operation of the labour market and the social organisation of work play a crucial part in producing the category of ‘disability’ and in determining the response to people with disabilities. This account is a valuable source of analysis for understanding current welfare discourses in advanced industrialised nation-states like Australia and the United States. Since the mid-1980s welfare reforms in most highly developed liberal welfare states have moved to an emphasis on recommodification of labour that demands the ‘worker’ be an able-bodied subject. In part, this is due to the changing nature of the labour market, as many people with a disability who would be employed in a tight labour market find themselves unemployed when general unemployment increases. For example, Cai and Gregory (2005) note the most common route for all DSP recipients in Australia is moving from receiving unemployment benefits to the DSP. However, with the more recent implementation of contemporary welfare reform, the thrust of policy is to
reverse this trend (which was a prior trend to decommodification), and to require that people with a disability which are not assessed as sufficiently severe to attract an entitlement to DSP, be expected to look for and take up employment.

Oliver (1995, 1996) writing close to a decade ago, states that in the quest for expanded markets and higher profits, capitalists set rigorous standards concerning physical abilities, which resulted in the exclusion of oppressed groups from areas of community and economic participation. The policy environment ten years later has embraced principles of mutual obligation and ‘workfare’, and advocated a continual tightening in eligibility for income support (Moss, 2001). This has contributed to the entrenchment of full participation in the labour market as the essential basis for adult citizenship, whilst simultaneously, and paradoxically, marginalising those who are differently-abled. It is suggested by Carol Thomas (2003) that the materialist theoretical perspective needs to be applied to the contemporary global capitalist economy. She argues that we read so much about our supposedly ‘post industrial’ and consumerist society – the McDonaldisation, the rapidity of global cultural change, about our ‘risk society’ and the ‘informational age’ – that we can easily forget the basic reality that the vast majority of the world’s population remains impoverished.

For Thomas, the key to unlocking the social dynamic which constructs disability is to examine the position that people with impairments occupy in the social relations of production and consumption in the economic system. To do this, Thomas advocates the development of a contemporary political economy of disability.

This could be achieved through building upon the work of Paul Abberley (1987, 1993, 1998). Abberley believes that examining the socio-economic origins of impairment in industrial capitalist societies enables us to appreciate that much impairment is created through industrial processes and accidents, through pollution, through medical advance as well as blunder, and through wars and famines. Abberley’s (1987:17) work suggests that there should be a theory of disability as oppression, noting that such a theory:

1. Recognises and, in the present context, emphasises the social origins of impairments;
2. Recognises and opposes the social, financial, environmental and psychological disadvantages inflicted on impaired people;
3. Sees both (1) and (2) as historical products, not as the result of nature, human or otherwise;
4. Asserts the value of disabled modes of living, at the same time as it condemns the social production of impairment; and

5. Is inevitably a political perspective, in that it involves the defence and the transformation, both material and ideological, of state health and welfare provision as an essential condition of transforming the lives of the vast majority of disabled people.

The political economy perspective, found in the materialist account of the social model of disability, is useful for analysing widespread changes in welfare discourses and policies. The ways in which people with disabilities are being included in socio-cultural and political-economic realms is increasingly being challenged through shifting constructions of the individual subject. Changes in welfare discourses are imposing upon people with disabilities an essentialist notion of identity derived from their individual impairment. This is entrenching a universalising concept of the subject – one which is problematic for people with disabilities, as the socio-cultural and political-economic realms are experienced through differently-abled subjectivities. Important questions are being raised about notions of rights, citizenship and justice, and such questions can no longer be ignored. The rapidly changing political environment to be found in advanced capitalist societies, such as Australia and the United States, is demanding that all citizens in the post-war welfare state account for themselves. The disabled citizen – absent for so long from official focus – is under a lens of scrutiny.

This chapter now turns its attention to citizenship discourses and analyses how such discourses position the disabled subject. A range of citizenship theories have been developed since the end of the Second World War to denote the ways in which individuals, or differentiated groups of individuals, are addressed in nation-state policies. Such theories have been called upon in order to argue for rights to material and symbolic resources, and to participation in the market, civil, political and private spheres. Citizenship discourses are powerful ways in which differently-abled individuals may be either accorded or denied rights of recognition, redistribution and participation. The following section outlines how most accounts of citizenship systematically neglect people with disabilities.

**Liberal Citizenship Theory and Disability**

Contemporary theories of liberal citizenship often begin with an analysis of T. H. Marshall’s post-war conception of citizenship, which focuses on according people a
number of citizenship rights. This thesis will not engage in a debate on the adequacy of Marshall’s theory as this has been undertaken comprehensively elsewhere (e.g. Kymlicka and Norman, 1994; Isin and Turner, 2002; Lister, 2003). The focus of this chapter is not about contributing to the classical citizenship debate *per se*, but of demonstrating how the subject within contemporary liberal citizenship requires a deconstruction beyond what has been achieved in the literature thus far. Therefore Marshall’s influential theory will be outlined briefly to demonstrate how the disabled citizen is absent from liberal citizenship discourses.

According to Marshall, citizenship is a matter of ensuring that everyone is treated as a full and equal member of society (Kymlicka and Norman, 1994:354). Marshall offers a tripartite view of citizenship – civil, political and social – that is concerned with notions of liberty and equality achievable through civil and political rights which grant full and equal membership. Citizenship is defined as:

A status bestowed to those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizen against which achievement can be measured and towards which aspiration can be directed (Marshall, 1963:87).

For Marshall (1963) the fullest expression of citizenship requires a liberal-democratic welfare state so that civil, political and social rights can be guaranteed to all. The welfare state in Marshall’s view ensures that every member of society feels like a full member and is able to participate in and enjoy common life. When any of these rights are withheld or violated, people will be marginalised and unable to participate.

Critics of liberal citizenship have argued that the contemporary contractual nature of a social welfare conditional upon the welfare recipient’s duties and obligations is inconsistent with the Marshallian notion of a ‘right’. Braithwaite, Gatens and Mitchell (2002), however, argue that Marshall’s account does match rights with duties and obligations. In their analysis, Marshall’s notion of citizenship is conceived within a genuine framework of reciprocity that is in part constructed with the values of freedom, mutual respect and dignity. They provide clear examples from Marshall where he explicitly refers to one’s duties and obligations to a number of various responsibilities. As Marshall (1963:117) states:
If citizenship is invoked in the defence of rights, the corresponding duties of citizenship cannot be ignored ... acts should be inspired by a lively sense of responsibility towards the welfare of the community.

Despite Marshall’s allusions to a number of obligations in his understanding of citizenship, this liberal model is commonly referred to as ‘passive citizenship’ (Kymlicka and Norman, 1994), due to the alleged absence of any obligation to participate in public life. However, a closer reading of Marshall reveals that he argues there are obligations attached to receiving welfare benefits. He (1963) states that social rights imply an absolute right to a certain standard of civilisation which is conditional on the discharge of the general duties of a citizenship. While Marshall did not specifically engage with disability, he believed that social rights enabled what he termed ‘the disadvantaged’ to enter the mainstream of society and effectively exercise their civil and political rights. Social rights for Marshall range from:

the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society (Marshall 1963:74).

But the liberal view of the citizen-subject is inherently problematic for people with disabilities. The key site for rendering the disabled subject invisible is the universal notion of citizenship as a ‘status’ and as a set of ‘rights’, which posits that the citizen-subject can be equal outside of societal structures. This poses problems for people with disabilities because it is often the societal structures which render them oppressed. An individual cannot achieve full participation if the means to achieve such participation are contributing to the very exclusion they wish to overcome. In other words, Marshall’s notion that to withhold rights renders the individual unequal and unable to participate as a citizen-subject (therefore no longer possessing the necessary full status) assumes that equality precedes the rights universally granted, and only by removing such given rights does a person become marginalised.

Furthermore, Marshall’s notion is underpinned by assumptions that once such rights are granted, the status itself is free of both socio-cultural and political-economic inequalities. This is problematic for the individual who is unable to participate in any citizenship realm due to his/her citizen ‘status’ being inherently bound in socio-cultural and political-economic injustices. What of the individual who is further marginalised by policies and practices supposedly intended to grant his/her full
participation? This is evident in the ways in which welfare reform in western liberal welfare states contractually links the provision of social security to labour force participation, thus further perpetuating the inequalities of an already socially and economically marginalised group.

People with disabilities within a liberal framework cannot achieve full and equal rights to participation and citizenship if they are impeded by a disabling society which embodies policies that, while intended for amelioration of marginalisation, are in fact embedded in structural and attitudinal barriers. This is evident with the significant so-called reforms to the Australian social security system (or in Marshall’s terms, ‘social rights’) for people with disabilities. While this issue will be addressed in Chapter Three, it is important to note briefly here how the new welfare climate of western liberal welfare states has replaced notions of welfare with ‘workfare’, advocated new policy principles including the recommodification of labour, and promoted an individualised model of citizenship that systematically ignores social, economic and labour market conditions (Parker and Cass, 2005). To hinge social security on labour force participation further perpetuates the inequalities of an already socially and economically marginalised group. People with disabilities within a liberal framework cannot achieve value-free justice, nor full equality, nor can they ever achieve the status of citizen-subject, as long as the reference point remains an unproblematised individual with capacities assumed to be equal. Within such a framework, the granting of social rights (which assumes the ability to equally participate in civil and political rights) is problematic, because such rights overlook the fact that it is societal structures themselves which are a site for injustice. In the example of social security – which is a social right according to Marshall and a necessary adjunct to rights in the political and civil realms – the ability to access and obtain social security benefits does not remove the multiple and complex barriers which a person with a disability faces. Social rights therefore do not in themselves enable the disabled citizen-subject to compete equally in civil and political society, nor in the economic sphere.

**Civic Republicanism/Communitarianism and Disability**

An alternative to liberalism is civic republicanism (or communitarianism) and there has been a revival of these philosophical perspectives in response to the rights-based
notions found in liberalism. These discourses view citizenship as an activity or as practice, not just as a status. Central to the civic republicanism notion of the citizen is a conception of the individual as not logically prior to society (Oldfield, 1994). In civic republican discourse it is believed that a citizen should undertake certain duties and responsibilities and be loyal to the state rather than to individual interests. Communitarians object to the asocial concept of the self in liberalism, since they view the self as both socially constructed and embedded in a cultural context (Delanty, 2002). Civic republicanism has focussed on the need to create a political community and a common bond between citizens which closes the differences of class, religion and culture (Siim, 2000). This discourse claims that identity is shared within a political community and this identity is seen to stem partly from self-determination and partly from a common history (Oldfield, 1990).

Ruth Lister (2003) states that the modern civic republican ideal is of citizenship as an active ongoing engagement in the formal political process. For civic republicanism, political activity is not a means to an end but an end in itself, associated with the pursuit of a common good. Lister notes how some feminists (e.g. Young, 1990; Phillips, 1993; Voet, 1998, cited in Lister, 2003:25) have been attracted by civic republicanism's portrayal of citizenship as active political participation and involvement in decision-making; by its potential for collective deliberation in the public sphere for the articulation of the interests of women and 'minority groups'; and by its potential for debating and confronting difference. Despite this appeal, Lister also notes how feminist writers have largely seen this model of citizenship as problematic, with their critique centring around three key areas: its narrow definition of the 'political' and of the 'citizen', which is underpinned by a rigid separation of public and private spheres; its appeal to universalism and the common good; and the demanding nature of the obligations. Lister argues that the latter criticism of civic republicanism has particular implications for women as they occupy different or competing spaces from men within the public realm.

This critique is also pertinent for people with disabilities. For people with disabilities to achieve parity of participation and citizenship, what is required is the recognition of both difference and commonality. If the (theoretical and policy practice) space for claiming rights to citizenship involves seeking 'common bonds' among identity of
individuals, what then of the differently-abled individual? The civic republican discourse of citizenship remains an inadequate framework in which to achieve socio-cultural and political-economic rights for people with disabilities. As noted earlier, rights and justice cannot be based upon a discourse of identity politics – particularly one that adheres to a ‘common trait’ – as this ignores not only the differently-abled citizen, but also important differences within the category of people with disabilities. Furthermore, as Meekosha and Dowse (1997:53) argue, the civic republicanism principle of ‘active citizenship’ requires people to take on responsibilities as well as claiming their rights, and this poses problems for people who have different or competing communities, such as people with disabilities.

In addition, civic republicanism’s requirement for duties and responsibilities is underpinned by a large moral component. As Oliver and Heater (1994) state, a citizen is someone who feels moral commitment to the state and to performing the duties associated with the status. This is supported by Dagger (2002), who suggests citizenship is primarily a matter of responsibilities. He argues that there is an ethical dimension to civic republicanism, as the ‘good citizen’ places the interests of the community ahead of personal interests. Furthermore, inherent in the concept of the citizen is a set of moral standards stressing the public nature of the citizen. These moral components inherent in a civic republicanism model of citizenship are reflected in the ideologies underpinning welfare reform in liberal welfare states like Australia and the United States, which have re-emphasised and re-oriented the need for welfare benefits as an individualised ‘problem’ (or as ‘deserving’ and ‘undeserving’). The citizen is positioned as having contractual obligations contingent upon participation in the labour market. Thus the recent shift in welfare ideology emphasising a moral and ethical component whereby the citizen has this particular ‘obligation’ to the state, defines the ‘moral duty’ of the citizen in a way that is unavailable to people with disabilities.

Civic republicanism cannot account for the disabled citizen. This is most clearly highlighted through the assumption that, “Citizens possess the knowledge and skills, the level of wellbeing, amount of time, and the freedoms of speech and association that are all necessary for the practice of citizenship” (Oldfield, 1990:156). This statement is reflective of how a person with a disability would find it difficult to
achieve citizen subjectivity as the tenets within this discourse are founded upon the unproblematised subject. This is further highlighted through the way in which civic republicanism assumes a rough economic equality among citizens (Oldfield, 1990:156). While liberal welfares states such as Australia use income support as one avenue for redressing economic inequalities of marginalised citizens, for people with disabilities it remains an insufficient means to achieve equal participation unless specific measures, such as the extra costs of disability, are taken into account. (This point will be taken up further in the following chapters). Policies that attempt to homogenise citizens will further impede rather than facilitate participation and citizenship.

It is argued here that it is the appeal to commonality among and between citizens that remains a fundamental problem with this discourse for people with disabilities. To use the example of current labour market structures, it is highly unlikely that employment history or the bonds experienced within the workplace would be similar for workers with disabilities and able-bodied workers. As discussed earlier in this chapter, the economic operation of the labour market and the social organisation of work play a crucial part in producing the category of ‘disability’ and in determining the response to people with disabilities. Oliver (1996) argues that, in the quest for expanded markets and higher profits, capitalists set rigorous standards of physical ability, which result in the exclusion of marginalised groups from areas of community and economic participation – the very same areas that civic republicanism advocates as the realms for the attainment of equal citizenship. By entrenching a notion of full participation in the labour market as the essential basis for adult citizenship, the current policy environment in Australia has paradoxically marginalised those who are differently-abled. In such an environment, the civic republicanism discourse of citizenship will find it difficult to create a space for disability, or for a person with a disability, because the genesis of the ‘citizen’ is an undifferentiated individual.

**Key Feminist Theories of Citizenship and Disability**

In response to both liberal and civic republican views of citizenship, the feminist literature has made valuable contributions to citizenship discourses and created embodied spaces in which to deconstruct the universalist, male notions. The range of feminist work on citizenship is quite varied and complex, and it is not the aim here to
contribute to general feminist debates on citizenship, as there is a large range of valuable feminist literature addressing such an area (see for example Voet, 1998) for a comprehensive literature review on feminism and citizenship. Instead, this section attempts to contribute to the citizenship debate by incorporating the neglected area of disability into several feminist accounts, so as to demonstrate how they remain incomplete for people with disabilities, and in particular, for women with disabilities.

In her explanation of patriarchal institutions, Carol Pateman (1992) offers a radical critique of the concept of universal citizenship in classical political theory. Her work has been widely influential in enabling spaces within citizenship discourses to be inclusive of women. She suggests that women are excluded from politics as a result of the fact that the private/public divide is based upon a male norm. She notes how welfare state legislation was underpinned by the assumption that women contribute through provision of private welfare — therefore women from the beginning were denied full citizenship. She argues that the difficulties women face in obtaining full citizenship stem from the ‘Wollstonecraft’s dilemma’, whereby the dual avenues available to women for accessing citizenship are mutually incompatible. For Pateman, the patriarchal understanding of citizenship requires either that women become like men — and so full citizens of the ways in which international and domestic policy discourse and practices deal with the citizenship rights of people with disabilities — or that they continue with private caring work — which is considered to be of little value for citizenship. In her view, within a patriarchal welfare state neither demand can be met.

Pateman believes that a sexually differentiated citizenship which distinguishes between men and women as different but equal individuals is ideal. She states that that if both sexes are to be full citizens “the meaning of sexual difference has to cease to be the difference between freedom and subordination” (1992:28). She maintains that women should be included as citizens based upon their caring work and that women should be incorporated into citizenship discourses as ‘women’ — rather than having a gender-neutral citizenship. The deconstruction of hegemonic patriarchal notions of the citizen-subject by Pateman was a distinctive shift in how citizenship was theorised, as she places the theoretical focus clearly on an embodied subject, markedly different to that of the universal (male) subject.
While this theory has begun the important process of embodying the citizen-subject within citizenship discourses, it remains problematic for people with disabilities – and in particular for women with disabilities, as it presumes that women are a homogenous category, capable of ‘caring’ tasks, and willing to do such work. This point has been taken up by Mary Dietz (1992), who states that, as long as feminists only focus on social and economic concerns around children, family, schools, work or wages, etc., they will not articulate a truly political vision or address the problem of citizenship. This point is also pertinent for people with disabilities, who require equality in both socio-cultural and political-economic realms if they are to achieve parity of participation and citizenship. Citizenship cannot be reformulated to ‘fit women’, but rather should be deconstructed from the dichotomies upon which it is constructed. A gendered discourse of citizenship is problematic for women who do not fit into the normalised gender, such as women with disabilities. The double oppression which women with disabilities face has been well noted (as discussed earlier in this chapter) and subsequently, such a gendered theory of citizenship contributes further to the injustices which people with disabilities experience. Meekosha and Dowse (1997) argue that feminist analysis which identifies the separation of the private from the public has not incorporated an examination of people with disabilities. Women with disabilities often inhabit a unique space somewhere between the private and the public, while seen as remaining a ‘burden’ in both. People with disabilities are conceived as having neither familial responsibility or public presence and are not constituted in traditional ‘masculine’ terms nor embraced by feminist critique which equates care-giving responsibilities as a form of citizenship (Meekosha and Dowse, 1997).

The tensions in feminist scholarship have been addressed by Siim (2000), who states that within citizenship discourse, the debate between gender equality and sexual difference is prominent. This point has been taken up by Kathleen Jones (1998), who believes that feminists have not articulated a coherent theory of feminist citizenship. She argues that many of the studies on women and citizenship use traditional definitions and measures of political participation which are based on liberal universal notions of the ‘male’. Dietz (1992) maintains that feminists need to declare citizenship to be a value which would enable feminists to pursue social and economic concerns through active engagement as citizens in the public world. In Dietz’s view,
feminist critiques of liberalism which focus on the idea of ‘equal access’ are problematic, for while they open up some avenues of discourse, they remain linked to the liberal concepts of rights, interests, contracts, individualism.

Ruth Lister (2003:29), in support of Dietz, suggests that, for an active participatory notion of citizenship to be realistic for women and other groups traditionally marginalised in the political process, it needs to embody a notion of ‘the political’ which incorporates activities in the public sphere. She offers an alternative view of citizenship premised upon her claim that citizenship is a process not just an outcome, where the struggle for rights is equally as important as the rights obtained. This perspective, she argues, envisages citizens as active participants in political and welfare institutions rather than passive holders of rights. She maintains that the balance between rights and obligations and the nature of each is at the heart of mainstream debates on citizenship. She argues that, while citizenship rights are represented as essentially abstract and universal, it is possible to incorporate notions of diversity and difference into the conceptualisation without sacrificing the principle of common and equal rights which is also necessary for the accommodation of difference. She proposes that citizenship should be reconceptualised through synthesising the rights and participatory traditions via the notion of human agency. She feels that, by embracing elements of the two main historical citizenship traditions, citizenship can emerge as a dynamic concept in which “process and outcome stand in a dialectical relationship to each other” (2003:37). She suggests that the idea of human agency as citizenship be conceived as both a status involving a wider range of rights, and a practice involving political participation. To be a full citizen means to be able to enjoy the rights of citizenship necessary for agency and social and political participation, and to act as a citizen involves fulfilling the full potential of the status.

This theory certainly looks promising for people with disabilities because it begins to address the question of how it is not just the outcome of rights that is important (as in the case of liberal and civil republican views), but also the means through which full citizenship is achieved. The disability movement is engaged in a constant struggle to obtain and reaffirm rights and the means for participation. Lister also importantly begins the process of incorporating notions of differentiation into citizenship discourses. Despite these achievements, however, when assessing this theory through
the lens of disability, problems become evident. For people with disabilities, the notion of human agency is problematic. While Lister appears to imply that human agency is a given and constitutes the means for attaining full citizenship, for people with disabilities the ability to exercise human agency is at the core of the struggle for full citizenship and therefore a deconstruction of it is necessary preceding its use to attain citizenship. Furthermore, the concepts of ‘status’ and ‘participation’ which Lister utilises have not been sufficiently extricated from their original flawed meanings within the liberal and civic republicanism traditions. It is questionable whether the socio-cultural and political-economic injustices which underpin such concepts can be overcome through binding them with human agency. It is also debatable that the synthesis of two historically problematic theories will actually create one unproblematic theory. For people with disabilities who have been excluded from the very definitions of status and participation, and whose human agency is challenged and constrained and often denied by a range of barriers, more than a synthesis of existing citizenship discourses is required in order to enable a space for their subjectivity – and one that embodies principles of rights and justice.

It is the systemic barriers that contribute to rendering people with disabilities less than full citizens, and this is an area which has not been given sufficient attention by feminist theories. Models of citizenship which privilege ‘female tasks’ such as motherhood and care-giving in the private sphere, or privilege an unproblematised notion of human agency, remain homogenised around an able body and exclude important intra-category differences. This exclusion from key citizenship debates of the historical and social circumstances of individuals has been taken up by Iris Marion Young who offers a radically alternative view of citizenship. In Young’s (1998) view, citizenship requires the development of a framework based, not on the assumption of an undifferentiated humanity, but rather on the assumption that there are group differences and some groups are actually or potentially disadvantaged. Young believes that the best way to realise the inclusion and participation of everyone in full citizenship is by the concept of differentiated citizenship. This approach to citizenship has been widely acclaimed by other feminists (e.g. Fraser, 1997; Siim, 2000; Lister, 2003) as it offers a rearticulation of citizenship which is inclusive of diversity and difference. Young’s theory can be useful as it attempts to be inclusive not just of women, but of other oppressed groups – namely people with disabilities.
Importantly, Young (1998) raises the point that rights and rules which are universally formulated are blind to differences of race, culture, gender, age or disability and thereby perpetuate rather than undermine oppression. This is the problem evident in both liberal and civil republican discourses of citizenship. Young believes that the universal notions found in contemporary theories of citizenship are problematic as they place citizenship above particular group and individual differences. In Young’s view, there are two key meanings attached to universal citizenship. Firstly, universality is defined according to what citizens have in common as opposed to how they differ. Secondly, universality presupposes that the laws and rules apply to everyone equally and is therefore blind to individual and group differences. As previously noted, for particular groups such as those with disabilities, it is the norms and laws which perpetuate rather than eliminate injustices.

The inclusion and participation of everyone in social and political institutions, Young suggests, requires the articulation of special rights which attend to group differences. In seeking a differential theory of citizenship, Young is aware of a contradictory problem that can occur which she refers to ‘the dilemma of difference’. Young (1998) notes that oppressed and disadvantaged groups seeking full inclusion and participation must continue to deny that there are any essential differences, in order to rule out any justification for being denied equal opportunities to participate in the socio-cultural and political-economy realm. However, Young notes that such groups have also found it necessary to affirm that there are often group-based differences, and that these make the application of a strict principle of equal treatment, especially in competition for positions, unfair because such differences put those groups at a disadvantage. She gives the example of the limited success in winning special rights for people with physical and mental disabilities in the past twenty years, and suggests this is a clear case for attending to the particular needs of different groups when promoting equality in participation and inclusion.

While Young’s differentiated citizenship theory has much to offer oppressed groups and individuals – and for people with disabilities it offers a substantial base for obtaining an enabling discourse of citizenship – some key problems persist. Fraser (1997) has been critical of Young’s earlier writing for having an essentialist notion of the ‘groups’ she identifies, for privileging cultural groups, and for its attempt to
include both cultural and political-economic phenomena. Fraser maintains that a single conception which attempts to encompass several disparate modes of collectivity (such as gender, race, ethnic groups, sexualities and social classes) may result in the loss of important conceptual distinctions. For a person with a disability, the assumption of homogeneity overlooks differences within disability. Often disability is wrongly viewed as an overarching category, despite the fact that there are significant variations in the type, degree and experiences of disability, and that these distinctions are underpinned by differences in gender, class, race and/or sexuality. Fraser suggests that a group differentiation perspective can mean that one of the modes of collectivity implicitly becomes dominant in the sense that its characteristics will be projected as the characteristics of all social groups. This latter point is crucial for a person with a disability, because it is often the disability which is seen first and foremost and other characteristics, such as gender, sexuality or class are pushed to the background. An inclusive theory of citizenship for people with disabilities cannot rest upon simple ‘group differentiation’ and so while Young offers us a hopeful theory, it is only the first step and remains incomplete. As Lister (2003:82) so aptly states, “A group differentiated politics, which asks the individual to identify with just one aspect of her identity, runs the same risk of fragmentation at the individual as well as at the group level”.

Fraser (1997:202) applies Young’s theory to African Americans, women and working-class non-professionals, and finds it problematic because disadvantaged social collectivities differ from one another not just in the kinds of disadvantages, as Young maintains, but also in the bases of their differentiation and in the roots of their oppression. Fraser suggests that in some cases, political-economic restructuring entails group de-differentiation while in others cases it does not. She points out that for non-professional workers, the politics of difference is not as useful as it is for gays and lesbians (where it is crucial for remedying oppression). The most difficult cases, Fraser argues, are those in which both redistribution of resources and recognition of difference which accords parity of respect are required to overcome an oppression stemming from multiple sources of injustice. This is certainly the case for people with disabilities, who suffer from both socio-cultural injustices and political-economic injustices. For people with disabilities, the dilemma of difference that Young draws attention to (while offering no solution) is something which needs to be addressed. It
is clearly evident that special rights for particular groups are warranted. However, citizenship discourses need to be detached from notions of identity before they can successfully be rebuilt to be inclusive of people with disabilities. What is needed, then, is a combination of particular rights, as well as restructuring of key justice areas (such as the labour market and social security benefits), to ensure the recognition, not just of difference, but of difference that is differently-abled. The ‘enabling’ theory of justice, it is suggested, holds the prospect of partially achieving this.

**An Enabling Theory of Citizenship**

Fraser’s (1997, 1998, 2003) work on redistribution and recognition promises to fill some of the absent spaces that can be found in the above citizenship discourses. Although Fraser overlooks disability, her theory of justice can nonetheless be drawn upon and utilised by people with disabilities and researchers in developing an embodied theory of citizenship. She (1998) proposes two broadly conceived, analytically distinct, understandings of justice. The first is socio-economic and stems from the political-economic structures of society. Injustice on this understanding involves the maldistribution of material resources, and examples include exploitation, and economic marginalisation and deprivation. For people with disabilities a key area of injustice is reduced access to the labour market, and those outside the labour market are marginalised and deprived. The second type of injustice Fraser notes is cultural or symbolic, and this stems from social patterns of representation, interpretation and communication. Examples include cultural domination, non-recognition and disrespect, i.e. misrecognition. Both forms of injustice, maldistribution and misrecognition, are pervasive in contemporary societies (although there are differences between them), and both are inherently bound up with processes and practices that systematically disadvantage some groups of people. While Fraser does not include people with disabilities in the groups discussed, it can be argued that people with disabilities are clearly and most obviously systematically disadvantaged through the twin processes of socio-cultural and political-economic practices. Fraser notes that her distinction between economic injustice and cultural injustice is purely an analytical one, and in practice the two are intertwined.

It is Fraser’s view that the remedy for economic injustice is political-economic restructuring, which could involve redistributing income, reorganising the division of
labour, or transforming other basic economic structures. Collectively these are referred to as ‘redistribution’. For people with disabilities, the achievement of full and inclusive citizenship cannot be realised without labour market and social security issues being addressed, as these form the twin pillars of disability policy and of justice and citizenship (or injustice and marginalisation) for people with disabilities. In the case of cultural injustice, Fraser believes that the remedy is cultural or symbolic change, which could involve revaluing disrespected identities or recognising and valorising cultural diversity. Collectively, these are referred to as ‘recognition’. For people with disabilities, the stigma, ignorance and fear of disability require redressing. While the disability movement has made valuable contributions to promoting differently-abled views and interests – seen though the collection of disability history, the formation of disability studies in academia, and artistic expressions of the disability experience through poetry, art, music and dance (Gill, 1995) – is unfortunate that (as of yet) these have not translated into a full and equal recognition of disability.

Fraser (2003:36) argues that the normative core of her conception of justice is the notion of parity of participation. According to this norm, “justice requires the social arrangements that permit all (adult) members of society to interact with one another as peers”. For parity of participation to be possible, she argues that at least two conditions must be satisfied: the ‘objective’ condition and the ‘intersubjective’ condition. The former condition precludes those institutionalised social arrangements whereby some people are denied, through material deprivation or exploitation, the means and opportunities to achieve equal citizenship. The latter condition precludes those institutionalised social norms whereby some people are denied the status of equal citizenship (e.g. through being perceived as possessing inferior qualities/traits; or by not having their ‘difference’ acknowledged). People with disabilities are denied both the means and opportunities to achieve equal citizenship, and the status of equal citizenship. Fraser suggests that the objective condition of participation highlights the political-economic structures of society, and brings into focus concerns associated with discourses and policies of redistribution (or maldistribution). Conversely, the intersubjective condition highlights culturally defined hierarchies of status, and brings into focus concerns associated with the discourses and policies of recognition (or misrecognition).
This thesis argues that, if people with disabilities are to achieve parity of participation and citizenship, the twin principles of recognition (via difference) and redistribution (via social equality) are necessary simultaneously, which can be potentially problematic for policy discourse and practice. Fraser (1998) states that recognition claims often take the form of calling attention to the specificity of some groups and thus tend to promote group differentiation. In contrast, redistribution claims call for abolishing unequal and inequitable economic arrangements which underpin unequal access to resources (both material and symbolic) by specific groups, and thus tend to promote group de-differentiation. This means the politics of recognition and redistribution have mutually contradictory aims to the extent that the former promotes group differentiation whereas the latter undermines it. Fraser rightly notes how the two kinds of claims thus stand in tension with each other and can interfere with or even work against one another. However, she believes that this is a false antithesis and that the tension can be resolved by a re-framing of redistribution and recognition in a form that is more amenable to resolution.

Fraser (1995:23) suggests this can be done through adopting two broad approaches which she terms ‘affirmation’ – which aims to correct inequitable outcomes of social arrangements without disturbing the underlying framework; and ‘transformation’ – which aims to correct inequitable outcomes by restructuring the underlying generative frameworks. Affirmation strategies to redress cultural injustices have been associated with ‘mainstream multiculturalism’, whereas transformation strategies are associated with ‘deconstruction’. With regard to economic injustices, affirmation remedies have associated with the liberal welfare state whereas transformative remedies have been historically associated with socialism. For groups who require both recognition and redistribution, there needs to be transformation in the economic realm (i.e. socialism rather than affirmation), and deconstruction in the cultural realm (i.e. rather than mainstream multiculturalism). Or in other words, “socialist economics combined with deconstructive cultural politics works best to finesse the dilemma” (Fraser, 1995:31). The task of transforming the deep structures of both socio-cultural and political-economic realms appears to be the one overarching programmatic orientation capable of doing justice to all struggles against injustice (Fraser, 1995: 32).
Currently however, such transformations are absent from policy discourse in liberal welfare states, and the contradictory aims of redistribution and recognition instead mirror the tensions currently constructed by government policy in employment programs and social security benefits for people with disabilities. The Organisation of Economic Cooperation Development (OECD, 2003:3) construct these as “twin but contradictory goals” and acknowledge that “how to reconcile these twin goals has yet to be resolved”. This inherent problem is also recognised by Fraser (1998:451) (although not in relation to disability), who states:

The redistribution-recognition dilemma is real. There is no neat theoretical move by which it can be wholly dissolved or resolved. The best we can do is try to soften the dilemma by finding approaches that minimise conflicts between redistribution and recognition in cases where both must be pursued simultaneously.

Along with redistribution and recognition remedies, Fraser (2003) argues that we also need to develop an alternative version of anti-essentialism, one which permits the link between a cultural politics of identity and difference with a social politics of justice and equality. This is what is inherently missing from other citizenship discourses delineated within this chapter. For people with disabilities, full and equal citizenship cannot be attained until the very structures of injustices which stem concurrently from socio-cultural and political-economic realms are reconstituted to be inclusive of the disabled body.

Fraser’s framework of justice is useful for locating issues of disability and citizenship, because a two-dimensional conception of justice is imperative if people with disabilities are to achieve parity of participation and citizenship. People with disabilities simultaneously experience misrecognition (e.g. discriminatory attitudes) and maldistribution (e.g. unequal access to the labour market) in all socio-cultural and political-economic spheres. As will be argued in the following chapters, if international and national policy responses are to effectively redress the marginalisation of people with disabilities, then such policies must aim to ameliorate injustices at the objective (structural) level and at intersubjective (status) level. Neither alone is sufficient. One means of achieving this is via the twin policy principles of redistribution and recognition: where welfare reform and human rights practices integrate principles of social equality with a recognition of difference. In addition, policies and legislation for people with disabilities must address the
underlying causes of maldistribution and misrecognition if parity of participation and citizenship is to be achieved. Fraser (2003) argues that the key problem with affirmative strategies (such as social security and anti-discrimination laws) for redressing injustices are that they aim to correct inequitable outcomes of social arrangements without disturbing the underlying social arrangements that generate them. This critical issue will be taken up further in subsequent chapters of this thesis in relation to income support policies (Chapter Three) and anti-discrimination legislation (Chapter Four). However, it is important to note briefly here once again that people with disabilities experience human rights violations and injustices in a number of participation areas, and affirmative policy strategies, while necessary, are insufficient in themselves if they fail to also address the underlying injustices which constrain parity of participation and citizenship.

Conclusion

While history has demonstrated a clear shift in attitudes about and policies for disability, a person with a disability remains less than a full and equal citizen. The rapidly changing political environment to be found in advanced capitalist societies like Australia and the United States, is demanding that all citizens in the post-war welfare state be self-reliant. This is problematic for people with disabilities – as the socio-cultural and political-economic realms are experienced through differently-abled subjectivities. As has been highlighted in this chapter, citizenship discourses can be powerful ways in which individuals may be accorded or denied rights of recognition, redistribution and participation. But these discourses are inextricably linked with notions of discrimination and marginalisation and, for the most part, societies have not done enough to enable those with disabilities to exercise their obligation (and their right) of self-determination. As Meekosha and Dowse (1997) note, major citizenship debates are influenced by race, ethnicity, class or gender identity but all neglect disability and people with disabilities. This chapter has demonstrated that citizenship discourses which focus on dichotomies of rights versus participation, or private versus public, or inclusion versus exclusion will remain inherently flawed for a person with a disability because the reference point within such bifurcated models rests upon normative judgements of the abled-bodied subject. It is the fundamental source of subjectivity which must be interrogated if equal citizenship is to be realised; and for people with disabilities, it is the normative
vision of the able-bodied citizen which must be unbound from its inherent socio-cultural and political-economic injustices if full and equal participation is to be achieved.

In sum, citizenship discourses as currently envisioned are theoretically and practically limited for people with disabilities because they are underpinned by a notion that all individuals have an equal capacity for self-sufficiency. The citizen is situated as an abstract and unproblematised subject with inherent human rights preceding the citizen-status. However for people with disabilities, rights can be one means in which to realise equal citizenship. If parity of participation and citizenship is to be achieved in all socio-cultural and political-economic realms, then policy discourse and practice must begin by redressing injustices at the objective (structural) and intersubjective (status) levels simultaneously. One means of achieving this is via the twin policy principles of redistribution and recognition. In addition, welfare reform and human rights practices must integrate principles of social equality with a recognition of difference. People with disabilities require a combination of particular human rights as well as a restructuring of key social justice areas (such as labour market and social security) prior to equal citizenship.

The next step in this thesis is to explicate how citizenship and participation for persons with disabilities have been realised in discourse and policy at the international level. To do this, the following chapter will explore how the UN human rights system is currently accommodating rights and justice for persons with disabilities. It will draw on international human rights discourses and practices to demonstrate that redistribution of resources and recognition of equality via a language of human rights and social justice is a dual necessity, and neither can occur in isolation.
CHAPTER TWO
CHAPTER TWO

International Justice: the United Nations, Human Rights and Disability*

Each individual is deemed to be of inestimable value and nobody is insignificant
(Quinn and Degener, 2002:14).

The UN has in the post World War II period been a key disseminator of rights-based ideology, beginning in 1948 with the Universal Declaration of Human Rights where:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other social status (Article 2 (1), UN, 1948).

While reference is made to a number of specific areas where discrimination can occur, people with disabilities are considered to fall under the ‘other’ status, signifying their relative invisibility within universal rights language, and it is this historical lack of visibility and consideration of people with disabilities as rights-bearers, that has impeded attainment of rights and parity of participation at both the international and national level. Although earlier UN activities supported the rights of persons with disabilities to receive welfare and public services (UN, 2003), very little attention was given to the wider structural and additional barriers - discriminatory attitudes ('misrecognition') and material deprivation ('maldistribution') - that constrain parity of participation in all socio-cultural and political-economic realms. In addition, to date international human rights law (like the theories discussed in the last chapter) has also largely been underpinned by an assumption that everyone has an equal capacity for self-sufficiency (Marks and Clapham, 2005). This has contributed to a long history of exclusion, marginalisation and human violations for people with disabilities.

At the international level, despite over fifty years of an entrenched rhetoric of rights by the UN, disablist assumptions are still implicitly embedded in the principles underlying human rights discourses. This is a two-fold problem: international standards and principles of rights are at present inadequate for people with disabilities

* A condensed version of this chapter has been published under the same title in Parker, S. (2006) Journal of Comparative Social Welfare, 22(1), April, pp. 63-78.
(Waddington, 2001; Degener and Quinn, 2002; National Council of Disability[NCD], 2002), and this is compounded by, but not mutually exclusive with, domestic implementation of international human rights, which can often undermine the rights of people with disabilities, particularly as some liberal welfare states retreat from rights-based principles altogether (Meekosha, 2000; Clear and Gleeson, 2002; Blanck et al, 2004). Although enactment of rights-based legislation in a number of western nation states has made some domains of human affairs less discriminatory, the underlying structural causes of disablement have resisted the legislative reform frameworks (Clear and Gleeson, 2002). This problem is acknowledged by the UN (2004), which notes how most disability legislation and policies remain underpinned by a belief that differentially-abled people are not able to exercise the same rights as non-disabled persons.

This chapter begins with an analysis of how the UN human rights treaty system is currently accommodating the rights of a person with a disability by examining two key binding covenants – the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). These two treaties are fundamental to human rights for persons with disabilities: the ICCPR pertains to independence, autonomy and participation – key tenets of the disability rights movement; and the ICESCR deals with issues of social justice, which underpin equality of opportunity for persons with disabilities. When assessed through the lens of disability, these two treaties demonstrate the potential of the UN to advance the rights of persons with disabilities via human rights language.

To gain an understanding of the extent to which a human rights perspective on disability is embraced at the domestic level, this chapter will offer examples of how the Australian government has incorporated the disability-relevant articles within ICCPR and the ICESCR into the national human rights framework. Despite the fact that the government has stated its commitment to human rights and social justice principles within policy and legislation (cf Commonwealth Government of Australia, 2004), people with disabilities remain one of the most marginalised groups in Australian society, largely as a result of a welfare reform that has embraced new policy discourses which are shifting traditional notions of participation and equality (Parker and Cass, 2005). (This is discussed in the following chapter). This chapter
will discuss the role of international human rights instruments in the context of the ‘new welfare’.

The objective of drawing upon these international instruments is to show that, while rights-based principles in the UN have the potential to offer an influential framework for positioning human rights at the domestic level, as currently envisioned and practiced such instruments (and their underlying principles) are inadequate to promote full and equal participation of people with disabilities. By analysing the UN human rights instruments through the lens of disability, it will be argued that a commitment to rights, while a necessary part of ensuring the possibility of equality for all, remains insufficient in itself to address the multiple discrimination and human rights violations of persons with disabilities. Overarching ideological and policy aspirations that embody human rights and seek to eliminate human rights violations do not encapsulate all the steps necessary to address the profound marginalisation that people with disabilities face. As Mohan (2005:6) states, “the doctrines of human rights do not usually specify, classify and clarify the instrumentality involved in achieving (human) rights for all”. This chapter suggests that what is missing from the UN human rights principles for people with disabilities are notions of social justice.

While binding UN treaties promote rights, the intersection of rights and justice at the international level is best seen in the non-binding instruments that pertain to disability. These international instruments – e.g. declarations, principles and guidelines – are not legally binding in international law, however they represent a moral and political commitment by States (UN, 2004). This chapter will analyse two key non-binding instruments: the World Program of Action Concerning Disabled Persons (1982) (WPA), and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) (the Standard Rules). As will become apparent, these instruments have a greater potential than the current ‘binding instruments’ to integrate the principle of social equality with a recognition of difference in both international and national legislative and policy frameworks (where even ‘binding’ instruments usually do not become part of domestic law until expressly enacted in domestic law). Fraser’s theory of social justice is once again drawn upon to illustrate how, concurrent with rights, a commitment to the principle of social justice is needed to ensure that persons with disabilities are offered parity of participation and citizenship in all socio-cultural
and political-economic realms. It is argued that, by incorporating the principles of redistribution and recognition into human rights discourses, the principles underpinning rights – alongside the practices of rights-based policies – would better facilitate the amelioration of injustices that impede participation of people with disabilities at both objective (structural) and intersubjective (status) levels. In closing, the future role of the UN human rights system is assessed in light of the new treaty on the rights of persons with a disability, which was agreed upon by the UN General Assembly in September 2006.

**Binding International Treaties and Disability**

During the 1960s, the UN began to recognise the vulnerability of certain populations to human rights abuses that were not addressed with any degree of specificity in existing international human rights laws. A re-evaluation of policy spurred a demand for fuller participation in an integrated society and a number of specialised human rights instruments were adopted. The core UN human rights Conventions are:

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965)
- International Covenant on Civil and Political Rights (ICCPR) (1966)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966a)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

These treaties created legal protections that address in concrete terms the social, political and cultural circumstances that impact on the human rights conditions of these populations (UN, 2003; NCD, 2002). International human rights treaties are binding under international law on States Parties that have ratified the instruments but, as mentioned, do not normally become part of domestic law until expressly enacted. Some universal instruments, such as the Universal Declaration of Human Rights, and some specific provisions, such as the principle of non-discrimination, have become part of customary international law and are considered binding on all States under international law (UN, 2004). Each treaty has a monitoring body whose task is to enforce or monitor implementation of the treaty in question, although primary legal
responsibility rests with the Member States (Quinn and Degener, 2002). The UN (2004) states that there are three main methods available to implement international legal instruments in domestic law:

1. Direct incorporation of rights recognised in the international instrument into what may be termed a ‘bill of rights’ in the national legal order.
2. enactments of different legislative measures in the civil, criminal and administrative laws to give effect to the rights recognised in international legal instruments.
3. Self-executing operation of international legal instruments in the national legal order.

The UN argues that, although slow and complex, translating an international Convention, standard or norm into a national law, and then to local implementation, is fundamental. States are primarily responsible for transforming legislative, administrative and judicial practices to empower persons with disabilities to exercise their rights. In an analysis of how international standards are implemented at the domestic level, Michailakis (1999) found that most governments are more advanced in establishing laws that guarantee the classic civil and political rights, which are thought be more immediately enforceable, than they are in establishing laws that guarantee social and economic rights, which are seen to be more aspirational. This is the case for Australia which has yet to develop a legal framework in which to guarantee the rights set out under the International Covenant on Economic, Social and Cultural Rights (ICESCR) (a point to be taken up later in this chapter).

Aside from the Convention on the Rights of the Child (CRC), the other treaties do not specifically refer to disability. None of the equality clauses in any of the three instruments comprising the International Bill of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) mentions disability specifically as a protected category (Degener and Quinn, 2002). Jones and Marks (2000) note that the jurisprudence of international human rights bodies has made it clear that people with disabilities are entitled to the same rights as all other members of the community. This is evident in the way in which the UN (2004) asserts that all international human rights instruments protect the human rights of persons with disabilities as they apply to all persons. But despite this acknowledgment that human rights apply to all people, persons with disabilities have historically remained on the fringes of human rights treaties. This has meant that the status and legal safeguards normally associated with the rule of law in almost all
nation-states were either not applied at all, or were largely discounted in the context of disability (UN, 2003a), although this view is slowly changing.

In 2000, the Office of the High Commissioner for Human Rights (OHCHR) commissioned a study on the human rights dimensions of disability, which resulted in an influential report entitled *Human Rights and Disability. The current use and future potential of United Nations human rights instruments in the context of disability* (Quinn and Degener, 2002). The study analysed the provisions of the six core human rights treaties through the lens of disability, and reviewed the functioning of the UN human rights system with respect to disability. The report describes how disability has shifted over the past two decades, from a medicalised approach that views people with disabilities as problems, towards viewing them as holders of rights. However, as the following chapter will show, in the domain of social security and income support the shift in *domestic* law has often been in the opposite direction: from entitlement to assessing medical impairment. Nonetheless, this research is still important as it reaffirms that the disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal and effective enjoyment of *all* human rights, without discrimination, by persons with disabilities (Quinn and Degener, 2002). The findings generated from this study contributed to placing disability rights firmly upon the human rights agenda in the UN, as seen in the following statement by the OHCHR:

A human rights approach to disability aims at empowering disabled persons and ensuring their active participation in economic, social, cultural and political life. It requires ensuring that people with disabilities have full access to the rights to which they are entitled – and which most people take for granted – in a non-discriminatory way that is respectful and accommodating of difference. It means abandoning the tendency to view people with disabilities as ‘problems’ and recognising the important contributions they can make to all aspects of societal life (UN, 2003a).

Following on from the study by Quinn and Degener (2002), demonstrating how the process of disability reform currently underway across the world could be strengthened and accelerated if greater and more targeted use were made of the international human rights treaties, the next two sections of this chapter provide an analysis of two key human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Their inclusion of, and applicability to, persons with disabilities is assessed with reference to a number of rights pertaining to disability.
within each Covenant. This is followed by an examination of Australia’s engagement with these treaties.

**International Covenant on Civil and Political Rights (ICCPR)**

The 1966 International Covenant on Civil and Political Rights (ICCPR) is one of the most important international instruments on human rights. Together with the 1948 Universal Declaration of Human Rights, and the 1966 International Covenant on Economic, Cultural and Social Rights (ICESCR), it effectively constitutes an ‘International Bill of Human Rights’. The ICCPR was adopted in 1966 by the UN General Assembly and entered into force in 1976 following ratification by a sufficient number of States (UN, 1966). As of September 2006, there were 157 Member States who had ratified the Covenant. The ICCPR is intended to be universal in the sense that it covers all human beings, as stated in the Preamble to the Covenant:

> recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... these rights derive from the inherent dignity of the human person (UN, 1966).

Monitoring and enforcement of the implementation of the ICCPR in States Parties is undertaken by the Human Rights Committee (HRC), composed of 18 independent experts elected by the States Parties for a four-year term. The HRC has adopted 29 general comments which are not binding on States Parties, but which provide useful guidelines on how to interpret the various Covenant provisions, although the Committee has made no specific general comment on persons with disabilities (Quinn and Degener, 2002).

**Rights within the ICCPR pertaining to Disability**

The right to equality is one of the oldest and most fundamental human rights norms, and guarantees of equality are reflected in several provisions of the ICCPR. The right to equality is one of the most important human rights for a person with a disability (Quinn and Degener, 2002) as it underpins all notions of social justice. While disability is not explicitly mentioned in the ICCPR treaty, it is covered by the term ‘other status’ in articles 2 and 26 which together constitute the non-discrimination clause of the treaty. Article 2 states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex,
language, religion, political or other opinion, national or social origin, property, birth or other status (UN, 1966).

Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (UN, 1966).

It has been suggested by some international commentators (e.g. Waddington and Diller 2002; Quinn and Degener, 2002) that the absence of a specific reference to disability in international articles has contributed to the marginalisation of people with disabilities across the world. One of the reasons why disability was not included as a specific category in the Covenant is due to the medicalisation of disability – where disability was viewed as problem to be resolved by a policy of medical intervention. Viewing disability as a medical problem can explain in part why historically disability has not generally been perceived as a human rights issue in the same way as gender or race. Quinn and Degener (2002) argue that when human rights doctrines and disability were associated, the focus was more on rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) rather than under the International Covenant on Civil and Political Rights (ICCPR). Marks and Clapham (2005) state in support of this point that this has meant that disability-based discrimination in the context of civil and political rights has received very little attention. This is reflected in the fact that the UN Disability Unit, located in the Division for Social Policy and Development, has no counterpart in the human rights machinery.

However, as is outlined below, parity of participation and citizenship for people with disabilities is constrained by human rights violations and injustices in a number of civil and political spheres. The ICCPR is an important rights-based instrument that can create a space for defensible claims against civil and political misrecognition (intersubjective injustices) and maldistribution (objective injustices) for all persons, including those with disabilities. When examining the ICCPR through the lens of disability, Quinn and Degener (2002) divide the various civil and political rights contained in the ICCPR into four clusters: (a) rights that refer to human existence; (b) liberty rights; (c) associational rights; and (d) political rights. This chapter now turns
to an examination of the rights under the ICCPR, offering examples of the violations that people with disabilities have incurred.

(a) Rights that refer to human existence:

For people with disabilities, relevant articles include 6 (right to life) and 7 (right to freedom from torture and other cruel, inhuman or degrading treatment and punishment). In developing countries, the mortality rate of children with disabilities is often higher than for children without disabilities as they are the last to be fed or taken care of (Quinn and Degener, 2002). In highly developed countries, controversies continue over euthanasia and assisted-suicide debates for foetuses, babies, and adults with disabilities (Campbell, 2002; Porter, 2004; Shakespeare, 2005). Meekosha (1999) contends that, in spite of international human rights instruments, widespread abuse of people with disabilities continues. There are a number of circumstances under which a person with a disability experiences degrading or inhumane services (article 7), which can include being subject to medical or scientific experimentation, or being placed in an inappropriate environment without the necessary sanitary facilities, such as prison and/or other institutions (Quinn and Degener, 2002). This is particularly the case for people with mental health issues who face serious rights violations when inappropriately institutionalised, and also when placed in the community with little or no support. Johnstone (2001:204) states that, “prejudicial and discriminatory attitudes toward people with mental health problems may see them systematically and legitimately excluded from, and marginalised to the fringes of society”.

The potential for utilising the ICCPR in addressing abuse of people with disabilities can be seen in the United States, where the enactment of the Civil Rights of Institutionalized Persons Act (Cripa) in 1980 has resulted in investigations into more than 300 residential facilities in 39 states. As a result, tens of thousands of institutionalised persons who were living in dire, often life-threatening, conditions now receive adequate care and services. Under Cripa, a number of investigations are continuing to enforce the rights of institutionalised persons with disabilities, so that they may receive adequate rehabilitation and active treatment, as well being able to access the most integrated setting appropriate to their needs (U.S. Department of
Justice, 2005). CRIPA is a useful example of how nation-states can utilise the rights principles under the ICCPR to address disability issues.

(b) **Liberty rights:**

For people with disabilities, relevant articles include 9 (right to liberty and security of person), 16 (right to recognition as a person before the law), 8 (freedom from slavery and servitude) and 12 (right to the liberty of movement). One of the key issues concerns the civil commitment to institutions of people with mental health challenges, where a long history of human rights violations and debates over guardianship laws remain prevalent in a number of countries (Stavis, 1995; Carney, 2000; RAND, 2000). In reference to article 16, Quinn and Degener (2002) argue that rights are relevant in the context of both civil and criminal law: people with disabilities, whether legally competent or not, must not be treated as mere objects in official proceedings. Further utilisation of the ICCPR at the domestic level would help ensure that people with disabilities have access to all their fundamental rights.

The issue of freedom from slavery and servitude (article 8) is an important human right for people with disabilities, particularly in the context of ‘sheltered workshops’, where poor working conditions and a lack of legal rights for employees have been compared to conditions of slavery (Quinn and Degener, 2002). Marks and Clapham (2005) note that the right to work is not realised where the only practical option for workers with disabilities is employment in sheltered facilities offering sub-standard conditions.

Article 12, the right to move around freely within a State and the freedom to choose one’s residence, underpins a number of interrelated issues specific to disability, such as public transportation and housing policies. Access to public transport is a critical issue for the parity of participation of people with disabilities, particularly as the availability of transport provides a critical link for participation in areas such as education and employment. In Australia under the Disability Discrimination Act, Standards for Accessible Transport were established in 2002. These Standards establish minimum accessibility requirements to be met by providers and operators of public transport conveyances, infrastructure and premises. The Standards set out requirements in relation to issues such as access paths, manoeuvring areas, ramps and boarding devices, allocated spaces, handrails, doorways, controls, symbols and signs,
the payment of fares and the provision of information (HREOC, 2007). Transportation and housing rights are under both the ICCPR and the ICESCR demonstrating the interdependence and indivisibility of the two treaties (Quinn and Degener, 2002). One significant factor in the rights under article 12 for people with disabilities is the issue of portability of disability support services. People with disabilities who require support through government-funded programs (such as home help or personal care) can be severely restricted in terms of being able to move around the nation due to the fact that the funded programs may not be portable between the various states and territories. This could mean that a person with a disability moving from one state to another could receive a significant decrease in service, which is unrelated to needs but simply due to that particular state’s eligibility criteria or resource constraints (WWDA, 2005a). This is a clear violation of the rights under the ICCPR, and creates further barriers to equality for people with disabilities.

(c) **Associational rights:**

Quinn and Degener (2002) note that associational, or ‘social cooperation’ rights, are rights that protect the needs of all human beings to cooperate, and to live in a community with others and as members of social groups. Relevant articles include 22 (freedom of association), 23 (family rights), 24 (the right to be protected as a child) and 17 (the right to privacy). The latter right is usually neglected in the context of disability, as people with disabilities are often subject to the involvement of many professional workers in their private lives (doctors, therapists, personal assistants, etc.), particularly in institutionalised settings (Morris, 1995; Marks, 1999; Quinn and Degener, 2002). Family rights are critical, particularly for women with disabilities who may, in some jurisdictions, face compulsory sterilisation, experience discrimination in reproductive rights, in motherhood and in family policies, and are often considered to be asexual. Studies have shown these issues to be pertinent in a number of different countries, for example, in Canada (Prilleltensky, 2003), Brazil (Block, 2002) and the United States (Morris, 1997). Leanne Dowse (2004), writing on Australia, argues that the practice of forced sterilisation is itself part of a broader pattern of denial of human and reproductive rights of women with disabilities, which also includes systematic exclusion from appropriate reproductive health care and sexual health screening, limited contraceptive choices, a focus on menstrual
suppression, poorly managed pregnancy and birth, selective or coerced abortion, and the denial of rights to parenting (Dowse, 2004).

(d) Political rights:

The ICCPR enshrines classical political rights in articles 18 (freedom of thought), 19 (freedom of opinion), 21 (the right to peaceful assembly), 25 (the right to take part in conduct of public affairs) and equality rights (articles 2, 3 and 26). In the context of disability, articles 18 and 19 often take the form of access to general political debate in society (Quinn and Degener, 2002). Article 19 states that the right to freedom of expression includes “freedom to seek, receive and impart information” (UN, 1966), a right of vital importance to those people with disabilities which constitute communication barriers. Representation of persons with disabilities in political parties (article 25) is a form of participation, and a number of writers have documented the lack of representation which people with disabilities have in public life (Morris, 1995; Newell, 1996; Longmore, 2003; Barnes and Mercer, 2005). The right to take part in political affairs raises issues of access to places where political life is played out, which under article 25 (the right to vote) poses problems if polling stations are inaccessible to wheelchair users, or if the election material is available in print version only (Quinn and Degener, 2002). The Physical Disability Council of Australia (2000) notes the continued discrimination that people with disabilities face in voting. These include: many Polling venues being totally inaccessible, though often claim they are; in a venue that is accessible there is no support for people with physical disabilities who cannot hold papers and pens; often the accessible venues are a considerable distance from a persons home, requiring accessible taxis to transport; in rural and remote communities, many people with physical disabilities travel considerable distances to find inaccessible voting venues; and many people with physical disability have been offered assistance outside polling booths, which negates the system of secret voting. In Australia and the US General Comment No 25 (the right to participate in public affairs, voting rights and the right of equal access to public service) is the first Human Rights Committee (non-binding) comment that specifically addresses persons with disabilities. This is done in three of its paragraphs:

4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria [...]. For example, established
mental incapacity may be a ground for denying a person the right to vote or to hold office.

10. [...] It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements [...]  
20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant [...] Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees (HRC, 1996).

These interpretations offer significant guidance for the inclusion of persons with disabilities into the electoral process. However, as Quinn and Degener (2002) argue, General Comment No. 25 fails to give detailed guidance on the kind of information that States Parties should include in their reports, and on the degree of detail required. For example, have blind people a right to receive voting material in Braille or on tape? Are deaf people entitled to sign language interpretation? The Comment is also silent on the meaning of article 25, subparagraph (c) “(the right) to have access, on general terms of equality, to public service in his (sic) country”. Quinn and Degener (2002) argue that this right has been read restrictively by the HRC as merely right of equal access to public service positions in terms of “appointment, promotion, suspension and dismissal” (HRC, 1996). While affirmative measures “may be taken in appropriate cases to ensure there is legal access to public service for all citizens” (HRC, 1996), persons with disabilities are not specifically mentioned. Quinn and Degener (2002) suggest that access is one of the main subjects addressed in the Standard Rules – adopted by the General Assembly just three years prior to the HRC adoption of General Comment No. 25 – and argue that the Comment would have been far more beneficial if the Standard Rules had been taken into account.

It is apparent from the above account that a number of rights under the ICCPR are relevant to disability. People with disabilities cannot achieve parity of participation and citizenship if their civil and political rights are constrained or impeded by disabling barriers and attitudes. It is evident that human rights violations and injustices are occurring in civil and political institutionalised social arrangements – where some people are denied the means and opportunities to achieve equal citizenship; and in civil and political institutionalised social norms – where some people are denied the status of equal citizenship. The ICCPR has great potential to be inclusive of disability rights at both international and domestic levels, although if it is to be effective for people with disabilities, it must allow for simultaneous claims
against misrecognition (e.g. lack of political representation) and maldistribution (e.g. exploitation).

This chapter now turns to an examination of the ways in which Australia has implemented the disability-relevant articles contained in the ICCPR, and the extent to which the government has incorporated the principles of rights into a national legislative framework.

**Australia, Disability and the ICCPR**

In Australia, the Covenant and other treaties are not ‘self-executing’, meaning the provisions of treaties to which Australia has become a Party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia. Thus, to ensure conformity with the ICCPR throughout Australia, from 1968 until ratification of the Covenant in 1984, the Federal Government undertook extensive consultations with state governments. The aim of these meetings was, first, to identify provisions in the law which were inconsistent with the Covenant, and second, to propose rectifying action or appropriate reservations. From 1985, the primary official forum for ensuring the compliance of states with the ICCPR is a committee comprised of federal and all state attorneys-general in Australia. The committee is known as the Standing Committee of Attorneys-General (Commonwealth Government of Australia, 1998). In accordance with the requirements of article 40 of the ICCPR, Australia has submitted a number of reports to the UN Human Rights Committee (HRC), the monitoring mechanism of the ICCPR. The most noteworthy of these reports for people with disabilities is the third report (Commonwealth Government of Australia, 1998) which covers the period from March 1987 to December 1995. This report documents a number of significant changes to Australia’s legislation, and an analysis of this report demonstrates a fundamental shift in the Government’s thinking about disability, in line with the international shifts towards promoting people with disabilities as holders of rights. This also coincided with a Labor government administration.

The Australian report offers an overview of federal and state discrimination law, and disability discrimination law, and refers to persons with disabilities in connection with nine substantive rights covered by the ICCPR. The report deals with such matters as anti-discrimination law in the context of disability, the relationship between abortion
law and disability, mental health legislation, civil and criminal commitment, medical research and scientific experiments, jury service, protection of legal personality, support measures for families with disabled children, and disability discrimination in the area of education, voting rights, public employment and staff selection (Quinn and Degener, 2002).

It is worth noting that the Australian Government begins the third report by stating to the HRC its position on the use of legal mechanisms to achieve social justice:

At the outset, however, it should be noted that Australia believes that not every matter concerning human rights is properly dealt with by resort to additional legal sanctions. In many cases, rights are better preserved by less formal processes, often associated with inquiry, conciliation and report. Methods such as special parliamentary committees or royal commissions may be appropriate to determine the balance between rights and obligations, which is an inherent part of the method by which human rights and freedoms are protected and promoted. Of course, where a matter is capable of precise legislative definition and traditional law enforcement, this method is also available (Commonwealth Government of Australia, 1998).

This statement reflects the Australian Government's position on human rights beyond legal measures. Australian programs tend to adopt a systemic approach rather than a complaints-based approach, a position which separates Australia from its liberal welfare state counterparts, in particular the United States. During the reporting decade, mid-1980s to mid-1990s, the United States embraced formal legislative measures as the primary means by which to redress social justice violations, with social justice for people with disabilities predominantly played out in the courts (e.g. Scotch, 2001, who traces civil rights law for disability in the United States). The use of legal sanctions, and the legal system itself, to achieve equality for marginalised groups is problematic, particularly for persons with disabilities, as discrimination is often bound up with the very structures used to promote equality. Jones and Marks (1999b) argue that, although the law may be a symbolic statement of the worth and dignity of people with disabilities, it can also have the opposite effect where it may undermine the rights of people with disabilities (e.g. where injustice is systemically entrenched in legislation and/or legislative processes). Therefore, incorporating means other than legal sanctions to achieve human rights is one step towards addressing the complex barriers that impede the achievement of social justice. As will be demonstrated in Chapter Four of this thesis, legislative methods do not go far enough in addressing systematic discrimination, because the use of conciliation and reports
does not necessarily translate into recognition of injustices, nor into action to eliminate injustices.

It was during the reporting period of the third report that the Australian Government fulfilled its ratification of the ICCPR via incorporation of new legislation specific to human rights. The Human Rights and Equal Opportunity Commission Act 1986 established the Human Rights and Equal Opportunity Commission (HREOC) to oversee the observance of human rights in Australia. HREOC is a statutory authority which receives complaints of discrimination under the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992, the Privacy Act 1988, and in relation to other human rights. Under the Human Rights and Equal Opportunity Commission Act, the following international instruments are realised: the International Covenant on Civil and Political Rights; the Declaration on the Rights of the Child; the Convention on the Rights of the Child; the Declaration on the Rights of Disabled Persons; the Declaration on the Rights of Mentally Retarded Persons; International Labour Organization Convention No. 111; and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (Commonwealth Government of Australia, 1998).

Since the submission of the second report by Australia to the Human Right Commission, the Federal Government has acted to improve the rights of people with disabilities through two pieces of legislation, one focused on infrastructure for service provision (the Disability Services Act 1986) and one focused on eliminating discrimination (the Disability Discrimination Act 1992). The Disability Services Act (DSA) was introduced in response to community calls for urgent and fundamental reforms in the area of service provision for people with disabilities. The Government of the day argued that it enables a more flexible range of support services to be provided to people with disabilities, for example, in the areas of accommodation, employment and community participation (Commonwealth Government of Australia, 1998). The DSA most clearly adhered to the international shift to a human rights philosophy on disability in its Statement of Principles and Objectives. These outline the Federal Government’s principles on how services for people with disabilities should be developed and delivered, and the DSA promoted the notion that people with disabilities had a right to enjoy the same rights that all members of Australian society
enjoy, for example, the right to respect, dignity, development, quality of life, choice, the least restrictive alternative and the pursuit of grievances. The principles also promoted the achievement of outcomes such as competence, self-reliance, participation and image (Commonwealth Government of Australia, 1998). Although the DSA contains the twin principles of recognition and redistribution, it was unclear whether or not resources were to be made available to give effect to these rights objectives. Having a form of equality in rights-based legislation that allows for simultaneous claims against misrecognition and maldistribution is only the first step towards securing parity of participation and citizenship for people with disabilities. What is also needed if social citizenship is to be achieved, is a commitment to parity of participation in welfare and rights-based practices.

The second piece of legislation, the Disability Discrimination Act (DDA) 1992 came into operation on 1 March 1993 and made discrimination on the basis of disability unlawful in a number of areas. On 9 December 1994, the Federal Government launched the Commonwealth Disability Strategy, designed to provide a plan of action to deal with systemic disability discrimination and to implement the objectives of the DDA from a federal government perspective (Commonwealth Government of Australia, 1998). Importantly, the approach was based on the Standard Rules, demonstrating how international non-binding documents have the potential to influence domestic policy and legislation. Further examination of the DDA will be taken up in Chapter Four.

The first piece of legislation, the DSA, and the Commonwealth/States Disability Agreement (to be discussed in a later section of this chapter), was focused on the provision of services as the primary means by which Government would fulfil its responsibility towards persons with disabilities in Australia (Parsons, 1999). During the 1981 International Year of the Disabled Person, the focus of disability rights activists in Australia was on services and the rights and potentialities of the people who used them, rather than on the injustices and inequalities of the society that gave rise to the need for those services in the first place (Parsons, 1999). This contrasts with the United States where a strong civil rights movement promoted the equality of persons with disabilities via a language of human rights (Fleischer and Zames, 2001), with little attention being paid to disability services. While this point will be taken up
in a subsequent chapter, it is important to note briefly here how the differing philosophies underpinning the paths to equality for people with disabilities in Australia and United States has led to differing outcomes. Australia’s approach focuses on specialised disability services and income support (recognising the principle of difference), whereas conversely in the United States there is a far stronger civil rights approach (recognising the principles of social equality). Neither is sufficient by itself to ensure parity of participation, and as will be argued, both these paths are necessary to achieve equality of opportunity for persons with disabilities in all socio-cultural and political-economic spheres.

At the international level, disability services were the main focus in initial UN disability documents, as can be seen in the 1975 United Nations Declaration of the Rights of Disabled Persons which emphasises rights to services and supports. Parsons (1999) argues that what is missing in the Declaration, and in the disability rights movement, is any assertion of the inherent value of disability. He states, “We do not see any proclamation of the new sorts of values with which the very existence of disability challenges, or could challenge, the society” (Parsons, 1999:28). Focusing on disability services is only one part of the policy puzzle, and does not lend itself well to the promotion of the fundamental rights that a person with a disability has, and so while the 1980s in Australia saw an important legislative shift to disability rights, this was just the initial step.

Concluding comments made by the Human Rights Committee (HRC) (2000) on Australia’s implementation of the ICCPR were positive overall. The HRC commended Australia’s implementation of the anti-discrimination legislation in all jurisdictions, including legislation to assist persons with disabilities. The Committee, although not specifically addressing women with disabilities, also “notes with satisfaction” the general improvement of the status of women in Australian society during the reporting period, particularly in the public service, in the general workforce and in academic enrolment. In addressing human rights in general, the HRC felt that one problem with the implementation of the ICCPR in Australia was the lack of a bill of rights:

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in
which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated (HRC, 2000).

This sentiment was supported by Jones and Marks (1999b), who argued that, if the rights are not supported by concrete strategies for their achievement, then their usefulness is limited. In Australia, rights-based legislation remains problematic due to the lack of accompanying enforcement mechanisms. Nonetheless, statements of rights do have the symbolic value of proclaiming to the community at large that people with disabilities are valued members of the community who are entitled to be treated with dignity and respect (Jones and Marks, 1999b). Quinn and Degener (2002) contend that for people with disabilities, the ICCPR does not merely protect against abuses, it also has the potential to break down barriers. As noted earlier, it potentially offers a means through which defensible claims against objective (structural) and intersubjective (status) injustices in civil and political spheres can be made simultaneously. But this can only occur if the rights that fall under the ICCPR are consistently utilised by States when developing, implementing and/or reaffirming policy and legalisation that pertains to people with disabilities.

While the ICCPR covers tangible, immediately enforceable rights, other more progressive rights were addressed under the ICESCR. This chapter will now turn to an examination of the articles under the ICESCR which pertain to disability, followed by an overview of Australia’s implementation of this binding treaty.

**International Covenant on Economic, Social and Cultural Rights (ICESCR)**

After a drafting process that took almost 20 years, the ICESCR was concluded in 1966 and came into force 10 years later in 1976. As of September 2006, there were 154 Member States who had ratified the Covenant. The implementation of the ICESCR in Member States is monitored by the ICESCR Committee which examines State reports. In contrast to the other UN treaty monitoring bodies, the Committee was not established as part of the ICESCR treaty but derived its existence from a resolution of the Economic and Social Council (Bruce, Quinn and Kenna, 2002). From its third session, the Committee on Economic, Social and Cultural Rights (CESCR) began to adopt General Comments for the purpose of assisting States Parties in fulfilling their reporting obligations. While they are not legally binding,
they represent an authoritative interpretation of the Covenant. As of January 2002, the CESC\R issued 14 general comments, including General Comment No. 5 (1994) which deals specifically with ICESCR rights as they relate to persons with disabilities. The other general comments often refer to ‘vulnerable and marginalised groups’ which also indirectly refer to people with disabilities (Bruce et al, 2002).

General Comment No. 5 provides links with other non-binding UN human rights documents including the Standard Rules and the World Program of Action (to be discussed in the following section), and these documents provide guidance to interpreting ICESCR rights in the context of disability. Importantly, the lack of a disability-specific category within the treaty is addressed:

The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago (General Comment No. 5, para 5, CESC\R, 1994).

While not stated as such, it is apparent that, when the International Covenant was being drafted, disability was located within medical realms. Persons with disabilities were not considered to be rights-bearers, and their marginalisation was attributed to individual impairment rather than systemic discrimination. Thus, this statement by the CESC\R in 1994 was a clear step to entrenching disability as a human rights issue, and symbolically represented how the ICESCR could be applied to disability issues.

**Rights within the ICESCR pertaining to disability**

The overall importance of the ICESCR to people with disabilities is made apparent in General Comment No. 5, as it recognises that:

Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services (General Comment No. 5, para 15, CESC\R, 1994).

Ameliorating the multiple violations requires more than just a commitment to human rights, as injustice stems from a range of interrelated dimensions that influence the capacity for participation. The amelioration of socio-economic and cultural or symbolic injustices via domestic facilitation of international human rights (e.g. with a government commitment in principle and policy practice to the economic, social and
cultural rights articles contained within the ICESCR) is only one factor in addressing the complex marginalisation that people with disabilities face. As Jones and Marks (1999) argue, even if a perfect regime of human rights existed, it would be only one small part of what is necessary to bring about true equality for people with disabilities. Both socio-economic injustice and cultural injustice are pervasive in contemporary societies and both are inherently bound up in processes and practices that systematically disadvantage some groups of people. This is particularly evident in the areas of the right to non-discrimination, social security and employment, which are considered to be ‘target’ areas for participation under the ICESCR and the Standard Rules.

This next section addresses some of the more generalised rights as they pertain to the ICESCR, as well as including specific examples from Australia on how each group of rights has been implemented at the national level. Following this, a broader examination of some of the key issues relating to Australia and the ICESCR – including women with disabilities – will be undertaken. The rights relating to disability that are protected under the ICESCR have been grouped by Bruce et al (2002) as: (a) overarching right to non-discrimination; (b) rights that facilitate participation; (c) rights to participate in the workplace; and (d) other ICESCR rights and disability. These categories will be used in the following section.

(a) **Overarching right to non-discrimination:**

This section of the ICESCR includes article 2 (right to non discrimination) and article 3 (right to equality between men and women). The relevant non-discrimination norm is a fundamental part of the ICESCR and plays an overarching role in ensuring the equal and effective enjoyment of all ICESCR rights. Under Article 2, the Member States:

undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (UN, 1966a).

Marks and Clapham (2005) note that under General Comment No. 5, governments do not fulfil their commitments by simply abstaining from action which might cause discrimination. Rather governments must reduce structural disadvantage and give appropriate preferential treatment. The Comment notes that discrimination against
persons with disabilities has a long history and takes many forms. The CESC
(1994) states that, despite some progress in terms of legislation, the legal situation for
persons with disabilities remains precarious, and it therefore calls for comprehensive
anti-discrimination legislation in all countries. This legislation, it is argued, should
provide both judicial remedies and social policy programs which enable persons with
disabilities to live "an integrated self-determined and independent life" (General
Comment No. 5, CESC, 1994). While a number of developed countries have
introduced anti-discrimination legislation for people with disabilities, Marks and
Clapham (2005) argue that the ways in which disability discrimination interacts with,
and is mediated by, other factors have received little sustained attention. This will be
addressed in Chapter Four.

Article 3 expands on article 2 by requiring States parties to ensure equal rights of men
and women to the enjoyment of all economic, social and cultural rights. General
Comment No. 5 affirms the importance of gender equality, and makes particular
reference to the double discrimination and neglect that women with disabilities face
(CESC, 1994. See also: Asche and Fine, 1988; Morris, 1991; Garland-Thomson,
1997; Meekosha, 1998). One of the key problems for the rights of women with
disabilities lies in cultural stereotypes. Garland-Thomson (2001) argues that many
parallels exist between the social meanings attributed to female bodies and those
assigned to disabled bodies. Both are cast as deviant and inferior; both mean
exclusion from full participation in public as well as economic life; both are designed
in opposition to a norm that is assumed to possess natural physical superiority. The
Comment urges that all States Parties prioritise the situation of women with
disabilities (CESCR, 1994), although one barrier to this is the lack of gender-specific
data. According to Sue Salthouse (2005) from Women with Disabilities Australia
(WWDA), Australian government reports do not generally publish disaggregated data,
and this makes it difficult to gain a clear understanding of the situation for women
with disabilities. Salthouse argues that aggregating data masks the marginalisation of
women with disabilities, and is itself a discriminatory practice. Disaggregated data is
essential so that inequalities can be identified, evaluated and addressed.
(b) Rights that facilitate participation:

Rights that pertain to people with disabilities are article 12 (the right to health) and articles 13 and 14 (the right to education). With regard to health care, General Comment No. 5 draws upon the Standard Rules to affirm that persons with disabilities have equal rights in the medical system. The CESC3R establishes links between health and participation: the right to physical and mental health implies the rights to medical and social services that enable people with disabilities to become independent (CESCR, 1994). At the global level, health issues are addressed by the WHO. As noted in the Introduction of this thesis, in 2001, the new International Classification of Functioning, Disability and Health (ICF) was endorsed by the World Health Assembly. The ICF provides a framework for the conceptualisation, classification and measurement of disability, and recognises disability as a multidimensional and universal experience. Within the ICF framework, a wide range of specific purpose definitions and applications can be located, developed and related to each other (AIHW, 2003). Since the ICF is inherently a health and health-related classification, it is also used by sectors such as insurance, social security, labour, education, economics, social policy and general legislation development, and environmental modification. Furthermore, the ICF is accepted as one of the UN’s social classifications, and is referred to in and incorporates the Standard Rules, thereby providing an appropriate instrument for the implementation of international human rights mandates as well as national legislation (WHO, 2001).

The Australian Institute of Health and Welfare (AIHW) – Australia’s national health and welfare statistics and information agency – as a Collaborating Centre of the WHO, has been involved for the last decade with the preparation of the ICF. The AIHW (2003) encourages use of the ICF to improve policy and information on disability and human functioning, and notes its value for Australia in that it:

- combines the major models of disability, recognising the role of environmental factors in the creation of disability and the importance of participation as a desired outcome, as well as the relevance of underlying health conditions and their effects; and
- provides a framework within which a wide variety of information relevant to disability and functioning can be developed (AIHW, 2003).

Both the ICF and the ICESCR General Comment No. 5 illustrate the links between health and participation, and in light of this, the AIHW suggests that analysis of
disability and long-term conditions requires a more holistic analytical approach. As people move between various health services over longer periods of time, the ‘whole person’ and contextual model of the ICF provides a useful conceptual and information framework (AIHW, 2003).

Under the article 13 (education) in the ICESCR, it is asserted that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms” (UN, 1966a). General Comment No. 5 promotes the importance of integrated education for persons with disabilities. In Australia in 2004, the Disability Discrimination Amendment (Education Standards) Bill 2004 was introduced in the Senate. The purpose of this Bill was to amend the DDA to enable the introduction of disability ‘Standards’ for education. Standards are designed to deal with systemic discrimination without the need to resort to proving discrimination through a complaints based process under the HREOC (Magarey, 2004). The Disability Standards for Education have been developed after a fairly lengthy process, which began in 1995. The primary purpose of the Standards is to clarify the rights of people with disabilities, and the obligations of education and training service providers, in relation to participation in education and training by people with disabilities. The Standards provide for the extension of the DDA in three areas:

1. Extension of the defence of unjustifiable hardship beyond the point of enrolment;
2. Inclusion in the definition of ‘education provider’ of “bodies whose purpose is the development and accreditation of curricula, training packages or courses” (including statutory authorities); and

The key concept of the Standards is the principle of treating a student with a disability on the same basis as a student without the disability, thereby affirming the rights set out under the ICESCR and General Comment No. 5. Magarey (2004) makes the point that, in developing these Standards, the key concerns of the educational stakeholders pertained more to questions of funding than to the principles involved. The Standards came into effect in late 2005 and the Commonwealth Department of Education, Science and Training (DEST, 2005) notes that the Disability Standards for Education cover the following areas:

- Enrolment;
- Participation;
• Curriculum development, accreditation and delivery;
• Student support services; and
• Elimination of harassment and victimisation.

Each area includes a statement of the rights of students with disabilities in relation to education and training, consistent with the rights of the rest of the community (DEST, 2005), thereby affirming a symbolic and legislative commitment to human rights of persons with disabilities. However, the extent to which these principles are being taken up in educational practices remains to be explored. As Forlin and Forlin (1998:2) state, “Although the rights of child to education have been established by international agreement, it is the interpretation of these rights that is crucial to the implementation of the right of all children to access similar educational opportunities”. Elizabeth Hastings (1996), the former Disability Discrimination Commissioner at HREOC, in conjunction with consultations held with education providers, outlined a number of barriers for people with disabilities in mainstream education. These included a lack of information for families and students about options and procedures; inconsistency between various education providers and sectors, in particular in transitioning between the various levels of school, and between school and university; a lack of necessary coordination between education, health and community services; insufficient provision of funds and resources, including lack of trained staff and necessary equipment; prejudice and discrimination by other students, parents and teachers; clustering of students with disabilities into particular schools; and transport and access barriers. It is apparent that the existence of rights-based legislation and policy does not go far enough in offering inclusive education for students with disabilities. Inclusive education needs to be underpinned by a notion of social justice, and as Ashman and Elkins (1994, cited in Forlin and Forlin, 1998) argue, education of students with disabilities needs to be an issue of equity rather than simply one of placement.

(c) Rights to participate in the workplace

The specific rights in the ICESCR under this section are article 6 (the right to work), article 7 (the right to just and favourable conditions of work), and article 8 (the right to form and join trade unions). Equal access to these rights is essential for persons with disabilities, as access to employment and adequate remuneration in the labour
market form an important foundation in ensuring participation and equality. In the ICESCR, article 6 asserts that:

the right to work ... includes the right of everyone to the opportunity to gain his [sic] living by work which he [sic] freely chooses or accepts ... the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual (UN, 1966a).

The UN (2003a) acknowledges that employment is not only crucial to the enjoyment of survival rights such as food, clothing, or housing, it also affects the level of satisfaction of many other human rights, such as the right to education, culture and health. Marks and Clapham (2005) argue that the right to just and favourable conditions of work (article 7) remains a key concern, whether people with disabilities work in sheltered facilities or on the open market. Poorer labour standards and exploitative rates of pay are inconsistent with this right. In General Comment No. 5, the CESC (1994) acknowledges that the field of employment is one in which disability discrimination has been prominent. It is asserted that States should actively support the integration of persons with disabilities into the mainstream labour market, as well as develop policies that promote flexible and alternative work arrangements that reasonably accommodate the needs of workers with disabilities. Furthermore, particular attention by governments should be paid to wider areas that enable employment, such as accessible transportation (CESCR, 1994).

The main themes informing the ICESCR right to work in the context of disability are non-discrimination; actions to modify the physical environments of workplaces, means of transportation and communication systems; the introduction of specialised training schemes and more flexible working practices; a strong preference for mainstream employment in the open labour market; and adequate protections for those in supported employment (Bruce et al, 2002; Marks and Clapham, 2005). General Comment No. 5 refers to the comprehensive instruments on work-related rights of persons with disabilities that have been developed by the ILO – in particular, Convention No. 159 (1983) concerning vocational rehabilitation and employment of persons with a disabilities – and urges States Parties to consider ratifying the Covenant (CESCR, 1994). Further discussion of employment and disability will be taken up in the following two chapters of this thesis.
(d) Other ICESCR rights and disability

Other rights which relate to disability include article 9 (the right to social security), article 10 (right to protection of the family, mothers and children), article 11 (the right to an adequate standard of living) and article 15 (right to take part in cultural life). Access to social security provision for people with disabilities has been established as a social right in a number of countries since World War II, and such programs have been shaped by welfare regime models (Parker and Cass, 2005). For liberal welfare states, the issue is not so much about the right to social security as much as it is about the right to adequate social security. As will be discussed in detail in the following chapter, social security programs in countries such as Australia and the United States are embedded in conflicting objectives. For people with disabilities, changes in the social security system over the past ten years have resulted in policy tensions where social security recipients are encouraged to participate in the labour market while simultaneously having their income constrained by a variety of income support and employment-related mechanisms, and in some instances effectively reduced, (National Centre for Social and Economic Modelling (NATSEM), 2005; Parker and Cass, 2005). Terry Carney (2003) argues that the disability support regime in Australia, under the new contractual and mutual obligation environment, has become considerably more restrictive. Such changes are eroding and impinging upon the rights found in the international treaty system. For people with disabilities, the right to adequate social security is one area where the existence of a disability-specific international binding human rights treaty would contribute to ensuring that such fundamental rights are not eliminated or eroded. Furthermore, if such international legislation incorporated principles of justice as well as rights – such as recognising the extra costs of disability – it would be an encouraging framework for people with disabilities to claim citizenship rights. This point is raised by Carney (2006c:7) who argues:

even if a state party were to take steps towards the realisation of the (social security) right – for example by legislating a right to social security – it would be necessary for the right to ‘fleshed out’ to include details the scope of, and eligibility for, such payments and the payment levels.

While General Comment No. 5 notes the particular importance of social security and income maintenance provision for persons with disabilities, the non-binding status undermines its potential at the national level. In addition, unless nation states embody
the twin principles of recognition (of difference via inclusion of the extra costs of
disability) and redistribution (of equality, via a legislative right to income support),
people with disabilities cannot achieve parity of participation and citizenship in all
socio-cultural and political-economic realms.

The main themes of the right to family life under article 10 of the ICESCR are the
right to intimate associations, the right to marry and found a family, the right to social
protection for vulnerable children, and the need to ensure respect for privacy and the
dignity of the person. The CESC (1994) asserts that these rights are frequently
ignored or denied, especially in the case of persons with mental disabilities.

The right to an adequate standard of living entails the fulfilment of basic material
needs. Article 11 in the ICESCR affirms:

the rights of everyone to an adequate standard of living for himself and his [sic]
family, including adequate food, clothing and housing, and to the continuous
improvement of living (UN, 1966a).

The right to housing is of particular importance to persons with disabilities as it gives
the individual access to one of the key bases of parity of participation in the political,
social, economic and cultural sphere of society. In many liberal welfare states, the
housing needs of people with disabilities have been, and continue to be, largely
ignored within the general area of housing policy. In Australia, there is legislation
which covers landlord/tenant rights and obligations: tenants are protected under
federal law by the Racial Discrimination Act, the Sex Discrimination Act, and the
Disability Discrimination Act, but this is an overlay on the primary responsibility
borne by state and territory legislatures for delineating the substantive relationship and
the establishment of general avenues for complaint (such as tenancy tribunals),
supported by equal opportunity laws which largely mimic the standards set down in
federal law. These various Acts across the two levels of government aim to ensure
that accommodation is not denied to people on the basis of race, gender or disability
(Commonwealth Government of Australia, 1998a). Despite a number of studies into
specialised housing for people with disabilities, research into mainstream housing
policies and disability are virtually non-existent. To date, there is only one study
undertaken in Australia by the Australian Housing and Urban Research Institute in
conjunction with the Disability Studies and Research Institute. The focus of the study
was on a range of 'general' housing options available in the community, including
social housing, private rental, and the privately purchased housing market. The premise underpinning the research project was that the provision of suitable housing, and a range of options, cannot be dependent on restricted welfare-type programs, and instead requires much greater focus on general housing and planning policy (Bleasdale, 2005).

The right to access to culture (article 15) for people with disabilities is important as it enables them to influence the way in which they are portrayed, and gives them access to society’s cultural products including sports, cinema and theatre (CESCR, 1994). Barnes (1991) argues that the ability for people with disabilities to participate in mainstream recreational pursuits and establish ‘normal’ social contacts and relationships is severely restricted as a result of economic, environmental and social barriers. This, he suggests, is compounded by public perceptions of disability, which add to the difficulties people with disabilities face when making social contacts, especially in personal and sexual relationships. Barnes contends that much of the responsibility for the persistence of disablism lies with the media, notably television, newspapers and the advertising industry, especially in charity advertising. This view is supported by Longmore (2003) who traces stereotypes of people with disabilities in television and movies. Longmore argues that there is a ‘paternalistic prejudice’ in media images, which influences how people with disabilities are treated in that culture. The issue of cultural representation is taken up in General Comment No. 5 which asserts that:

In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability. In particular measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities ... the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues (para 38, General Comment No. 5, CESCIR, 1994).

In sum, the philosophy of General Comment No. 5 is geared towards using the ICESCR rights to achieve independence, autonomy and participation for persons with disabilities (Bruce et al, 2002). The key principle of equalisation of opportunities moves efforts towards the inclusion of people with disabilities in all aspects of life (Marks and Clapham, 2005). In discussing the general obligations of the States Parties to the ICESCR, the Committee is cognisant of the trend towards market-based policies, and the impact that this can have on marginalised groups:
Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasise certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatised and in which the free market is being relied on to an even greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities (General Comment No. 5, para 11, CESC, 1994).

This is followed by an acknowledgment that:

In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces (General Comment No. 5, para 12, CESC, 1994).

The emphasis on the role of government in mediating the private sector as well as public policy itself is critical. The influence of international treaties on social justice issues at the domestic level cannot occur without involvement of the government in all areas, including in the market, and for persons with disabilities especially in the market in the light of the recent welfare reforms that treat working-age persons as if they were able-bodied subjects, all equally able to participate in mainstream employment. The CESC, by asserting that the States Parties have an obligation to regulate the private sector, and to intervene in market forces, are explicitly promoting the necessary and sometimes additional actions required to ensure that persons with disabilities have the capacity for full participation.

It is apparent from the above account that a number of rights contained in the ICESC are relevant to disability, and people with disabilities cannot achieve parity of participation and citizenship if their socio-cultural and economic rights are constrained or impeded. Such injustices are occurring simultaneously through social arrangements – where the means and opportunities to achieve citizenship are denied – and social norms – where the status of equal citizenship is denied. The ICESC offers significant potential for defensible claims against structural and status injustices in economic, social and cultural spheres. But this can only occur if the rights that fall under the ICCPR are consistently utilised by States when developing, implementing and/or reaaffirming policy and legalisation pertaining to people with disabilities. This chapter will now turn to an examination of the ways in which Australia has
implemented the disability-relevant articles contained in the ICESCR, and the extent to which the government has incorporated the principles of rights into a national legislative framework.

**Australia, Disability and the ICESCR**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was signed by Australia on 18 December 1972 and ratified on 10 December 1975. It came into force for Australia on 10 March 1976. Australia’s report to the Committee on Economic, Social and Cultural Rights (CESCR) covers the period from 1990 to 1997 (Commonwealth Government of Australia, 1998a). In the report, the Government reiterates (as with the ICCPR) that legal sanctions are not the only means to achieve human rights (Commonwealth Government of Australia, 1998a). The Federal Government introduced a number of programs during the reporting period, demonstrating Australia’s commitment to the implementation of the ICESCR. Disability is primarily discussed under the employment and social security articles, although the report also addresses disability in family life, education, the principle of non-discrimination, standard of living, and physical and mental health.

Some of the issues highlighted in Australia’s report to the CESCR are similar to those in the HRC report (for the ICCPR) – signalling the indivisibility of the two treaties – and so will not be repeated here. This includes areas such as the advent of HREOC and its associated Acts. One worrying omission in the report by the Australian Government is the lack of a specific reference to disability in the context of article 3 on the equal rights of men and women. Carolyn Frohmader (2002) from Women with Disabilities Australia (WWDA) provides an overview of the status of women with disabilities, and states that “Women with disabilities are, from the government record, one of the most marginalised and disadvantaged groups in Australia”. Women with disabilities face double discrimination in a number of key human rights areas. They are:

- Less likely to be in paid work than other women, men with disabilities, or the population as a whole;
- Likely to earn less than their male counterparts;
- Less likely than their male counterparts to receive a senior secondary and/or tertiary education;
- Substantially over-represented in public housing;
- Spend more of their income on medical care and health-related expenses than men with disabilities;
• Less likely than women without disabilities to receive appropriate health services, particularly breast and cervical cancer screening programs, bone density testing, menopause and incontinence management;
• More likely to be unlawfully sterilised than their male counterparts;
• Regardless of age, race, ethnicity, sexual orientation or class, at least twice as likely to be assaulted, raped and abused as non-disabled women;
• More likely to be institutionalised than their male counterparts; and
• More likely to experience violence at work than other women, men with disabilities or the population as a whole (Frohmader, 2002).

One pressing issue in the call for human rights for women with disabilities in Australia is the struggle to attain the right to bodily integrity, an issue that moves across rights under both the ICCPR and the ICESCR. Leanne Dowse (2004) notes that the Australia Government currently does not have a coherent national approach, for example, to the sterilisation of women and girls with disabilities. Instead of developing universal legislation which protects their human rights, and prohibits the sterilisation of women and children except in those circumstances where there is a threat to health or life, the Government has consistently taken the view that there are instances in which sterilisation can and should be authorised. In August 2003 the Standing Committee of Attorneys-General agreed that “a nationally consistent approach to the authorisation procedures required for the lawful sterilisation of minors with decision making disability is appropriate” (Standing Committee of Attorneys-General Working Group 2003, cited in Dowse, 2004). Further work on the issue of sterilisation from 2003 has been directed toward the goal of resolving jurisdictional issues between Guardianship Tribunals in the various State and Federal Courts, and developing nationally consistent criteria which can be applied in all jurisdictions so that sterilisations can be authorised. It clearly undermines the fundamental human rights of women and girls with disabilities (Dowse, 2004). Furthermore, it calls into question the extent to which disability and gender are systematically addressed in any mainstream human rights instruments.

While the UN Convention on the Elimination of All Forms of Discrimination Against Women targets discrimination against women, it fails to address in any substantial manner the specific injustices that women with disabilities experience, where discrimination occurs as a result both of gender and of disability. Frequently, it is the disability which is seen first and foremost and other characteristics of the individual become subsumed. A single conception which encompasses several disparate characteristics used to group individuals (such as gender, race, ethnic group, sexuality,
social class) may result in the loss of important conceptual distinctions (Fraser, 1998). Incorporation of disability into a human rights discourse must firstly account for multiple sources of injustice if they are to advance the rights of all persons. This point has been raised by Mohan (2005) who suggests that the overarching objective prior to honouring a commitment to human rights is the achievement of a society that values social justice and inclusiveness. The promise of this goal is essential for people with disabilities, and in particular for women with disabilities, who continue to experience a number of human rights violations. While the UN Convention on disability will be discussed later in the chapter, it is important to note here how, in the drafting process, there were extensive deliberations about whether or not to include a separate Article within the Convention specific to women with disabilities (UN, 2005b). This represents a promising step in recognising the particular disadvantages and vulnerability that women with disabilities face.

Overall, there has been less success with the ICESCR in Australia than with the ICCPR. This is largely attributed to a lack of domestic legislation with which to frame the International Covenant. The CESCR in its concluding observations of Australia’s implementation of the ICESCR states:

In spite of existing guarantees pertaining to economic, social and cultural rights in the State party’s domestic legislation, the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions. The Committee regrets that, because the Covenant has not been entrenched as law in the domestic legal order, its provisions cannot be invoked before a court of law (CESCR, 2000).

The Committee recommends to Australia that they incorporate the Covenant in legislation in order to ensure the applicability of the provisions of the Covenant in the domestic courts. As is consistently mentioned throughout a range of UN documents, whilst international human rights law can have a great impact on a national system, ultimately the effectiveness of international justice depends upon the subsequent actions of the States.

Another area of concern for Committee is the absence of an official poverty line. The CESCR (2000) recommends that Australia establish an official poverty line so that a credible assessment can made of the extent of poverty in Australia. With the recent changes to both welfare and labour laws (as highlighted in the following chapter), links between poverty and disability are becoming more evident in Australia.
(NATSEM, 2005; WWDA, 2005; Saunders, 2006). Subsequently, the CESCER (2000) requests that Australia in its next report to the International Committee provide additional, more detailed information, including statistical data disaggregated according to age, sex and minority groups, concerning the right to work, just and favourable conditions of work, social security, housing, health and education. While persons with disabilities are not specifically mentioned, it is clear that they would fall under the category ‘minority groups’. This request for an official poverty line, and for detailed information on a number of human rights areas by the International Committee, highlights the inadequacies of the Australia Government’s implementation of human rights.

**Overview of International Binding Conventions**

The international Conventions remain a fundamental means for promoting the equal rights of all persons, including those with disabilities. However when these instruments are assessed in Fraser’s framework of social justice, they are found to be limited (both internationally and domestically) primarily because they fail to redress injustices and rights-violations at both the objective (structural) and intersubjective (status) levels. Although the analysis contained here demonstrates the relevance for people with disabilities of a number of articles in both the ICCPR and the ICESCR, generalised binding rights-treaties have overall been limited in their potential to redress the profound marginalisation and discrimination that people with disabilities encounter. One of the key factors that contributes to the limitation of the generalised treaties is the historical invisibility of people with disabilities within the UN treaty system. Further to this, as demonstrated by examples from Australia, the domestic implementation of international treaties is constrained by both social and political forces. It is evident that they are just one part of the larger process needed to ensure parity of participation and citizenship for persons with disabilities.

The binding treaties undeniably promote rights – but it is the non-binding instruments which currently have a greater potential for attaining both human rights and social justice for persons with disabilities. Instruments such as the Standard Rules are more clearly underpinned by social model principles of disability, and embody the twin principles of social equality and recognition of difference (as outlined in Fraser’s theory). This chapter now turns to a discussion of key non-binding instruments.
pertaining to disability within the UN, and analyse their effectiveness in facilitating
parity of participation and citizenship for people with disabilities.

Non-Binding International Instruments and Disability

International instruments such as declarations, resolutions, principles, guidelines and
rules are not technically legally binding under international law. They express
generally-accepted principles and represent a moral and political commitment by
States, as well as being used as guidelines in enacting legislation and formulating
policies concerning people with disabilities (UN, 2004). Several disability-specific
non-binding international instruments have been adopted at the international level.
The following section will delineate four of the more significant ones. These are:

- Declaration of the Rights of Mentally-Retarded Persons (1971)
- Declaration on the Rights of Disabled Persons (1975)
- World Programme of Action concerning Disabled Persons (1982)
- Standard Rules on the Equalization of Opportunities for Persons with Disabilities
  (1993).

The Shift to a Human Rights Approach

During the 1940s and 1950s, the UN concentrated on disability prevention and
rehabilitation (UN, 2004a). However, from 1955 through to 1970, the focus of the
UN shifted, with early activities supporting the rights of persons with disabilities to
receive welfare and public services, although initially little attention was paid to
societal obstacles. From the 1970s onward, there was a new approach to disability as
the concept of human rights began to be more internationally accepted. In the 1970s
the social model of disability emerged, and its principles were reflected at the
international level through two major declarations that were adopted by the General
Assembly. The first of these, the Declaration on the Rights of Mentally Retarded
Persons (20th December 1971), states that the ‘mentally retarded’ person has, to the
maximum degree of feasibility, the same rights as other human beings. Some of these
include the right to medical care and physical therapy, education, training and
rehabilitation, to economic security, to perform productive work, to protection from
exploitation, and to access to legal procedures. The Declaration states that whenever
possible, the ‘mentally retarded’ person should live with their own family or with
foster parents and participate in different forms of community life (UN, 1971). This
Declaration was important in that it provided for future principles of integration to be adopted in the UN.

The second milestone during this decade was the Declaration on the Rights of Disabled Persons, adopted by the General Assembly on 9 December 1975. Recognition was given to the fact the persons with disabilities were entitled to the same political and civil rights as others, including measures necessary to help them become self-sufficient. The Declaration reiterated the rights of persons with disabilities in education, medical services, vocational training and rehabilitation, and placement services, and to other services which would enable them to develop their capabilities and skills and contribute to social integration. It further recognised their right to economic and social security, to employment, to live with families, and to participate in social events (UN, 1975). The Declaration noted that “disabled people are entitled to have their special needs taken into consideration at all stages of economic and social planning” (UN, 1975), demonstrating an initial awareness of the importance of recognising group differences concurrent with advocating for equality. Furthermore, it was an important first step in developing an international framework of justice in which citizenship rights could be claimed.

Although providing a framework of participation, these earlier human rights documents were criticised by disability groups for embodying paternalistic, medicalised models of disability that focused primarily on prevention and rehabilitation (NCD 2002; Marks and Clapham, 2005). The failure to refer to people with disabilities in earlier human rights texts, coupled with the use of weaker non-binding instruments for specialised instruments, reflected the attitudes towards people with disabilities at the international level, one that implicitly suggested people with disabilities were not a group particularly vulnerable to human rights violations (Waddington, 2001; Waddington and Diller, 2002). Any disadvantages that people with disabilities faced were attributed to the existence of individual impairments, in accordance with the medicalised model of disability, and not seen as the result of discrimination and lack of rights, in accordance with a rights-based model of disability. This international approach to disability was reflected in policies at the national level where policies and legislation for people with disabilities involved separation and segregation (Abberley, 1987; Barnes, 1991).
However, the Declaration was significant in that it provided the UN with a framework in which to promote the parity of participation of persons with disabilities, and on the 16 December 1976, the General Assembly declared the year 1981 International Year of Disabled Persons. The themes and objectives were ‘full participation and equality’ – defined as the rights of persons with disabilities to participate fully in the social life and development of their societies, to enjoy living conditions equal to those of their fellow citizens, and to have equal share in improved conditions resulting from socio-economic developments. Other objectives included increasing public awareness, understanding and acceptance of persons with disabilities and encouraging them to form organisations through which they could effectively improve their situations (Despoy, 1993:9). Of most significance was the commitment – at least in discourse – to the social justice principles of recognition and redistribution: there was an awareness of the need to promote both equality and difference in all socio-cultural and political-economic spheres.

**The World Program of Action concerning Disabled Persons**

The International Year of Disabled Persons was celebrated with numerous programmes, research projects, policy innovations and recommendations. On 3 December 1982, the General Assembly proclaimed the period 1983-1992 United Nations Decade of Disabled Persons and encouraged Member States to utilise this period as one of the means to implement the World Program of Action concerning Disabled Persons (WPA). The WPA was focused around three themes: prevention, rehabilitation and equalisation of opportunities which are defined as:

1. **Prevention** means measures aimed at preventing the onset of mental, physical and sensory impairments (primary prevention) or at preventing impairment, when it has occurred, from having negative physical, psychological and social consequences.

2. **Rehabilitation** means a goal-oriented and time-limited process aimed at enabling an impaired person to reach an optimum mental, physical and/or social functional level, thus providing her or him with the tools to change his or her own life. It can involve measures intended to compensate for a loss of function or a functional limitation (for example by technical aids) and other measures intended to facilitate social adjustment or readjustment.

3. **Equalisation of Opportunities** means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all (UN, 1982).

While the first two goals of the WPA – prevention and rehabilitation – reflected a traditional approach to disability law and policy, the third goal – equalisation of
opportunities – set the scene for significant change in thinking about disability at the international level (Quinn and Degener 2002; Marks and Clapham, 2005). The latter goal is the guiding philosophy for the achievement of parity of participation of persons with disabilities in all aspects of socio-cultural and political-economic life. Underpinning this theme is the principle that people with disabilities should be integrated into mainstream services. The aims of the WPA were a step towards international acceptance of the social model of disability which situates disability as a rights-based issue. In an important step, the WPA acknowledged the role of the environment in disability:

Experience shows that is largely the environment which determines the effect of an impairment or a disability on a persons daily life. A person is handicapped when he or she is denied the opportunities generally available in the community that are necessary for the fundamental elements of living (WPA, UN, 1982).

This signalled a clear shift away from the medicalisation of persons with a disability that had long dominated policy responses to disability. The WPA acknowledged that to achieve goals of full participation and equality, rehabilitation measures aimed at the individual are not sufficient. Furthermore, it clarified the point that people with disabilities have equal obligations as well as equal rights:

Societies must raise the level of expectations as far as disabled persons are concerned, and in doing so mobilise their full resources for social change. This means, among other things, that young disabled persons should be provided with career and vocational opportunities – not early retirements pensions or public assistance (WPA, UN, 1982).

The language of ‘equal obligations’ under the WPA heralded the rights philosophy of equality of opportunity, and embodied social justice principles of independence, access and participation. Furthermore, it is recognised that the achievement of parity of participation and citizenship is impeded by structural forces. However, the non-binding status of international disability rights documents, such as the WPA, draw on a so-called ‘soft-law’ (or broad textured) approach to human rights language and therefore remain open to interpretation at the national level, a problem evident in recent changes to the social security systems in countries such as Australia and the United States. Galvin (2004) notes that, while disability activists see that issues such as access and participation require structural change within social institutions, the ‘new welfare’ in liberal welfare states promulgates the view that access and participation can be achieved through individual behavioural change. In effect, this removes from government the responsibility of addressing structural discrimination
and injustice, which is at odds with the international framework of human rights. The problem of national interpretation of international rights-based documents could be ameliorated with the implementation of a binding disability rights treaty to ensure that the emancipatory international objectives of ‘participation’ and ‘independence’ remain as envisioned.

The WPA states that the rights of persons with disabilities to participate in societies can be achieved primarily through political and social action. Legislation in many countries has been enacted to guarantee that persons with disabilities have the rights to, and opportunities for, schooling, employment and access to community facilities, to remove cultural and structural barriers and to proscribe discrimination against persons with a disability (UN, 1982). The WPA provided guidelines for Member States to implement the recommended measures, and to achieve the stated goals. Under the theme of equalisation of opportunities, the following areas were identified for national action: legalisation, physical environments, income maintenance and social security, education and training, employment, recreation, culture, religion and sports (UN, 1982). At the Global Meeting of Experts in Stockholm, Margaret Joan Anstee, Director-General of the UN Office in Vienna, stated:

The International Year of Disabled Persons, 1981, was a milestone in the long history of the struggle of people with disabilities against discrimination and segregation, and for equal rights. The World Program of Action concerning Disabled persons, the fruit of collective work by Governments and organisations, recognised disabled persons first and foremost as citizens vested with all the rights and obligations that this implied … The problems of disabled persons could not isolated. Their solution depended on the recognition of the rights and needs of implementation of effective and integrated strategies (UN, 2004).

Alongside the introduction of the WPA was produced a thematic report on human right violations with respect to persons with disabilities, which contributed to influencing the international shift to a human-rights-based philosophy. On 29 August 1984, the UN Commission on Human Rights appointed Mr Leandro Despouy (Argentina) the Special Rapporteur on Human Rights and Disability of the Subcommission on Prevention of Discrimination and Protection of Minorities. Mr Despouy undertook a study of the causal connection between disability and serious violations of human rights and fundamental freedoms. He produced an influential report entitled Human Rights and Disabled Persons (Despouy, 1993), which
highlighted the extent to which human rights of people with disabilities were being overlooked. The introduction stated:

[disabled] persons frequently live in deplorable conditions, owing to the presence of physical and social barriers, which prevent their integration and full participation in the community. As a result, millions of children and adults throughout the world are segregated and deprived of virtually all their rights, and lead a wretched, marginal life (Despouy, 1993:1).

The Report drew attention to the legal issues regarding people with disabilities; the factors causing disability, particularly the violations of human rights and humanitarian laws; the prejudices, discrimination and other violations of human rights to which persons with disabilities are subject; and the national and international policies and measures designed to eradicate discrimination practices and guarantee persons with disabilities full enjoyment of human rights (Despouy, 1993). In his analysis of international human rights instruments, Despouy concludes that:

The principle of equality of rights – inherent in the concept of human rights and expressly embodied in all the instruments – confers on disabled persons the same rights as on other persons in general ... disabled persons also have specific rights ... these rights do not appear in any formal listing but are scattered throughout a number of legal instruments, or have been recognised by the courts. In fact, what might be termed the specific rights of disabled persons are only the material and legal expression of the minimum contribution which the community or States should make towards ensuring that such persons can on an equal basis enjoy all the human rights enjoyed by individuals in general (Despouy, 1993:10).

The Report highlights the fact that, while most Member States recognise at least implicitly that prejudices and discrimination against persons with a disability exist, few Governments have made a study of the causes and forms of such practices. The recommendations offered by the Special Rapporteur to combat discrimination include incorporation of disability-specific anti-discrimination legislation, and a systematic review of national laws and the incorporation in them of the principles and guidelines contained in the various international instruments which prohibit any form of discrimination against a person with a disability (Despouy 1993: 28).

In speaking of the national and international policies and measures, the Report states that while joint responsibility may be a dominant concept behind the WPA, the principal obligation to remove obstacles impeding or hindering the integration and full participation of persons with disability lies with Governments:

This means that they cannot be mere onlookers; they must act, sometimes with great vigour, and especially in difficult situations, in order to prevent marginalisation and to
ensure equalisation of opportunities is not just rhetoric but real and effective (Despouy, 1993:29).

The Special Rapporteur remarked that despite the many actions undertaken throughout the Decade, at the end of this period persons with disabilities would remain at a legal disadvantage in relation to other vulnerable groups, such as refugees, women, migrant workers, because the latter groups have protection from a single body of binding norms (Despouy, 1993). The existence of a specific international treaty allows for legislative claims against injustices to be made more easily in an international forum. Prior to the more recent drafting of a UN disability-specific Convention, people with disabilities could only make claims under the more generalised treaties. In conclusion, the Report stressed that one of the most important issues that required redress was the lack of an international monitoring mechanism to supervise compliance with the various regulations for the protection of the human rights of persons with disabilities. At that time:

The discussions in the Economic and Social Council on drafting an international Convention on the subject led to the conclusion that the immediate future was not the moment for undertaking this activity, for reasons of circumstance rather than substance (Despouy, 1993:38).

The possibility of an international Convention specific to disability was first raised in 1987 in Stockholm at the Global Meeting of Experts to Review the Implementation of the World Program of Action. The recommendations were that a guiding philosophy should be developed to indicate the priorities for action in the years ahead. The basis of the philosophy should be the recognition of the rights of persons with disabilities (UN, 1993). A draft of a Convention on the human rights of persons with disabilities was prepared by Italy and presented to the General Assembly at its forty-second session. Further presentations concerning a draft Convention were made by Sweden at the forty-fourth session of the Assembly. However, on both occasions, no consensus could be reached on the suitability of such a Convention. In the opinion of many representatives, existing human rights documents seemed to guarantee persons with disabilities the same rights as other persons (UN, 1993). As a compensatory alternative, the General Assembly eventually adopted the non-binding Standard Rules (General Assembly Resolution, 48/96 20 December, 1993). The Standard Rules were perceived as a substitute for a binding international treaty (Waddington, 2001).
The Standard Rules on the Equalization of Opportunities for Persons with Disabilities

The Standard Rules were developed on the basis of the experience gained during the UN Decade of Disabled Persons (1983-1992), and were not the result of a single sudden achievement but of a slow process with many interacting forces, taking over twenty years to be developed (Michailakis, 1999). The political and moral foundation for the Standard Rules is constituted by the six binding treaties, as well as the WPA (UN, 1993). According to the Standard Rules, Member States are morally obligated to provide for their citizens with disabilities the widest possible range of rights and opportunities for participation. While they are not legally binding, the UN believes that they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law (UN, 1993). They imply a strong moral and political commitment on behalf of States to take action for the equalisation of opportunities for persons with disabilities, defined as:

the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation (Para 24, Standard Rules, UN, 1993).

There are 22 rules divided into four sections: preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism.

(a) Preconditions for Equal participation

This section includes rules on awareness-raising (rule 1), medical care (rule 2), rehabilitation (rule 3), and support services (rule 4). In a study on the use of human rights instruments, Quinn and Degener (2002) found invisibility to be a large contributing factor in obscuring the rights of persons with a disability. The Standard Rules herald awareness-raising in promoting the needs, rights, potential and contribution of persons with disabilities, and encourage States to promote an awareness that persons with disabilities are citizens with the same rights and obligations as others. The Special Rapporteur on Disability, in her last report to the Economic and Social Council on the Standard Rules states that:
Equalisation of opportunities is a concept that requires a change in attitude and behaviour. Existing attitudes and current behaviour are the result of ideas that people have inherited about disability and its causes. Changing attitudes require ridding society of discrimination and prejudice and breaking down walls of superstition and ignorance. The media is the most powerful tool to effect this change and has been successful in changing attitudes at the public and social levels in many regions (Hessa, 2004).

The disability rights movement across the world has played a large role in promoting all aspects of disability: from highlighting the need to eliminate cultural and social stereotypes and myths about disability (Charlton, 2000; Fleishcer and Zames, 2001); to rewriting the social history of disability (Longmore and Umansky, 2001); to a discussion on the role of film in raising awareness of disability (Harnett, 2000; Pavlidès, 2005); to a range of grassroots, national, and international political campaigns (Oliver, 1990; Meekosha and Jakubowicz, 1999; Scotch, 2001; Hurst, 2003).

Alongside awareness-raising, the availability of support services (rule 4) is critical to achieving equalisation of opportunities for people with disabilities. In Australia, the Commonwealth State/Territory Disability Agreement (CSTDA) provides the national framework for the delivery, funding and development of specialist disability services. It encompasses the principles and objectives outlined in the Disability Services Act 1986 and the Disability Discrimination Act 1992, therefore playing a potential role in demonstrating Australia’s commitment to human rights for people with disabilities. The CSTDA is based upon the Standard Rules, and is said by the government to be embedded in dual philosophies of human rights and social justice. It acknowledges, at least in official discourse, the pivotal role that government plays in promoting the rights, equality of opportunity, citizenship and dignity of people with disabilities (Department of Family and Community Services {FaCS}, 2003a), and states that it is aligned with international standards of justice for people with disabilities. In the Agreement it is stated that:

- Commonwealth, State and Territory Governments acknowledge that the objectives identified in the United Nations Decade of Disabled Persons (1983-1992) are valid and will require continued action under this Agreement ... Governments commit to upholding the intentions of international and national Conventions and standards in respect of removing all forms of discrimination and supporting equal rights and opportunities to all individuals throughout their life (FaCS, 2003a).

The specialised disability services which come under the CSTDA include accommodation support, community support, community access, respite,
employment, advocacy, information, and print disability. Under the three Agreements signed so far (the first in 1991), the Commonwealth government states that it has responsibility for the planning, policy setting and management of specialised employment assistance; the state and territory governments have similar responsibilities for accommodation support, community support, community access and respite; and support for advocacy and print disability is a shared responsibility (FaCS, 2003a). While Chapter Four will consider the role of specialised services in promoting disability rights, it is important to note here that these listed services draw on a number of areas as outlined in the Standard Rules, particularly in the areas which have been outlined as ‘target areas’ for participation.

(b) Target Areas for Equal Participation

This section in the Standard Rules addresses areas of accessibility (rule 5), education (rule 6), employment (rule 7), income maintenance and social security (rule 8), family life and personal integrity (rule 9), culture (rule 10), recreation and sports (rule 11), and religion (rule 12). These areas have been identified by the UN as key sites where human rights violations and injustices occur, and are identical to the rights that fall under the binding International Covenant on Economic, Social and Cultural Rights (ICESCR). As previously noted, General Comment No. 5 of the ICESCR was constructed upon the Standard Rules, demonstrating the influence of the latter document on binding UN rights instruments.

The Standard Rules promote the philosophies of equal opportunity, participation, human rights and social justice in all target areas. While the binding instruments primarily focus on the legislative and policy aspects of rights, the Rules also incorporate a commitment to redressing injustices at the objective (structural) and intersubjective (status) levels simultaneously. In rule 7 (employment), the Standard Rules covers aspects of employment legislation and regulations; measures to integrate people with disabilities in open employment; action programs; awareness campaigns to address negative attitudes and prejudices; equitable recruitment and promotion policies; and employment conditions and environment. Underpinning each of these is the principle of integration:

The aims should always be for persons with disabilities to obtain employment in the open labour market. For persons whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative. It is
important that the quality of such programmes be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market (Para 7, Standard Rules, UN, 1993).

An examination of labour market outcomes for people with disabilities in Australia, compared with outcomes for non-disabled people, reveals that people with disabilities have significantly lower rates of employment (as discussed in the following chapters). Australia’s commitment to redressing the discrimination embedded in labour market structures has waned over recent years. The advent of welfare reform under the Howard Coalition Government has shifted notions of citizenship, participation and equality and tightened their embrace of a neo-liberal philosophy – re-organising citizens as market-workers and distributing resources predominantly via market participation. This contravenes the principles outlined in the Standard Rules, and has had an adverse impact on those who already experience high levels of discrimination in unregulated markets, such as those with disabilities. These issues will be taken up further in subsequent chapters.

For income maintenance and social security (rule 8) the Standard Rules importantly acknowledge how the extra costs of disability must be taken into account:

States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability (Para 1, Standard Rules, UN, 1993).

Access to social security provision for people with disabilities has been established as a social right in a number of countries since the early part of the twentieth century. Although a statutory right, it remains an insufficient means to achieve full participation and equality for persons with disabilities unless specific measures are taken, such as allowing for the extra costs of disability. Under Rule 8 (income maintenance and social security) in the Standard Rules, it is recognised that: “States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability” (Para 1, Standard Rules, UN, 1993). Additional costs occur in a range of areas – medical, transport, assistive technology, housing, and personal assistance, amongst others. A number of Australian commentators (for example, Cooper, 1993; Clear and Gleeson, 2002; Parker and Cass, 2005; Saunders, 2006) have shown how these costs are often overlooked in the welfare system, and this hinders the capacity for economic and social participation of persons with disabilities. Dr Jack Frisch (2001), who was
commissioned by the Physical Disability Council of Australia to undertake a study into the costs of disability, found that Federal and State programs to offset the additional costs of disability are inequitable and inefficient. The study illustrates how most people with significant disabilities are pushed into poverty by a combination of low workforce participation, low incomes and high living costs as a result of disability. It was concluded that:

The impoverishment of people with significant additional costs of living due to disability are swept under the carpet, and attempts to do something about it are thrown into the too-hard basket ... It is unjust that the Disability Support Pension is no greater for people with high financial support needs than it is for aged persons with no additional financial support needs (Frisch, 2001).

Similar research undertaken in other liberal welfare states has also demonstrated the urgent need for additional income support to meet the extra costs of disability (see for example Zaidi and Burchardt, 2003; Monet, 2004; Smith et al, 2004).

The Standard Rules also advocate that social security systems include incentives to restore the income-earning capacity of persons with disabilities and should not discourage them from seeking employment: “Income support should only be reduced or terminated when persons with disabilities achieve adequate and secure income” (Para 6, Standard Rules, UN, 1993). National policies that attempt to homogenise marginalised groups cannot facilitate social citizenship of people with disabilities as they fail to integrate principles of social equality with a recognition of difference. It is argued here that UN instruments are most effective at the domestic level when these dual principles are included.

(c) Implementation Measures

Implementation measures encompass rules 13 through 22, and address areas of information and research, policy-making and planning, legislation, economic policies, organisation of persons with disabilities, and national monitoring and evaluation of disability programs. This section of the Standard Rules provides a framework for States to collect and disseminate information on the living conditions for persons with disabilities, including gender-specific statistics, and establishing a data bank on disability. One of the key problems underpinning all disability research is the lack of available data and statistics at both the national and international level (Despouy, 1993; Quinn and Degener, 2002; OECD, 2003). Part of the problem with obtaining
valid data stems from the diversity of disability, as highlighted by the Special Rapporteur on Disability:

*Equalisation of opportunities is a universal concept measured against universal norms, which should apply to all cultures and countries equally. The challenge is that we live in an increasingly diverse universe where levels of development, cultural values, attitudes, norms, needs and services differ from one region to another, one country to another, and even within the same country (Hessa, 2004).*

The Standard Rules also urge States to continuously monitor and evaluate national efforts at ensuring equalisation of opportunities for persons with disabilities (rule 20). Australia has played a vital role in the development of National Action Plans on Human Rights, which have had some influence over achieving human rights of all persons, including those with disabilities. At the 1993 Vienna World Conference on Human Rights, Australia proposed that all countries prepare a National Action Plan on Human Rights. This suggestion became one of the recommendations contained in the *Vienna Declaration and Program of Action*, and in the following year (1994) Australia became the first country to complete and to submit to the Commission on Human Rights a comprehensive National Action Plan. The plan drew together all the elements of Australian Government policy relating to the domestic observance of human rights and social justice across the full range of civil, political, economic, social and cultural rights (Commonwealth Government of Australia, 1996). In discussing Australia's position on human rights, the Minister for Foreign Affairs, Alexander Downer, stated:

*The protection of human rights to promote the dignity of the individual is too important a matter for symbolic gestures alone. It is only through the pursuit of practical and effective efforts to promote human rights that we show our real commitment to the welfare of individuals and society (Commonwealth Government of Australia, 2004).*

The National Plan is intended to demonstrate the Government’s commitment to human rights, and their efforts in promoting human rights domestically and internationally, although it has yet to translate from rhetoric to policy and the promotion and enactment of human rights for any marginalised group in Australia. While there are a number of sections that could be implicitly relevant to persons with disabilities within the 2004 National Action Plan, disability is only targeted in two areas under the headings: 'Addressing the human rights of people with disability', and 'Equality for people with disability'. The first section provides a brief overview of the Commonwealth Disability Strategy; the Disability Standards (under the DDA);
encouraging greater participation in the workforce; education; and access to telecommunications. While it is by no means a comprehensive overview of the issues that persons with disabilities face, it does raise key points pertaining to disability and human rights. Under the latter heading, there is a brief reference to the DDA only. While it is commendable that disability is mentioned specifically in the National Action Plan, it is disappointing to see that the Government omits many of the complex areas that impede participation and equality of opportunity for Australians with disabilities.

(d) Monitoring Mechanism

The monitoring mechanism under the Standard Rules was established so as to promote their effective implementation, and is intended to assist each State to assess its level of implementation, measure its progress, and identify any obstacles. The Rules are monitored via the appointment of a Special Rapporteur, who facilitates exchange of experience and information between States, and establishes direct dialogue between States and local non-governmental organisations. In 1994, Bengt Lindqvist (Sweden) was appointed Special Rapporteur on Disability of the Commission for Social Development by the Secretary-General. His mandate was twice renewed in 1997 and in 2000. During his time as Special Rapporteur he submitted three monitoring reports on the Standard Rules.

The first report (1994-1997) found that the Rules had contributed to increasing public awareness and information campaigns on the rights of persons with disabilities, although there was less progress with regard to implementation of the target areas for equal participation (Rules 5-12), which suggests a greater focus on process than outcomes in the period immediately following the adoption of the Rules. In sum, Linqvist states that:

The purpose of the United Nations Standard Rules is to provide guidance to Member States concerning policies and measures to achieve the goal of ‘full participation and equality’. That goal brought a new dimension to disability policy when it was launched 15 years ago. It drew attention to the surrounding society and inevitably brought up the human rights aspect of disability policy. The recommendations in the Standard Rules are very progressive and, in the opinion of the Special Rapporteur, no country, not even among the most advanced countries, has fully implemented the Rules (Bengt Lindqvist, Special Rapporteur for Disability, 1997).

The second monitoring report (1997-2000) documents the progress in the area of human rights and disability. Lindquist found that the Standard Rules were a useful
evaluative instrument when assessing the degree of compliance with human rights standards. The report also noted that countries were using the Rules as a frame of reference for disability-sensitive policies, plans and programmes but there were shortcomings and gaps in the Rules. It was in this report that the idea of a UN Convention specific to disability was raised by the Special Rapporteur. This would, Lindquist believed, enable new issues to be addressed as well as cover topics not currently considered in the Rules. However, it was not until the third monitoring report (2001-2002) that the idea of a special Convention was fully explored. Lindqvist observed that the question of a special Convention on the rights of persons with disabilities had been actively discussed by a number of non-governmental organisations in the disability field. Two key issues raised in these discussions centred around:

1. The contribution of a legally binding instrument on human rights and disability in achieving higher priority accorded to disability needs at the national level.
2. The inclusion of the human rights of persons with disabilities as an integral part of regular United Nations treaty monitoring mechanisms, and not simply as a matter of social or medical concern (UN, 2004b).

The Special Rapporteur expressed the view that a ‘twin-track’ approach may be the best way to elaborate a Convention on the rights of persons with disabilities. This would mean continuing the development of the disability dimension in existing UN human rights monitoring system, while proceeding with the elaboration of a disability Convention (UN, 2004b). By June of 2003, the General Assembly decided to engage in the drafting of a Convention specific to disability.

During this year, Sheikha Hessa (Qatar) was appointed as the new Special Rapporteur for Disability for the period of 2003-2005. Her mandate was extended to 2008 by the Economic and Social Council in 2005. In her first report on the Standard Rules (2003-2005), she noted that one encouraging development within the disability movement was the rethinking and revision of the understanding and practice of rehabilitation. During a Committee meeting on the proposed disability Convention, it was unanimously agreed that rehabilitation be treated as a separate article from health and medical care, demonstrating the entrenchment of a rights-based approach for people with disabilities. The report signalled that a new understanding has emerged whereby community-based rehabilitation needs to deal with issues related to the lives of people with disabilities in all their aspects. The Special Rapporteur stated:
Disabled persons' organisations, the medical establishment and Governments need to be made to move away from the purely medical model of dealing with issues of disabilities and recognise that the disabled are persons first, and that their inclusion in society should be based on that criterion. Therefore, rehabilitation should address the person as whole at the social and professional levels, as well as the medical and therapeutic levels (Sheikha Hessa, Special Rapporteur for Disability, 2004).

Another development in the past few years has centred around the continued usefulness of the Standard Rules and the meaning of 'equalisation of opportunities'. As part of the rhetorical justification of social spending retrenchment many countries are stating that their national budgets are not financially able to cover increasingly high costs of disability and rehabilitation. Many western welfare states are embracing a much more market-oriented welfare system, based on the proposition that government can no longer afford the high costs of social programs. The move to a 'post-welfare' environment has also raised questions about the continued use of international instruments such as the Standard Rules. Michailakis (1999) suggests that, due to the increasing impact of market ideology in the sphere of social policy, people with disabilities are not defined as citizens but as individual consumers. This neo-liberal ideology conflicts with the core idea expressed in the Standard Rules, and these conflicting principles are difficult to reconcile. This issue is also raised by Meekosha (2002) who argues that people with disabilities are being further marginalised as a result of the expansion of free-market economic and social policies, and the withdrawal of governments in industrialised countries from social programs.

In addressing this, the Special Rapporteur (2004) for disability states that:

> I urge business leaders everywhere to contribute to the equalisation of opportunities for persons with disabilities, not only through financial donations and contributions. It is necessary to provide career and job opportunities for persons with disabilities, to enhance workplace accessibility and to sponsor training programmes to enhance the skills and build the capacities of persons with disabilities, which would allow them to contribute to the economy and take responsibility for their own independent lives (Sheikha Hessa, Special Rapporteur for Disability, 2004).

The UN must account for national trends that include a number of countries moving towards 'post-welfare' states, if they are to retain effectiveness in promoting rights of persons with disabilities. Quinn and Degener (2002) point out that one of the main tasks of the international human rights system is to make societies aware of the contradictions between their self-professed values and their application (or non-application or misapplication) in the context of disability. However this role can only
continue if the UN system of rights is systematically inclusive of the rights and needs of people with disabilities.

**Overview of International Non-Binding Instruments**

When compared with the 'binding' treaties, the 'non-binding' instruments offer greater potential for people with disabilities when assessed by Fraser's framework of social justice, as they integrate the principle of social equality with a recognition and respect of difference. Underpinning the Standard Rules are the principles outlined in the social model of disability, which maintains that it is disablist structures and attitudes that impede the full possibility of rights and equality for persons with disabilities. However, analysis of the potential for these instruments to facilitate parity of participation and citizenship for people with disabilities demonstrates that the 'non binding' instruments are constrained by the same political and social forces as the 'binding' instruments. In particular, the Standard Rules have no legal standing domestically, and therefore offer only a symbolic (or status level) commitment to justice, without the potential to contribute to the amelioration or redress of structural injustices. The capacity of international and national human rights frameworks to effectively promote the rights of people with disabilities would be greatly assisted by the introduction of a binding treaty specific to disability.

**The Future of Disability within the UN System**

The UN stated that:

> Despite the efforts to increase cooperation, integration and increasing awareness of, and sensitivity to, disability issues since the adoption of the World Program of Action and the Standard Rules, they have not been sufficient to promote full and effective participation of and opportunities for persons with disabilities in economic, social, cultural and political life (Para 6, UN, 2005a).

Therefore, in December 2001, the UN General Assembly decided to establish an Ad Hoc Committee to consider proposals for a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination (UN, 2005a). Andrew Byrnes (2003), an Australian Professor of law, in a document for the Expert Group Meeting on the development of the Convention, stated:

> The possibility of the adoption of a new treaty focusing specifically on issues of disability has enormous potential to placing disability rights firmly and visibly into
the mainstream of the United Nations work on human rights, and to provide impetus
to international and national efforts to ensure the enjoyment of human rights and
fundamental freedoms by persons with disabilities on the basis of equality with
others.

Since 2002, there were a series of Ad Hoc Committee sessions regarding the drafting
of the Convention. In 2003, the Committee decided to establish a Working Group
with the aim of preparing and presenting a draft text of a Convention, which would be
the basis for negotiation by Member States. The Working Group would take into
account all previous contributions submitted to the Ad Hoc Committee by States,
observers, regional meetings, relevant UN bodies, entities and agencies, regional
commissions and intergovernmental organisations, as well as civil society including
non-governmental organisations, national disability and human rights institutions and
independent experts (Working Group, 2004).

The implementation of a thematic Convention for people with disabilities was
intended to underpin, not undermine, existing human rights treaties. It was not an
effort to secure special privileges or to reinforce segregated treatment of people with
disabilities via a separate treaty. Rather the aim was to secure unequivocal protection
for the fundamental human rights and freedoms of people with disabilities.

International law is not like domestic law – the elaboration of a disability-specific
Convention does not come at the cost of excluding disability issues from the
mainstream instruments, but quite the reverse (Quinn and Degener, 2002). The new
treaty could offer a social justice framework in which national legislation could be
measured, and as Meekosha (2002) noted, the Convention would enable people to
compare their own government’s performance against international benchmarks. The
Standard Rules have been inadequate in this regard as they are not binding on
Member States.

The Australian Government submitted a paper to the Ad Hoc Committee Working
Group on their approach to a draft Convention, which said:

Australia has already stated its preference that the option of a new instrument in the
form of a protocol of annex to one of the existing human rights treaties be considered,
rather than a free-standing new Convention (Commonwealth Government of
Australia, 2004).

This paper by the Government was widely criticised by disability groups in Australia,
primarily because it was not representative of the views of many people with
disabilities. Peak disability groups were omitted from the consultative process at the drafting stage, and this went against the core slogan of the disability rights movement, ‘nothing about us without us’. The Physical Disability Council of Australia (PDCA) (2004) stated that they:

*do not support the Australian Government’s position that a new Convention is not required and that people with disability would be better served by the option of a new instrument in the form of a protocol or annex to one of the existing human rights treaties. PDCA believes that this position reflects the Australian Government’s failure to acknowledge the commitment required to address the current human rights violations experienced by people with disability and in addition, PDCA is extremely concerned about how the Australian Government came to adopt this position and questions its legitimacy given the lack of opportunity provided to people with disability across Australia to contribute to this process prior to this draft document being produced (PDCA, 2004).*

Meekosha has noted that, at the 2002 meeting to discuss the Convention, the Australian delegation of government officials emphasised that the states should ensure that deliberations on the Convention were ‘measured and considered’, and that proposals ‘draw upon existing instruments to prevent duplication’. Meekosha remarked that, in reaching this position, the Australian government had neglected to consult with any Australian NGOs from the disability community. No Australian disability NGO delegates attended, nor were they invited by the Australian government to participate. (Meekosha, 2002). However, in 2004, national consultations were commissioned by the Australian Department of the Attorney-General in relation to the proposed UN Convention on human rights and disability. These consultations were conducted by People with Disability Australia (PWD), in partnership with the Australian Federation of Disability Organisations and the National Association of Community Legal Centres. The consultation strategy of the study (PWD, et al 2004) had the following objectives:

(a) Raising the awareness about the Convention among people with disability and disability rights and advocacy organisations across Australia;
(b) Embedding a sense of ongoing responsibility for engaging in the development of the Convention across the disability rights movement in Australia;
(c) Consulting the Australian disability rights movement about the current Expert Working Group text proposal for the Convention;
(d) Consulting the Australian disability rights movement about the proposals for revision and amendment of the Expert Working Group text submitted by Australian non-government organisations; and
(e) Consolidating the views of the Australian disability rights movement in relation to the Convention into a single document.
The consultations found overwhelming support for the development of a UN Convention by people with disabilities and their organisations, and PWD unanimously called for the Australian Government to actively support the development of the Convention. The report noted that it appeared widely known that the Australian Government was initially reluctant to support the development of a Convention, a position which was heavily criticised by the participants in the consultations. However, the Australian Government’s position has now moved to the point where Australia is engaged in the development of the Convention. Participants expressed the view that a new thematic Convention is essential if the human rights of people with disabilities are to be recognised as having the same status as the human rights of others (PWD, et al 2004).

In October 2005, the Chairman of the Ad Hoc Committee, Don Mackay (New Zealand) released the draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (UN, 2005). In the preamble of the draft Convention it stated:

that a Convention dealing specifically with the human rights of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries (Para r, UN, 2005b).

After five years of negotiations, countries meeting at UN Headquarters in New York in August of 2006 finally agreed on a new treaty to protect the rights of persons with disabilities. Proponents of the Convention maintained that the treaty was necessary because persons with disabilities represented one of the most marginalised groups and that their rights had been routinely ignored or denied throughout much of the world. The UN (2006a) maintains that the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities. It covers a number of key areas such as accessibility, personal mobility, health, education, employment, rehabilitation, participation in political life, and equality and non-discrimination. The fundamental principles of the new disability treaty are outlined as:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
(b) Non-discrimination;
(c) Full and effective participation and inclusion in society;
(d) Respect for difference and acceptance of disability as part of human diversity and humanity;
(e) Equality of opportunity;
(f) Accessibility;
(g) Equality between men and women;
(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities (UN, 2006).

The Convention marks a shift in thinking about disability from a welfare concern to a human rights issue, which acknowledges that societal barriers and prejudices are themselves disabling. It is important to note that the Convention is inclusive of a range of dimensions that impact upon capacity for participation. It highlights the necessity for obtaining socio-cultural rights alongside political-economic rights in order to achieve equality of opportunity, and it embodies both human rights and social justice principles. This stands in contrast to the current situation with disability policy in liberal welfare states, where simultaneous access to income support and to participation in the labour market are constructed as contradictory goals of disability policy that rest upon bifurcated discourses of disability (Parker and Cass, 2005), a position that is also reflected in the international human rights Conventions, where civil and political rights retain a separate status to economic, social, and cultural rights. However, the new disability Convention offers a framework in which claims to rights can occur simultaneously in the recognition and redistributive areas.

Don Mackay (Ad Hoc Chairperson), in a press release on the development of this Convention, said that the fact of the matter was that people with disabilities enjoyed exactly the same rights "as the rest of us". Those rights were covered by all the core human rights instruments, including the Universal Declaration of Human Rights, but the reality on the ground was different (Mackay, 2005). The intention of the Convention is to reiterate the rights of people with disabilities and set out a more detailed code for their implementation. For example, persons with disabilities have freedom of movement, but that right is not much use to someone confined in a wheelchair if no accommodation has been made for accessibility. Mr Mackay (2006) said that the goal of the treaty is to create a "paradigm shift in the way that governments think about disabilities" that will make a "real and concrete difference to the approximately 650 million people with disabilities worldwide". He noted that a perception had existed in the past that existing human rights treaties applied to people with disabilities but that those rights were often not respected in practice. "What
we’re basically doing in the convention is setting out a code for governments so that they implement these broad rights that people with disabilities already actually are entitled to but are not receiving”, said Mr. MacKay (2006). The Convention does not create new rights. Instead, it specifically prohibits discrimination against persons with disabilities in all areas of life, including civil rights, access to justice and the right to education, health services and access to transportation. It was formally sent to the General Assembly for adoption in September 2006, at which point it will then be open for signing and ratification by all countries. Once states have signed it, they will be obligated to introduce measures that promote the human rights of persons with disabilities without discrimination. These measures include enacting anti-discrimination legislation, eliminating laws and practices that discriminate against persons with disabilities, and considering persons with disabilities when adopting new policies and programmes. Other measures include making services, goods and facilities accessible to persons with disabilities (UN, 2006a).

While the process of adoption of the treaty is well underway, some reservations remain. One criticism is that if people with disabilities have more attention drawn to them via a disability-specific treaty, then it may only serve to heighten their difference and perhaps increase marginalisation. Quinn and Degener (2002) argue that this concern generates the dilemma of difference. If policy-makers draw attention to disability as a difference via incorporation of a separate treaty, then this may result in perpetuating stereotypes of disability that contribute to the problem of marginalisation. However, if the difference is ignored – or is buried in a general or common legislative template – then the stereotypes are not fuelled, but at the cost of overlooking the differences that do exist.

This dilemma of difference in disability theory and policy is a fundamental issue. As discussed in the previous chapter, Young (1998) argues that marginalised groups seeking inclusion must deny any essential differences so that there are no justifications upon which such groups can be denied equal opportunities to participate. Conversely, such groups must affirm that there are differences which must be accounted for if equality of opportunity is to occur. Similarly, Fraser (1998) shows that claims for redistributive justice are about eliminating the inequitable economic arrangements that underpin unequal access to resources (both material and symbolic),
and therefore rests upon the notion of 'equal rights'. In contrast, recognition claims promote 'special rights' as they draw attention to the specific needs of that group. There is no neat theoretical solution to this problem. However, Quinn and Degener (2002) have shown that, while this is a genuine reservation, such concerns did not prevent the adoption of the thematic Conventions on women, children and racial minorities. The dilemma of difference underpins all marginalised groups, yet such groups have achieved legislative steps to obtaining international recognition, and the ability for reparation, and so it is hard to see why this negative reaction should occur in the field of disability and not in other fields. Quinn and Degener also make the significant point that if such an objection had been taken literally, even the Standard Rules would not have been adopted.

**Conclusion**

While it is premature to discuss the extent to which the UN disability Convention will facilitate the rights of persons with disabilities across the world, it is apparent that this Convention will only be as effective as the Member States allow it to be. While a new thematic Convention is essential if the human rights of people with disabilities are to be recognised as having the same status as the human rights of others, international norms concerning people with disabilities are useful predominately to the extent that they can set common standards at the national level. The UN Secretary-General at that time, Kofi Annan, in reporting to the UN General Assembly in September 2003, said:

> Human Rights are universal principles, but, inspiring as those principles are, none implement themselves. Good governance, effective institutions, adequate material resources and international support are usually what make the difference between noble aspirations and effective realisation (cited in Commonwealth Government of Australia, 2004).

While the importance, and increasing role, of international law in promoting the rights of persons with disabilities is recognised by the international community, domestic legislation remains one of the most effective means of facilitating social change and improving the status of people with disabilities (UN, 2004). International norms concerning people with disabilities are useful only to the extent that they can set common standards for disability legislation.

If the rights of people with disabilities are to be advanced within a social justice framework, governments cannot retreat from addressing systemic barriers in key
participation areas of non-discrimination, social security and employment. The moral and political assumptions embedded in the ‘new welfare’ comprise ideologies of ‘participation’ which are eroding principles of human rights and social justice. Human rights discourses are powerful ways in which individuals may be accorded or denied rights of recognition, redistribution and participation, and these discourses are inextricably linked with notions of discrimination and oppression. For persons with disabilities a commitment to human rights alone is insufficient to ameliorate their profound marginalisation because the principles of rights must be accompanied by notions of justice. As Marks and Clapham (2005:120) state:

If international human rights law is to become an effective tool in efforts to ensure independent living on the part of people with disabilities and redress their social inequality, a much more systematic approach is likely to be needed than has emerged to date.

International and national human rights frameworks must account for multiple sources of discrimination and injustice. The complex, and sometimes competing, dimensions that influence the capacity for participation of millions of people with disabilities, must be taken into consideration to ensure a future of international justice.

Michailakis (1999) argues that the most effective protection of the rights of persons with disabilities at the national level is with a combination of special and general legislation. When the rights of persons with disabilities are established by means of general legislation only, several citizenship rights (political rights, the right to marriage, the right to parenthood/family) as well as several social and economic rights (financial security, employment, independent living) are not guaranteed by law. Therefore a combination of legislative instruments that address the specific, complex needs of people with disabilities, as well as generalised legislation that signify equality is warranted. As Fraser (2003:9) states: "Justice today requires both redistribution and recognition. Neither alone is sufficient".

Rights legislation and policies for people with disabilities have been enacted to varying degrees across welfare states, with liberal welfare states encompassing both generalised and specific legislation and policy. However, rights-based legislation – even that which allows for simultaneous claims against misrecognition and maldistribution – is only the first step towards securing parity of participation and citizenship for people with disabilities. What is also needed is a commitment to parity
of participation in welfare practices if citizenship is to be achieved. This thesis will
now turn to an examination of how Australia and the United States have enacted
domestic policy principles and practices of international rights and justice for people
with disabilities, taking into consideration the uses of recognition and redistribution.
To do this, it will engage with two key areas that enable parity of participation and
citizenship for people with disabilities: the right to social security and the right to non-
discrimination. The subsequent chapters will examine the ways in which legislation
and policy in Australia and the United States constrain, limit or expand the capacities,
material resources and cultural recognition of people with disabilities through social
security and anti-discrimination policies. Chapter Three will address social security
legislation and policy for people with disabilities, situating changes to welfare
discourse and practice in the context of human rights and social justice. Chapter Four
will examine the Disability Discrimination Act in Australia and the Americans with
Disabilities Act in the US. The object is to show that a more appropriate theory of
citizenship that embodies human rights and social justice may be usefully developed
through analysis of policy institutions and their impacts on both socio-cultural
recognition and political-economic resource distribution.
CHAPTER THREE

New Paradigms of Welfare: Social Security Policies in Australia and the United States*

Perhaps the most significant insight afforded by an historical overview of disability policy is that we use old programs to cope with new problems (Berkowitz, 1987:226).

Since the 1990s welfare states have undergone substantial changes which have seen Conservative Governments across liberal welfare regimes embrace new policy discourses and practices that are shifting traditional notions of participation and equality, and repositioning what it means to be a citizen. Governments have implemented sweeping reforms to their welfare systems with the aim of reducing welfare expenditure and demanding workforce participation. Liberal welfare regimes in general have seen a move towards a post-welfare policy environment and this ‘new welfare’, rather than tempering discrimination and injustice, is embedding structural disadvantage. This is particularly evident with income support policies for people with a disability, which have undergone significant changes over the past two decades. Beginning in the 1980s, policy transformations shifted from earlier conceptions of medicalised disability, to an incorporation of social, economic and environmental structures. More recently, however, since the 1990s there has been a return to the official construction of a disability discourse that positions the individual as the ‘problem’ within the welfare system and, as Galvin (2004) notes, attempts to move people with disabilities into workplace participation using more stringent definitions of disability, and imposing market participation requirements and penalties for perceived non-compliance. This ‘new welfare’, evident in countries such as Australia and the United States, has largely neglected a commitment to human rights and social justice for people with disabilities. Such overarching changes in welfare discourse and especially practices have counteracted international efforts to promote rights and participation for all persons with a disability, such as those advocated in the UN human rights treaties (as discussed in the previous chapter).

The changes to disability policies and programs under conservative governments in liberal welfare regimes have constrained, rather than facilitated, labour market participation opportunities for people with disabilities. This is has happened through cuts to essential services (e.g. advocacy); the weakening of laws that protect basic human rights (e.g. Disability Discrimination Act, Industrial Relations laws, etc.); and the lack of inclusive policies (e.g. in areas of education, work, accommodation, built environment, etc.) (Disability Council of NSW, 1999:3). Widespread changes in welfare discourse and practice have replaced notions of welfare with ‘workfare’, advocated new policy principles – including the recommodification of labour – and promoted an individualised model of citizenship that systematically denies the social, economic and labour market conditions in which people with disabilities are obligated to seek employment. These recent shifts have had a large impact on whether or not people with disabilities can achieve socio-cultural and political-economic inclusion, resulting in further important questions being raised about issues of justice, rights and citizenship.

This chapter examines disability income support arrangements in Australia and the United States historically and in the current period of ‘welfare reform’ since 1990. It begins by positioning these two countries’ social security systems internationally, exploring how ‘new welfare’ has largely neglected a commitment to human rights and social justice for people with disabilities in favour of a neo-liberal welfare agenda. It will explore the changing construction of social security law and administration for people with disabilities through the implementation of medical models of impairment as the core of assessment for income support eligibility. While disability welfare reforms over the two decades are premised on the provision of incentives for social and economic participation, the medical assessment model has been accompanied by a systematic disavowal of the significance of social, economic and labour market conditions in providing or constraining opportunities for participation. Once again, Fraser’s (2003) work on redistribution and recognition is relevant, because it locates injustice within the processes and practices that systematically disadvantage some groups of people, while her theory of justice shows that social security is only one part of the policy puzzle for people with disabilities to have equal participation and citizenship.
In addition, the chapter shows that changes to social security legislation are situated in an overarching welfare discourse, originating in the new politics of welfare in the United States. This 'new welfare' espouses the principle of re-commodification of labour through a move to policies of 'workfare' and compulsory workforce participation as the eligibility criterion for receipt of benefits, accompanied by the tightening of the eligibility rules for income support such that a person's livelihood is increasingly expected to be dependent on market participation (Blank and Haskins, 2001; Lodemel and Trickey, 2002; Pierson, 2001; Sainsbury, 2001). Paradoxically, the enforcement of more stringent, medically-constituted criteria for eligibility for disability income support in Australia as well as in the United States may militate against labour force entry and the sustaining of labour force participation. Furthermore, the changes to the Australian welfare system have been accompanied by labour law reforms which have dismantled labour law award protection in favour of 'individual bargaining'. Carney (2006a, 2006b) argues that the combined effect of these reforms not only brings about closer integration between social security and labour law, but also reduces participation opportunities of the most vulnerable individuals – whether they are in work (under reduced employment conditions) or on welfare (on less generous benefits). The chapter argues that the current reform agenda fails to account for the contradictory goals inherent in disability policy, and as a consequence, welfare-to-work legislative and policy transformations intended to promote parity of participation are actually impeding social citizenship rights and labour market participation for people with disabilities.

**Situating Australia and the United States Internationally**

Access to statutory social security provision for people with disabilities that affect their labour force capacity was established as a social right in a number of countries in the early part of the twentieth century, and especially during and immediately after World War II. Such programs have been implemented to varying degrees and in different ways, usually shaped by welfare regime models. By the mid-1990s, 163 countries had statutory general disability programs. The types of social security arrangements addressing disability and the extent to which they embed principles of social rights vary, shaped by welfare state institutional patterns, levels of socio-economic development and the prevailing political and social philosophies embedded in welfare regimes (Dixon and Hyde, 2000). In their comparative analysis of social
security policies for people with disabilities, Dixon and Hyde (2000) note that most (130) of the 163 countries have a social insurance program characteristic either of the European corporatist welfare regimes or of the liberal welfare regime of the United States. Australia is among a minority of countries (with Denmark, South Africa, New Zealand, the Cook Islands and Nauru) having an income-tested, non-insurance-type, social assistance program. Such a model is consistent across all payments in the Australian social security system, covering the life-course contingencies of old age, disability, severe illness, unemployment, lone parenthood, parenting in low income families where one spouse is unemployed, and constant care-giving for disabled and vulnerable family members, relatives and friends (Carney, 2006). A social assistance system of this nature, traditionally characterised by relatively liberal income- and assets-tests to define need but not to discourage part-time employment while in receipt of benefits, does not require prior paid employment or labour force attachment in order to confer entitlement, and therefore has wider population coverage, especially for women (O’Connor et al, 1999). Nevertheless, as will be discussed below, the opportunities for employment while on income support are increasingly being restricted.

In contrast to the Australian system, the system in the United States predicates one of the two avenues to obtain social security support upon prior employment history. This is problematic for individuals who have intermittent involvement with the labour market, such as women, people with severe disabilities since early childhood who have not been able to build an employment history, or people with an episodic disability. Income support involves either Supplementary Security Income (SSI) or Disability Insurance (DI). The SSI is similar to Australia’s Disability Support Pension (DSP) in that it is a means-tested transfer program targeted to low-income adults with disabilities who meet certain income and asset criteria. However, the DI program is a social insurance program designed to replace the lost wages of adults with disabilities with payments based upon an individual’s lifetime average earnings (Wittenburg and Favreault, 2003).

To evaluate the various social security programs, Dixon and Hyde use a design-feature evaluation methodology based on social security dimensions considered by the
ILO to constitute a conservative, minimum standard set of statutory social security values or criteria, comprising:

- Universality of coverage;
- Minimal restrictions with regard to categorisation, general qualifying eligibility requirements, and specification of needs-assessment criteria;
- Provision of periodic cash payments as entitlements that enable recipients to maintain their customary lifestyle, relative to the prevailing community living standards.

According to this evaluation, social democratic and corporatist welfare regimes (including Austria, Denmark, Sweden, Finland, Norway and Portugal) dominate the global disability league table, but Australia is deemed to have the best designed disability program. This is a significant result (even though it is ‘design feature’ dependent on the methodology used), particularly when compared to other liberal welfare regimes which scored much lower on the table. From the 163 countries, New Zealand came in at 13, Canada at 61, the United Kingdom at 72, the United States at 76, and Australia was number one (Dixon and Hyde, 2002). This evaluation will be considered in the light of two other highly significant criteria not included in the evaluation methodology: the extent to which income support arrangements facilitate parity of participation in the labour force; and the extent to which such arrangements embody the principles of social justice and human rights.

One of the key issues when assessing the effectiveness of disability policy comparatively or within a country is reconciling the twin but potentially contradictory goals of disability policy. This problem is summarised by an OECD Report published in 2003, entitled *Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People*, which states:

One goal is to ensure that disabled citizens are not excluded: that they are encouraged and empowered to participate as fully as possible in economic and social life, and in particular to engage in gainful employment, and they are not ousted from the labour market too easily or early. The other goal is to ensure that those who are, or who become, disabled have income security: that they are not denied the means to live decently because of disabilities that (may) restrict their earning potential. How to reconcile these twin goals has yet to be resolved (OECD, 2003:3).

It is evident that underpinning disability policies are the conflicting principles of social equality versus recognition of difference, encapsulated in Fraser’s (2003) theory of social justice. Affirmative strategies (such as social security) are inadequate for redressing injustices because they aim to correct only the inequitable outcomes of
social arrangements (e.g. social processes and systems) without disturbing the underlying social arrangements that generate those outcomes.

Dixon and Hyde (2000:726) point to a number of problems inherent in contemporary social security systems for people with disabilities. These are:

- The creation of poverty traps because existing social security programs for people with disabilities reinforce benefit dependency since earnings from employment typically fail to compensate for income losses which would result from benefit cessation;
- Inadequate benefits because benefit levels are often insufficient to promote a standard of living that is commensurate with that enjoyed by non-disabled people, particularly if benefit levels do not adequately compensate for the additional costs of disability;
- Unfair discrimination, because disability programs in social insurance welfare regimes privilege the interests of people who have previously been in paid employment, particularly those who have accumulated sufficient contributions to qualify for earnings-related benefits. Such programs discriminate in particular against women with disabilities, who, because of minimum contribution or employment period requirements, may be forced to rely on the less generous benefits, perhaps provided by social assistance safety net programs;
- Poor targeting, because disability benefits do not vary according to the severity of impairment, as distinct from the earnings loss suffered as a result of disablement, e.g. under a compensation model;
- Administrative complexity, because disability benefits usually involve a bewildering array of coverage and eligibility criteria, which may prevent some from receiving the benefits to which they may be entitled.

Another key problem inherent in social security systems not addressed by Dixon and Hyde is the inability for people with disabilities to accumulate assets. Morris (2004) argues that very little attention has been given in the United States to the barriers or facilitators for advancing the economic freedom of people with disabilities. Compounding this is the fact that disability is usually viewed both in Australia and the United States from the medical model perspective where disability is a 'problem to fix'. As a consequence, the ability of people with disabilities to build private wealth and accumulate assets, in particular with regard to housing and retirement savings, has not been examined. People with disabilities often have interrupted work histories and this affects asset accumulation, and this is evident in the low homeowner rates in the United States for people with disabilities which sits at under 10 per cent (The Law, Health Policy and Disability Center, 2003). Similar figures are not available for people with disabilities in Australia, but the figures on rates of private home ownership show the relatively low rate for low-income individuals or families, in
which people with disabilities are situated (Cass, 1998). In addition, analysis of the second main form of asset accumulation in Australia, employment-based superannuation savings for retirement, shows that people with no labour force history, or an interrupted one where incomes are low and predominantly derived from income support, have little or no superannuation entitlement, and are therefore likely to have very low income in old age (Shaver, 2001).

The result is that current disability policies give conflicting messages – social security recipients are encouraged to participate in the labour market while simultaneously having their personal assets and income constrained (Saunders, 2006). The OECD (2003:64) notes that to become and remain entitled to income support, people have to be officially labelled as disabled (or in other words ‘unable to work’), which they characterise as the ‘inherent dilemma of disability policy’. In response to this perceived dilemma, a number of countries have tightened access to income support eligibility in order to reduce the numbers of recipients through a more stringent assessment procedure. This policy response has included one or more of the following:

- A more regulated and standardised medical assessment procedure;
- Use of an abstract, rather than specifically-located labour market criterion;
- Emphasis on granting benefits on a more temporary basis; and
- Reduction in benefit levels (OECD, 2003:141).

Furthermore, there has been a recognition in a number of liberal welfare states of the differences between income support programs and anti-discrimination laws, as in Australia where disability income support arrangements are not predicated on principles of rights and therefore cannot call upon ‘rights’ to justify eligibility. One of the key problems with disability eligibility requirements is the sending of conflicting messages. For example, Wittenburg and Favreault (2003) argue that in the United States, the Americans with Disabilities Act (ADA) promotes employment and independence for adults with disabilities while concurrently, eligibility for Social Security Administration (SSA) disability programs requires a person to prove an inability to work to obtain benefits. Application for income support sets up a dichotomous process whereby a person has to decide whether to follow either a ‘disability path’ or a ‘work path’. David Wittenburg (2003) from the Urban Institute states that, “On the disability path, as soon as you start applying for SSA disability
benefits – either SSI or DI – there are no temporary options for cash support, for health care support, or rehabilitation support; it’s an all or nothing proposition”. This results in tensions between the disability definition for SSA disability programs and efforts to provide return-to-work services to participants receiving income support because of the eligibility criterion requiring successful applicants to prove an inability to work (Wittenburg and Loprest, 2004). The same observation is pertinent for disability policy and legislation Australia. These issues will be taken up further in the following chapter.

The OECD Report proposes that the key issue in improving the labour market integration of people with a disability is to transform the very perception of disability, which should no longer be equated automatically with being unable to work in the market. The Report recommends eight policy objectives to achieve more equitable integration of people with disabilities:

1. Introduce a culture of mutual obligation;
2. Recognise the status of disability independently of the work and income situation;
3. Design individual work/benefit packages for persons with disabilities;
4. Promote early intervention;
5. Involve employers in the process;
6. Restructure benefit systems to remove disincentives to work;
7. Reform program administration;

While a detailed analysis of each of these objectives is beyond the scope of this chapter, it is important to note the prominence given to the objective of re-commodification: re-defining and re-positioning the person with a disability as a potential market worker. Underpinning the OCED’s analysis of disability policy is the valorisation of labour force participation, and it must be noted, a masculine model of labour force participation. Work is equated totally with market work, and no policy space is given to the modes of work constituted by informal care-giving outside of the market in families, extended kin households and community-based voluntary organisations. This re-positioning of people with disabilities as potential market-workers is framed within a wider welfare discourse which posits a person with a disability as ‘welfare dependent’ unless economically active, rendering other forms of social participation invisible and far less important. Use is made of terminology such as ‘passive dependency’ to describe the effects of current disability policy. This
resonates with welfare reform measures in various countries, namely, the trend to recommodification, with consequent de-legitimating of income support by depicting it as generative of dependency (a dependency which has both financial and moral overtones), bringing disability policy into line with unemployment policy and policy for lone parents (Sainsbury, 2001; Lodemel and Trickey, 2002; Macintyre, 1999).

What are the Australian labour market circumstances in which changes to the disability income support regime are located, and in which re-commodification is valorised?

**The Australian Labour Market Context**

Borland, Gregory and Sheehan (2001) identify three inter-related features of economic developments in Australia since the mid 1980s and especially in the 1990s:

- A significant change in the employment structure with a shift from full-time to casual part-time jobs and an increasingly unequal distribution of better paid jobs;
- Increased inequality in earnings in the better paid jobs which are available, and in particular within full-time jobs;
- The growing polarisation of households into ‘work rich and work poor’, with some households having access to several jobs and working long market hours in total, while an increased proportion of households have little or no paid work.

In keeping with these labour market transformations, there have been substantial impacts on peoples’ sources of income, as a greater proportion of the employment-age population has become reliant on social security income support in periods of labour force exclusion or marginality. Since 1966, the proportion of people of workforce age who receive social security payment, service pensions or student assistance, increased from 4 per cent to 12 per cent in 1980 and then to 21 per cent in 2000 (Henman and Perry, 2002). This increase occurred as a result of long-term unemployment and involuntary labour force withdrawal before the normal retirement age, accompanied by increased rates of severe illness and disability and the consequent claiming of disability and sickness income support payments, and the joblessness associated with child care responsibilities for lone parents (Saunders, 1994). Some commentators (e.g. Argyrous and Neale, 2003) have argued that shifting people on to the DSP was a deliberate strategy by government as it disguised the real extent of unemployment. In addition, increasing numbers of people have come to rely on income support not to replace but to supplement their market earnings, which is permitted, indeed
encouraged, within the design of income-tests (Landt and Pech, 2000; Henman and Perry, 2002).

It was in the context of a "growing concern about the extent of welfare dependency in Australia", as stated by the Minister at that time responsible for social security, Senator Newman (1999:3), that the Federal Government commissioned the Reference Group on Welfare Reform to examine and address the increased demands on the Australian welfare system. The recommendations in the Final Report of the Reference Group, (often called the McClure Report after its Chairman) have provided some of the legitimating discourse for contemporary welfare reform in Australia, and in particular have placed firmly on the policy agenda the key words of 'mutual obligation' and 'participation' (Reference Group on Welfare Reform, 2000). The recommendations of the Final Report rest on the fundamental premise that the welfare system must assist the social and economic participation of individuals, with priority accorded to market participation (Shaver, 2000). To its credit, the Report acknowledged that there are some people who face structural or systematic barriers to participation, including discrimination and problems with access to appropriate services and support. The Report stated, "People with a disability face barriers to economic and social participation due to their impairment but also low expectations of participation by other community members and employers" (Reference Group on Welfare Reform, 2000:38). The Report did not explicitly include people with disabilities within the scope of its recommendations for a more rigorous regime of mutual obligation to enforce labour force participation. However it did draw attention to the 'capacity to work' criterion in the eligibility for disability income support. Despite the significance of this review, overall the Australian policy climate in 2006 bears little resemblance to the recommendations outlined in the McClure Report. As Carney (2006a:2) argues, the 'job first' rationale contained in the welfare-to-work reforms – where social security recipients of workforce age are required to accept 'any job, of any duration or quality' – is a significant departure from the policy model of 'individualised activation with extensive supports' as canvassed in the report of the Reference Group on Welfare Reform.

There is abundant evidence that people with disabilities have poorer labour market outcomes compared with the overall population of work force age. Employment
disadvantages are constructed not only by the individual’s impairment, but also by structural and attitudinal barriers pertaining to workplaces and employment practices (Morris, 2006). Analysis of employment rates for persons of work-force age with disabilities in selected OECD countries (where data are available) show that the average employment rate for people who report that they have a disability is 27 percentage points lower than for other workers: with employment to population ratios of 44 per cent and 71 per cent respectively (OECD, 2003b). An examination of labour market outcomes for people with disabilities in Australia, compared with outcomes for non-disabled people, reveals that people with disabilities have a significantly lower rate of employment, a much higher rate of income support, and a much lower mean income (Wilkins, 2003:24). As of 2003 (latest data available), employment rates for men with disabilities are 52 per cent compared with 86 per cent for non-disabled men; for women, the figures are 42 per cent and 67 per cent respectively. As well, employed people with disabilities are considerably more likely than non-disabled people to be in part-time employment, and thus subject to lower earnings (Wilkins, 2003:24-25). The employment rate for all working-age persons with disabilities has increased only modestly in recent years. Between 1998 and 2003, the average employment rate for all persons with a reported disability rose from 47.1 per cent to 48.7 per cent (DEWR, 2005:8). Constraints such as difficult access to workplaces, including the additional time and cost of transportation, lack of appropriate arrangements in workplaces (e.g. the opportunity to vary working hours), coupled with prejudices among many employers, co-workers and the general public, may exacerbate an already difficult situation (O'Reilly, 2003). It is evident that participation for people with disabilities is constrained at a number of complex levels, involving both objective (structural) and intersubjective (status) injustices. Policies and programs must account for these multiple sources of injustice if they are to successfully facilitate labour force participation and citizenship for people with disabilities.

The operation of the labour market and the social organisation of employment in each workplace play crucial roles in shaping the category of ‘disability’ and in determining the response to people with disabilities. As Fraser noted, injustice is located in the economic structure of society. Examples of such injustice include exploitation (having the fruits of one’s labour appropriated for the benefit of others); economic
marginalisation (being confined to undesirable or poorly-paid work or being denied access to income-generated labour altogether); and deprivation (being denied an adequate material standard of living). For people with disabilities who are caught between the policy contradictions evident in the changes to welfare discourse and practice – which advocates a recommodification of labour while systematically denying the significance social, economic and labour market conditions – such injustices are all too apparent. And yet the current policy environment in both Australia and the United States has entrenched notions of market participation as the essential basis for adult citizenship while simultaneously constraining income support.

As part of the Australian Federal Government's strategy to increase workforce participation among disability income support recipients, the Department of Employment and Workplace Relations (DEWR) conducted a pilot project between December 2003 and June 2004 to explore ways of increasing the number of Disability Support Pension (DSP) recipients using Job Network services. The Job Network is the system of not-for-profit and commercial employment service agencies funded under Federal Government contracts to provide employment advice and referrals for unemployed people and to monitor their compliance with their mutual obligation agreements. A further responsibility of Job Network agencies is to report on clients' breaches of their agreements to Centrelink, the government authority which oversees the administration of benefit payments and which may impose financial sanctions in respect of agreement breaches (Carney and Ramia, 2002). Before July 2006, while unemployed people in receipt of income support were obliged to use the Job Network services, people with disabilities in receipt of DSP did not have this mandatory obligation, but they might access the Network in a voluntary capacity. The changes to these arrangements for people with a disability from July 2006 are outlined later in this chapter.

The interim results of the pilot project were released in October 2004. It found that the majority of people with disabilities wished to engage in paid employment but a range of disincentives impacted on the realisation of their workforce aspirations, including:

- Fear of losing the DSP and associated benefits coupled with concerns about ability to retain the pension as a safety net or re-establish eligibility for the DSP if employment cannot be sustained;
- A lack of awareness of currently available work incentives such as the relatively liberal income test allowing for workforce earnings, the continuing availability of concessions as market earnings increase; and the pension suspension arrangements which operate when employment is accessed;
- Insufficient guarantees of a return to pension support if the person loses their job;
- Negative experiences with employers and a lack of employer awareness of disability and discrimination issues; and
- The lack of availability of workplace accommodations for the circumstances of people with diverse types of disability (DEWR, 2004a).

In response to this pilot study, the president of the peak advocacy body of welfare organisations in Australia, the Australian Council of Social Service (ACOSS) stated that:

This pilot study underlines how hard it is for people with disabilities to find work and the importance of employment assistance. Of the 1,100 voluntary participants who started this pilot only 57 per cent completed it and less than 10 per cent of them obtained a substantial paid job (ACOSS, 2004).

In their international, cross-country study, Dixon and Hyde (2000:726) noted similarly that the central problem with disability policies is that at best they ignore, or at worst frustrate, the achievement of economic and social inclusion through the attainment of satisfactory employment.

The OECD Report on disability policies acknowledges the contradictions entailed in achieving an equitable balance between income support on the one hand, and training and employment opportunities on the other. In virtually all OECD countries, disability benefits remain the main source of income for jobless people with disabilities, and even for employed persons with disabilities, benefits comprise half of their income (OECD, 2003). In addition, the extra costs of disability are rarely taken into account in providing disability benefits. This recognition of the importance of income security for both employed and non-employed people with disabilities demonstrates that while integration into the labour force is an equitable and much sought after goal, income support maintains its status as the bedrock of citizenship entitlement. It is apparent that (following Fraser’s framework of social justice) people with disabilities require social security arrangements that allow for both principles of recognition (recognising, respecting and giving legitimacy to differential abilities for market participation), and redistribution (having social security arrangements that allow for an equal standard of living and compensating for the extra costs of
disability). How do the Australian and United States systems of social security and income support for people with disabilities measure up to these dual objectives?

The Disability Support Regime in Australia and the United States

The Federal government in Australia first began its involvement with income support for people with disabilities with the introduction of Invalid Pension in 1908, in conjunction with the Old Age Pension. These federal social security initiatives were essential components of the nation-building legislation following the federation of the Australian states into the Commonwealth, the establishment of a Commonwealth parliament and federal constitution. The social security payments for age and disability were and remain means-tested, non-contributory social assistance payments based on the principle of ‘need’, and requiring no prior employment or labour force attachment (Carney and Hanks, 1994). Their financing is drawn from consolidated revenue. The eligibility criterion embedded in the Invalid Pension was based on the assumption of total and permanent labour force incapacity. Pensioners were not expected to be labour force participants. The pension arrangements, subsequently consolidated into the Social Security Act (1947) (in the time of Post-War Reconstruction) were that a means-tested, flat rate payment would be made to men and women (without regard to prior labour force participation) who were assessed as having a permanent incapacity for work as judged in a real labour market, and which constituted an 85 per cent incapacity (Carney and Hanks, 1994). These criteria were largely unchanged in social security legislation until 1991. Eligibility hinged on the functional test of permanent inability to obtain a real job in a real labour market, in other words, labour market conditions – in effect local labour market conditions – were to be taken into account in determining eligibility. It was not expected that recipients would be employed, even part-time, and therefore the emphasis was on ‘social protection’ rather than support for labour force entry and sustaining of employment.

In the United States there was only minimal income support for people with disabilities in the early part of the twentieth century, with the advent of workers’ compensation in 1911. However this was limited to physical impairments which stemmed from accidents in the workplace. The major US disability benefit programs
trace their history to the Eisenhower Administration of the 1950s. In 1956, after years of public debate, the Social Security Act was amended to add the Social Security Disability Insurance (DI) program which offered uniform national coverage for all disabilities regardless of their origins (NCD, 2005). While it was proposed as a program to cover people of all ages, it emerged from the political process as a program only for those fifty years of age or older and consequently became closely associated with the retirement of older workers (Berkowitz, 1987). A strict test of disability was ensured through requirements for the severity of the condition and prognosis of prolonged or terminal outcomes. From 1956 through the mid-1970s, Congress significantly expanded eligibility for disability benefits and increased benefit levels. Originally, benefits were provided only for medical reasons for workers aged between 50 and 65; however in 1957 there was a regulation added which took into consideration non-medical factors, such as education, training and work experience. Three years later the minimum age restriction was removed. In 1967, concerned that the definition of disability had eroded, Congress directed the SSA “to re-emphasise the predominant importance of medical factors in the disability determination” (SSA, 1986 cited in Goodman and Waidmann, 2003:343). This re-emphasis on a medicalised notion of disability – seen in Australian social security in the early 1990s (to be discussed below), was to have a significant and wide reaching impact on later disability policies and legislation (e.g. anti-discrimination legislation), as well as on the parity of participation for persons with a disability. In 1974, the Supplementary Security Income (SSI) was introduced as a new federal program that guaranteed a minimum income for the permanently and totally disabled, the blind and the elderly. It replaced a wide variety of state programs, and had the effect of eliminating work history requirements for those without significant assets or other sources of income. It also first provided Medicare and Medicaid protection for DI and SSI beneficiaries respectively (Goodman and Waidmann, 2003). In contrast to the underlying policy premise of the DI program – income replacement insurance for workers who retire early due to injury or illness – the SSI program is based on a welfare model, intended to serve as a safety net (NCD, 2005).

During the 1970s, both Australia and the United States saw a significant increase in the numbers of income support recipients. Between 1970 and 1978, the number of workers on DI in the United States nearly doubled and expenditure quadrupled. It
was believed that factors such as high unemployment rates; changing attitudes towards disability; high benefit levels of beneficiaries who did not work; and inadequate administrative control were collectively responsible for such unprecedented growth (NCD, 2005). In response to this, a number of amendments were made to the DI benefit structure and procedures during the 1980s, which included a more stringent maximum family benefits calculation, and greater work incentives for DI and SSI recipients with disabilities. The 1984 Disability Benefits Reform Act involved the development of statutory standards for evaluating disability. This Act made it harder to terminate a recipient’s benefits, gave more weight to the assessment of the applicant’s physician and broadened the list of conditions considered to be disabling, most notably making it easier for person with psychiatric impairments and chronic pain to qualify for benefits (Goodman and Waidmann, 2003). However, the attempts to re-engage recipients with the labour market were limited, and further entrenched a ‘disability path’ that was underpinned by notions of exclusion and segregation (a point to be take up further in the following chapter).

It was during the 1970s that governments in Australia were also beginning to call into question the burgeoning numbers of income support recipients and a lack of re-engagement with the labour market by recipients (Carney, 2006). There was a growing recognition of poverty and a greater interest in social justice and policies to reduce inequality and the focus turned not only to increased expenditure on social security, but also increased expenditure on social programs such as health and education (Kewley, 1980). The Invalid Pension, in place from 1908 to 1991, provided income support for persons with a disability based on an assessment of their work-related handicap, taking local labour market conditions into account. However, since 1991, when the Disability Support Pension (DSP) replaced the Invalid Pension, the legislation has contained a medically derived set of Impairment Tables, which shifts the eligibility base for income support to medically measured impairment (Carney, 2003). The legislative test moved from including wider social and economic impact of disability to one which gives greatest weight to medical impairment and pays significantly less attention to the social dimensions of disability.

The DSP introduced by the Labor Government in 1991, was part of the Disability Reform Package, which included labour market and training programs and the
enactment of the Federal Disability Discrimination Act. The DSP was seen as a complete departure from the Invalid Pension, with an emphasis on providing income support as well as training and rehabilitation assistance to maximise labour market and social participation. Recipients were permitted employment for up to 30 hours per week, without losing eligibility for income support. Under the pension income-test, employed recipients were eligible for a part pension, which served to augment their earnings, a form of 'work in welfare', recognising the constraints imposed by an impairment. The maximum of 30 hours a week employment test was not considered to be a risk or a matter of concern at the time of introduction of the DSP, as it was believed that for many recipients, DSP would be a temporary payment. To set a limit lower (e.g. 10, 15, or 20 hours a week) might take people off the pension too quickly as they increased their work capacity/activity (Yeend, 2003). However, it is apparent that the effectiveness of these objectives relies not only on the form of the income support payment (which is a necessary but insufficient condition), but also on the way in which the payment is articulated with facilitative training, rehabilitation and subsidised employment. Nevertheless, the principle of permitting a person with a disability in receipt of income support to be employed for up to 30 hours per week embodied recognition of the legitimacy of work and welfare 'packages' in maintaining reasonable income levels and labour market attachment.

The criteria for receipt of DSP was governed by the following key elements of the Social Security legislation:

94. (1) A person is qualified for disability support pension if:
(a) The person has a physical, intellectual or psychiatric impairment; and
(b) The person’s impairment is of 20 points or more under the Impairment Tables, and
(c) One of the following applies:
   (i) the person has a continuing inability to work;
   (ii) or, the person is participating in a specially approved supported wage program, and
(d) The person has turned 16; and
(e) The person meets residential requirements.

The Meaning of Continuing Inability
94. (2) A person has a continuing inability to work because of an impairment if the Secretary (of the relevant department) is satisfied that:
(a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
(b) either
(i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on the job training during the next 2 years; or
(ii) if the impairment does not prevent the person from undertaking educational or vocational training or on the job training, such training is unlikely (because of the impairment) to enable the person to do any work within the next 2 years.

94 (3) In deciding whether or not a person has a continuing inability to work because of an impairment, the Secretary is NOT (author's emphasis) to have regard to:
(a) the availability to the person of educational or vocational training or on the job training; or
(b) or the availability to the person of work in the person’s locally accessible labour market (Carney, 2003).

Moreover, the assessment of an impairment must meet the criterion that the impairment be diagnosed, treated and stabilised before it can attract a rating. It is apparent that the principle of capacity to access employment shifted from the locally accessible labour market to the more generalised concept of a theoretical capacity within the entire national labour market. Most importantly, as Carney (2003) notes, the focus of the DSP hinged much more centrally on medical impairment, and much less on whether or not a real job is available in the locally accessible labour market – a notion that embodies a medical model of disability. By removing 'real-world' circumstances (i.e. the local labour market conditions) from assessment of 'impairment', wider structural and systemic barriers were no longer taken into consideration. Similarly, in the United States the assessment of an impairment for social security has been underpinned by a medicalised notion of disability. The term 'disability' under the SSI and DI programs is:

Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months (Social Security Act Amendments, 1956, cited in NCD, 2005:42).

The medical requirements for eligibility for the DI and the SSI are the same under both programs, and the same process is used to determine if a person’s impairment meets the criteria. However, eligibility for DI is based on prior employment under Social Security, while SSI disability payments are means-tested and not employment-related (Goodman and Waidmann, 2003). Berkowitz (1987) argues that Congress failed to consider the effect that the introduction of the SSI would have on other disability programs, as Congress applied the same definition of disability and system of determining eligibility to SSI as for the social insurance programs. By using the
same process and definition for disability insurance – a form of social insurance that people received as rights – and for Supplementary Security Income – a form of welfare that only poor people and people with disabilities received – it produced serious consequences for disability policy in the future (e.g. by creating policy tensions between a discourse of equality versus a discourse of difference. This will be discussed in more detail later in the thesis).

This is true for disability policy across most OECD countries because policies and legislation are often founded upon contrasting principles. Social security legislation often reinforces the disability characteristics of a recipient or claimant, whereas employment programs or related legislation (e.g. ADA in the United States and DDA in Australia) promote enabling processes for persons with a disability (a point to be taken up further in the following chapter). With new moves in both the United States and Australia to ‘workfare’ principles since the mid 1990s, the inherent contradictions in disability policy have become further exacerbated. Carney (2003) argues that the disability support regime in Australia in the new contractual and mutual obligation environment since the 1990s has become considerably more restrictive and mean-spirited. Further to this, the focus on re-commodification in contemporary welfare reform is likely, paradoxically, to deter and restrict labour force participation by people with disabilities who seek to retain the ‘protection’ of disability income support while taking on the risks of employment, and increasing their hours of employment. This highlights the contradictions (and policy tensions) encapsulated within the current reform agenda. While these reforms are intended to facilitate participation, the likely result for people with disabilities is that such reforms will not only constrain labour force participation, but will further erode policy principles of human rights and social justice in social security discourse and practice. This directly contradicts the principles underpinning international human rights treaties (discussed in the previous chapter), and will have a significant impact on the citizenship of people with disabilities.

The Disability Support Pension under the ‘New Welfare’

In Australia, under the ‘new welfare’ characterised by the mutual obligation programs of the Liberal Party and National Party Coalition Government since 1996, additional significant measures have been introduced to reform the disability income support
legislation and its administration. Policy focus turned to the 30-hour rule, the number of hours that a person with a disability is permitted to work and retain eligibility for disability income support. Under the DSP, when introduced, work was defined as employment for 30 hours a week at award wages – a generous-spirited entitlement evidently based on providing incentives for recipients to maximise their labour force participation without undue anxiety about loss of pension entitlement. As part of the ‘mutual obligation’ regime concerned since 2000 with increasing labour force participation among various population categories observed to have low participation rates (FaCS, 2003), the Coalition Government proposed new legislation that would ultimately reduce the number of hours from 30 to 15 per week, that persons with disabilities were permitted to work while still retaining eligibility for Disability Support Pension.

The proposed amendments to the DSP provisions in the Social Security Act were introduced to the House of Representatives on 16 May 2002, called the Family and Community Services Legislation Amendment (Disability Reform) Bill 2002. The House of Representatives passed the first Bill on 30 May 2002, although the original Bill was never introduced to the Senate. The second Bill was introduced to the House of Representatives on the 27th of June 2002 and was called the Family and Community Services Legislation Amendment (Disability Reform) Bill (No. 2) 2002. This second Bill was passed by the House of Representatives on 19 September 2002 and after being introduced to the Senate on 23 September 2002, was rejected on 19 November 2002. The only difference between the first and second Bills was that, under the second Bill, DSP recipients granted payments on or before 30 June 2003 would remain under the existing 30-hour-a-week test. It would only be those granted DSP from 1 July 2003 onwards who would be exposed to the proposed 15 hour-a-week test (Yeend, 2003). This Bill had a third failed attempt in parliament. The Bill was rejected because in previous governments, until the government formed following the 2004 election, the Coalition had control of the House of Representatives but not of the Senate. The main influences which the Government stated as the reason for pressing for changes to the DSP qualification criteria have been outlined by Daniels and Yeend (2005). The first influence involved the increasing numbers of DSP recipients over the past 15 years, which government saw as unacceptable. The number of recipients on the Disability Support Pension increased from 222,000 in
1981, to 706,000 in 2005 (ABS, 2005). Various analyses have shown the key reasons for the increase were older women’s loss of other income support entitlements and older men’s higher unemployment (Henman and Perry, 2002). Another impetus for the proposed changes to the DSP program arose from the recommendations of the McClure Report (2000). The McClure Report recommended the development of expected levels of participation for people with a disability and also a review of the capacity for work criterion (the 30-hour threshold) for people with disabilities, ensuring that any such criterion should be in line with contemporary patterns of labour market participation. However, no mention was made of the difficult and discriminatory treatment faced by people with disabilities in sustaining employment.

The Government’s intention to reintroduce the Disability Reform Bill, as outlined above, was flagged after the 2004 election. When the Government gained control of the Senate from July 2005, the opportunity for the enactment of the Bill was provided and new legislation was introduced. From 1 July 2006, people with disabilities who are assessed by the new ‘comprehensive work capacity assessment’ as being able to work 15-29 hours per week at award wages in the open labour market, are required to do 15 hours or more of part-time work a week and are placed on Newstart Allowance instead of the DSP (Harding et al, 2005). The main outcome for those affected by the amended legislation is that a greater number of claimants will not be eligible for disability income support, but instead will have to apply for the unemployment income support, the Newstart Allowance. This unemployment payment is less advantageous than the DSP. It has rates which are considerably lower than disability pension rates of payment; it does not attract the same level of concessions; and the ‘mutual obligation’ tests are considerably more onerous, including stringent ‘workfare’ components.

In addition, the reduction of the maximum hours of permitted employment from 30 to 15 hours in order to remain eligible for DSP may act as a brake on disabled peoples’ hours of employment while in receipt of income support. Such an outcome would be contradictory to the stated intention of the social security changes – to increase labour force participation. This is particularly pertinent in light of Australian studies which demonstrate that one of the key determinants of income support recipients moving from welfare to employment is having employment experience when in receipt of
income support. It would appear from the evidence that combinations of work and welfare are effective precursors to movement off welfare and into employment (Shaver et al., 1994; Saunders, 2002; Flatau and Dockery, 2001). Research in the United States has also found similar results. Handler (2004:75) argues that the more successful welfare to work programs are those that combine strategies offering a mix of job search, education, job training and work activities. Similarly, Diller (1998) argues that policy proposals which attempt to make the disability benefit program less ‘attractive’ will have the principal effect of making life harder for benefit recipients, while having only a small impact on the number of recipients who will return to work. Other policy proposals that seek to impose penalties and deterrents on those individuals considered to have the greatest potential to return to work will only target a few individuals and are likely to have a perverse effect as they will create incentives for recipients to be found incapable of rehabilitation. This system would exacerbate the perceived problem that the disability benefit programs encourage individuals with disabilities to emphasise their deficits rather than their strengths.

Another problematic outcome of forcing people with disabilities to seek jobs and work pertains to impact on a person’s health, which may be adversely affected. The National (Australian) Association of Legal Community Centres (2006:7) state that, “The pressures to look for work and accept work could lead to a worsening of a person’s medical conditions… it requires the person to disclose their medical condition to a Job network agency [and] once the condition has been disclosed it may lead to a person’s illness being disclosed to prospective employers”. Morris (2006) also makes a similar point.

The limited potential of efforts to return income support recipients to the labour market has significant implications for policy choices for promoting employment. If income support policies are to be successful in ensuring that people with disabilities are considered equal citizens, then they must focus on reducing, not increasing, penalties imposed on income support recipients entering or re-entering the labour force. They must also recognise and compensate for the extra costs of disability. The new welfare-to-work changes in Australia may not achieve the goal of participation. In fact, not only will people with disabilities have their workforce participation constrained because they fear loss of pensions, but many will receive much lower
incomes than they currently have. Although the Government does not intend to force existing DSP claimant onto Newstart, the Government argues that those people who go on Newstart Allowance instead of the DSP as a result of the welfare-to-work policy will actually be financially better off, as they are likely to get at least a part-time job, compared to being jobless on the DSP. In fact, not only will people with disabilities have their workforce participation constrained because they fear loss of pensions, but many will receive much lower incomes than they currently have. Although the Government does not intend to force existing DSP claimant onto Newstart, the Government argues that those people who go on Newstart Allowance instead of the DSP as a result of the welfare-to-work policy will actually be financially better off, as they are likely to get at least a part-time job, compared to being jobless on the DSP. In addition, people in receipt of DSP who increase their work hours beyond 15 hours per week run the risk of being moved to Newstart Allowance, which is effectively a process of forced transfer from a more liberal to a less liberal form of income support.

In arguing that people who go on Newstart will be financially better off, the Government is drawing inappropriate comparisons between the income of jobless people on disability support and employed Newstart Allowance recipients. This is problematic as it does not compare the incomes of people in like circumstances. Comparing like with like, the National Centre for Social and Economic Modelling (NATSEM) (2005) found that people with disabilities will be worse off on Newstart than on the DSP. They found that even those who obtained employment paying up to $700 per week (gross) would be worse off. This is the income level at which the DSP cuts out completely and people are no longer entitled to income support. It is around 50% higher than full-time pay on the minimum wage. Very few of those affected by the welfare-to-work changes will progress quickly to such a job (ACOSS, 2005a). The reductions to payments per week for people with a disability moving from the DSP to Newstart Allowance are as follows:

- $38 less per week (or 10-15% lower) if single and with little or no private income ($19 less per week if they have a partner).
- $93 less per week (or 20% lower) if single and working 15 hours a week (the minimum hours of work required).
• $155 per week less (or 40-50% lower) if they are studying full time for over 6 months, and are renting privately ($113 less per week if they have a partner) (ACOSS, 2006).

A major issue concerns the significant increase in effective marginal tax rates incurred by people with disabilities on Newstart Allowance when they have employment, compared with DSP recipients with employment. This is a perverse incentive of significant size (NATSEM, 2005).

Another key problem with the Government’s claim that the new policy changes will make people better off is that it assumes that all or at least the vast majority of those affected by the policy will actually find employment. The Government’s comparison implies that people with disabilities affected by the policy (e.g. those who go on Newstart Allowance) will typically obtain regular part time employment for 15 hours a week. However, the official data for the outcomes of employment programs suggests that, at best, only a small minority of people with disabilities will get jobs after being transferred to Newstart Allowance and receiving employment assistance (ACOSS, 2005a). As noted earlier, in 2005 the job outcomes three months after program conclusion for those who voluntarily participated in the Newstart Allowance job assistance program, were that only 12% of people with a disability were in full-time work, while 25% were in part-time work (DEWR, 2005).

One of the major concerns with the new policy is that people on allowance-level payments are required to undertake a number of activities such as searching for jobs and taking a ‘suitable’ job offer. If they fail to undertake an activity, they can incur a ‘strike’ on their record. Under the new compliance system, if a person receives a strike they are required to comply within 48 hours, and until they do their payment is suspended. If they comply immediately (before payment is due), then their payment continues as usual though the strike remains against their name. If they fail to comply then their payment is suspended until they do so. If a person receives three strikes in 12 months, they will lose their payment for eight weeks and there is no opportunity for re-engagement in that period. These breaching rules place sole responsibility (and blame) on the individual, without any regard for wider circumstances or structural factors. In addition, there is also a strong moral undertone to these compliance rules. Those who do incur the maximum penalty, but are classified by social workers in Centrelink as ‘exceptionally vulnerable’, will be offered financial case management.
for urgent expenses: e.g. food expenses, living expenses such as rent and mortgages, medical expenses, utility expenses and/or car costs. However recent evidence suggests that of the 18,000 people expected to face eight-week penalties in the first year of the new reform, only 4000-5000 people will be eligible for financial case management (ACOSS, 2006). This will leave thousands of income support recipients without even basic rights to support.

Rather than offering new solutions to old problems, the welfare-to-work reforms are strengthening a medicalised discourse of disability. Rather than addressing structural discrimination and injustice, the focus is on individual blaming and demands for behavioural change – key tenets of the medical model of disability. This is evident in the policy language used to promote the new reforms. In a community information pack intended for social security recipients to explain the reforms, the new ‘Job Capacity Assessment’ is described as “Help[ing] to identify what services you need to overcome any medical conditions or problems that prevent you from finding or keeping a job” (Centrelink, 2006, emphasis added). The individual is constructed as the ‘problem’ in policy, rather than taking into consideration wider structural factors such as the availability of suitable jobs. Further to this, the new eligibility test only assesses potential ability to work 15-29 hours per week. It does not actually address whether such work is available. If suitable work is not available in the area where the person lives, they will be put on Newstart Allowance rather than DSP (Harding et al, 2005), and incur the harsher conditions of the allowance as outlined above. ACOSS (2005a) has estimated that around 81,000 people with a disability will be worse off from 2006-2009 after the introduction of the new policy, and note the inherent flaws in the new policy as:

- The maximum rates of payments are too low, especially for those most at risk of income poverty;
- There are large gaps in the safety net, notably for new migrants and people who are breached; and
- Major living costs are not effectively compensated, especially the costs associated with disability.

It is apparent that although social security policies are characterised as promoting participation, under the current restructuring of the welfare state, there has instead been a systematic retreat from the wider economic, attitudinal and workplace conditions that constrain the capacity for labour market participation. This limits the
potential for income support policies to redress injustices at both structural and status levels. In one of the few qualitative studies that has been undertaken in Australia with DSP recipients, Morris (2006) found that people experience a number of difficulties in attempting to enter (or re-enter) the labour market, including discriminatory attitudes, difficult architecture and inflexible workplaces. Morris argues that the recent welfare-to-work reforms are likely to reduce labour market participation and increase reliance on income support – which is at odds with the both the intentions of the reform and with the principles of social citizenship and justice. By aiming to correct inequitable outcomes of social arrangements without disturbing the underlying social arrangements that generate them, Australia and the United States both fail to include measures in their social security arrangements that redress the causes of poverty or that account for extra costs of disability. This problem is being further exacerbated under the welfare restructing of current conservative Federal governments, which have increasingly placed emphasis on independent market participation as the essence of adult citizenship – a condition that may be very difficult for people with a disability to attain, particularly if structural barriers to labour force entry are not addressed and workplace conditions not adapted to take account of differing abilities.

In sum, the welfare-to-work reforms (so-called) have moved individuals from being subjects of social security policy to becoming subjects of labour market policy (Carney, 2006a), promoting an individualised model of citizenship that systematically disadvantages some groups of people, such as those with a disability. This has been compounded by wider legislative changes. In addition to social security law reform, the Federal Government has also recently 'reformed' Australia's industrial relations law, resulting in a convergence between social security law and labour law. Carney (2006b) argues that at the heart of these two sets of laws is the goal of greater participation. However, the market-oriented industrial relations reforms (entitled 'Work Choices') dissolve the original 'protective-social' paradigms in favour of economic models of individual contracts. The new labour laws are designed to make individual bargaining the norm, with awards being stripped back to a few core conditions for all workers. New employees will also lose the capacity to insist on bargaining collectively through unions, and instead face the option of declining the job or accepting an individual employment contract (or 'Australian Workplace Agreement') which, as Carney notes, is crafted by the often powerful employer rather
than bargained in any real sense. Analysts have suggested that the welfare-to-work changes are likely to interact with the industrial relations changes, potentially leading to more precarious labour force conditions for the most vulnerable job seekers, such as those with a disability (Carney, 2006a, 2006b). Moreover, the transformations in legislative discourse and practice of both social security and labour laws are eroding fundamental policy principles of rights, participation and justice; which contravene the international efforts (discussed in the previous chapter) to promote the full and equal participation of persons with a disability in all socio-cultural and political-economics spheres.

What do these policy transformations signify for the Australian welfare state? Has the re-designing of income support into a conditional and contractual system completely removed previous policy principles of social rights and entitlements?

**Moving Towards a Post-Welfare State**

The shift to neo-liberal market ideology in both Australia and the United States has resulted in a number of similar changes to the welfare system. The research literature on contemporary welfare reform in a number of welfare regimes points to the ways in which income support has been redesigned as conditional and contractual, in contrast with previous principles of social rights and entitlements (Pierson, 2001; Sainsbury, 2001; Macintyre, 1999; Harris, 2000; Moss, 2001; Shaver, 2002). It is argued that the welfare policy shift has led to a repositioning of the social contract between citizen and government, placing predominant obligation on the recipient/citizen, rather than on government investment in institutional capacity-building which would facilitate engagement in education, training and labour force participation (McClelland, 2002). Furthermore, these policy transformations are underpinned by a shift in the moral and political assumptions embedded in the welfare system such that employment is now considered to be the primary gateway to citizenship and dependence upon income support is seen to be incongruent with citizenship (Yeatman, 2000; Moss, 2001).

Australia and the United States continue to place a strong emphasis on the market as the key institutional arena for citizenship participation. In their comparative analysis of welfare reform in liberal states, Pawlick and Stroick (2004) found that the primary goal underpinning these changes concerns moving the individual towards self-sufficiency, especially in terms of employability. There is little interest in market
restricting but rather a strong emphasis on the design of employment-oriented social policies. The cornerstone of welfare policy in the United States had always been to separate the ‘deserving’ poor from the ‘undeserving’ poor and this distinction is made primarily in terms of attachment to the paid labour force – with the dependent poor considered at ‘moral fault’, where the victim is blamed rather than structural issues (Handler, 2004:27). In Australia, the new welfare paradigm has defined welfare as a problem associated with a dependency culture and has linked reforms to specific social categories, in particular unemployed people, mature age people who ‘exit’ the labour force before the usual age of retirement, lone parents, and people with disabilities (Wilson and Turnbull, 2001). Carney (2006:147) argues that measures such as the imposition of impairment tables, exclusion of ‘social’ factors (such as lack of education or skills) when judging capacity to work, reduction in the duration of permitted ‘work’ hours, and assessment by experts in work ability rather than medical experts, have all been deployed in an endeavour to overcome the perceived problem of ‘welfare dependence’.

Transformations in the governance of the welfare system which encapsulate new political and moral assumptions of the ‘post-welfare’ state became even more evident after the Federal election in 2004. The Government transferred a range of programs and services previously administered through the Department of Family and Community Services (FaCS) (the department previously responsible for all income support payments) to the Department of Employment and Workplace Relations (DEWR) (responsible for employment and workforce participation, as well as industrial relations). Open Employment Services for people with disabilities; the Personal Support Program; Job Placement, Employment and Training and Green Corps, together with most income support payments for people of working-age (e.g. Newstart Allowance, Disability Support Pension, Parenting Payment) were moved from FaCS to DEWR (DEWR, 2004b). Moreover, funding of labour market programs for people with disabilities have shifted away from ‘program funding’ towards an individualised ‘case-based’ (outcomes) funding. This is evident as the new Disability Employment Network comes into operation, mimicking the Job Network program for non-disabled individuals. This move signals a new era of welfare governance in Australia. Citizenship, participation and self-sufficiency have been re-framed as participation in paid employment.
How have these policy and governance changes been assessed in the literature? Galvin (2004) argues that the language used by disability rights advocates to make claims for community participation has been adopted by government to frame welfare reform as consistent with such emancipatory objectives. For disability activists, concepts such as ‘independence’, ‘access’ and ‘participation’ signify social justice and equality; but these are reformulated by government into an individualised, contractual approach to disability law and its administration. Disability activists see issues such as access and participation requiring structural change within social institutions, particularly in access to education, training and employment and the organisation of workplaces, whereas the ‘new welfare’ implies that access and participation can be achieved through individual behavioural change (Galvin, 2004). Similarly, Davis and Davis (2000) argue that a welfare reform policy which is intended to empower persons with disabilities (where empowerment is equated with labour force participation) may instead exacerbate social exclusion. Welfare-to-work policies can only empower people if suitable jobs, including education and training, are available to them, and if the design of the income support system attempts to maximise and support rather than minimise and penalise workforce participation.

In the United States, current disability benefit programs are based on a policy principle that assumes a permanent incapacity to work, and this all-or-nothing nature creates challenges for the Social Security Administration (SSA) to design and deliver welfare-to-work services and promote employment. Policymakers, researchers and advocates have repeatedly identified the key problems of the current definition of disability in the SSI and DI programs as:

1. The current definition of disability hampers SSA’s return-to-work efforts because applicants are required to demonstrate a complete, permanent inability to work in order to qualify for benefits.
2. The current definition fails to recognise the concept of partial disability.
3. The current definition does not take into account that disability is a dynamic condition.
4. The length of the application process in current Social Security disability programs and the waiting periods in the DI program actually contribute to the ineffectiveness of return-to-work efforts and the inability to intervene early in the disability process (NCID, 2005:45).

Although the SSA has taken steps to improve its welfare-to-work services, such policies have failed to make significant improvements in workforce participation. Policies that are underpinned by ideologies of ‘workfare’ centre around the Ticket to
Work and Work Incentives Improvements Act of 1999 (TWWIIA). This program is designed to promote work by providing SSI and DI recipients with a ‘ticket’ to purchase rehabilitation from state VR agencies, as well as other agencies that provide employment and rehabilitation services (Wittenburg and Loprest, 2004). TWWIIA was enacted in 1999 to remove barriers and disincentives to employment for persons with disabilities while increasing consumer control over the delivery of employment and rehabilitation services. The objective of this legislation was to provide people with disabilities more opportunities to participate in employment, increase financial well-being while simultaneously decreasing dependence on income support. TWWIIA provides a number of program opportunities and work incentives for both SSI and DI beneficiaries, although these programs remain largely underutilised and most SSI and DI beneficiaries remain on income support (NCD, 2005). Despite the existence of work incentive programs for SSA disability participants, there has been continued criticism of the degree to which the current disability system actively promotes return-to-work opportunities. It is argued that the Ticket program will not offset the large current work disincentives embedded in both the SSI and DI, which include high effective marginal tax rates on benefits for earnings (approximately 50% in the SSI program) and the potential loss of health insurance if earnings exceed a certain threshold (Wittenburg and Favreault, 2003). Compounding this is a fundamental problem in current arrangements of ‘workfare’ policies, namely the contradictory nature of the disability eligibility requirements. This is evident in both the SSI and the DI. Wittenburg and Loprest (2004) pose the important question, “How do you provide return-to-work services to a population of participants who must show a permanent inability to work at the time of application to qualify for benefits?”

Kinneir, Grant and Oliver (2003) in their account of welfare reform in Australia find that ‘active policies’ work best in a strong labour market. Without a steady supply of appropriate and accessible jobs, such policies will be ineffective. Furthermore, in their assessment of the use of sanctions on welfare recipients, which is a key part of ‘mutual obligation’ policy, it was found that sanctions are often applied to the most vulnerable clients. As they state, “It would be a sad irony if a policy designed to promote social inclusion for those at the margins of society should in itself be the means to exacerbate exclusion” (Kinneir et al, 2003:30). The recent changes to the
compliance system for allowance-payments are in fact doing just that. Abello and Chalmers (2002) argue that, on the one hand, local labour market conditions are missing from the determination of eligibility for benefits and assessments of work capacity for people with disabilities. On the other hand, also missing from the agenda is the promotion of disability-friendly work practices and accommodations such as job redesign, flexible hours, workplace modification, adaptive technology and accessible transportation. It is evident that (in Fraser's terms) these social security arrangements contain principles neither of recognition (according respect to differential abilities in market participation), nor of redistribution (having social security arrangements that allow for an equal standard of living and compensating for the extra costs of disability).

**Conclusion**

Over the past two decades there have been significant changes in income support arrangements for people with disabilities. The developments in policy and legislation have been underpinned by a belief that individuals with disabilities are a 'problem' within the welfare system and this has been reflected in significant modifications in the eligibility criteria and assessment procedures for disability income support and a much more rigorous system of categorisation and surveillance of adherence to regulations. In turn, the welfare reform agenda of the government in Australia and the United States has embraced a medicalised model of disability. This has in effect removed from policy discourse and practice, recognition of the wider factors that influence the capacity for equality of opportunity in all socio-cultural and political-economic realms.

The reforms to disability policies, while characterised as promoting incentives for social and economic participation, have instead systematically retreated from including the wider conditions that influence the capacity for equality of opportunity, thus removing notions of rights and justice from the more recent welfare reform debates. As Thornton (2000) notes, neo-liberalism has largely neglected a commitment to social justice in favour of an economic rationalist agenda. As discussed earlier in the thesis, under a capitalist market economy people with disabilities find it very difficult to secure employment (Oliver, 1996). In this post-welfare policy environment, the recent shifts in welfare discourse and policy have
repositioned and redefined what it means to be a citizen, and raised further questions about issues of justice and rights for people with disabilities. Carney (2006a) suggests genuine welfare reform requires that attention return to the social rights of citizenship of welfare recipients, and our reciprocal social responsibilities, to ensure that governmental action is taken to ameliorate the risks of participating in an increasingly deregulated labour market. In addition, disability policies and legislation must begin to address the underlying causes of maldistribution and misrecognition if parity of participation and citizenship is to be achieved.

People with disabilities, attempting to negotiate the dual objectives of employment and income support, face a particular set of transitions and risks. Disability income support legislation which embeds a medicalised model of impairment as the criterion for eligibility, and disregards the circumstances of the local labour market in providing appropriate job opportunities, and where the risk of loss of benefit increases as employment increases, is not likely to achieve the important objective of increasing labour force participation. Without strong and sustained investment in education, training and subsidised employment programs, and without policy action to establish workplace practices which take account of the particular circumstances of employees with disabilities, greater stringency in disability income support law and its administration may exacerbate social and economic exclusion, rather than promote participation. In itself, social security legislation and its related policies represent just one dimension of the policy puzzle for equal rights and justice for people with disabilities. While social security is in itself an insufficient policy response to ameliorate the discrimination and marginalisation that people with a disability face restrictions, curtailment and effective employment disincentives (as demonstrated for both Australia and the United States) undermine the capacity of income support arrangements to effect redistribution and provide an adequate standard of living.

This thesis now turns to an examination of another key dimension that offers the potential of parity of participation and citizenship for people with disabilities – anti-discrimination legislation and its associated policies.
CHAPTER FOUR

Equality Beyond Rights: Anti-Discrimination Laws in Australia and United States

Discrimination is one of the most difficult concepts introduced into the legal system as, like the cognate concepts of justice and equality, its essential malleability is conditioned by time and circumstance (Thornton, 1990:2).

Socio-legal regimes are important ways of negotiating the rights of citizenship and the state’s ability to enforce such rights. Since World War II there has been a complex body of international human rights instruments, which nation-states have enacted to varying degrees and in different ways. Within liberal welfare regimes, the United States was the first country to enact anti-discrimination legislation for people with disabilities, entitled the Americans with Disabilities Act (ADA). This Act placed human rights in a civil rights framework, where rights are protected and enforced via a Bill of Rights. Australia followed shortly thereafter with the development of the Disability Discrimination Act (DDA). The DDA stemmed from previous anti-discrimination Acts on race and gender, which together formed a comprehensive anti-discrimination regime that aimed to protect the rights of all its citizens. Anti-discrimination legislation for people with disabilities makes it unlawful in certain circumstances to treat a person unfavourably because of their disability and can take different forms across different countries. It can take the form of specific laws proclaiming the entitlements of people with disabilities to the same rights and goods as all other members of the community; or of legislation proclaiming specific rights of people with disabilities which are designed to level the playing field; or it can be in the form of a reference in a bill of rights or constitutional provision (Jones and Marks, 1999b). Regardless of its domestic legislative form, the prevailing philosophies underpinning rights-based legislation is that of reducing and preventing discrimination against marginalised persons, and ensuring equality of opportunity as citizens.

The meaning of equality that is used in domestic anti-discrimination legislation has a significant impact on the extent to which goals of the legislation are achieved. This chapter will begin with a brief overview of the type of equality underpinning anti-discrimination legislation for people with disabilities, and look at the extent to which
this form of equality offers the potential for parity of participation. The chapter will then examine the enactment of domestic anti-discrimination legislation, beginning with the ADA in the United States. This will be followed by an examination of the Australian DDA. It will delineate the differing philosophies underpinning each law, and look at their capacity to ameliorate or outlaw discrimination in key areas of participation (particularly in the labour market) so that social citizenship may be achieved. To gain an understanding of the extent to which domestic legislation facilitates human rights and social justice, the chapter will offer an overview of the political events that led up to the passing of this legislation in the United States and Australia, highlighting the critical role of the disability rights movement.

One of the key issues in domestic implementation of rights-based legislation for people with disabilities is that key federal policies for people with disabilities abound in contradictions. This is evident in the differing philosophies underpinning the federal social security legislation governing national social security transfers on the one hand, and on the other, the federal and state/territory anti-discrimination legislation and the provision of disability services at the state or territory level. Despite the stated aims of the ADA and the DDA (to reduce and eliminate discrimination), such pieces of legislation remain embedded in legislative and philosophical contradictions. As this chapter illustrates, it is the inherent contradictions in and between government policies which hinder the full potential of progressive legislation for people with disabilities. Such contradictions have become further exposed over the past decade under conservative federal governments, as the advent of ‘welfare reform’ in liberal regimes has shifted notions of citizenship, participation and equality. With moves towards a ‘post-welfare’ climate, federal governments in both the United States and Australia have tightened their embrace on a neo-liberal philosophy – used as a means of re-organising citizens as market-workers and re-distributing resources via market participation. This has had an adverse impact on those who already experience high levels of discrimination in unregulated markets, such as those with disabilities. This chapter highlights the fact that national policy and legislative regimes of equality do not encapsulate all the steps necessary to address the profound marginalisation that people with disabilities face, and demonstrates that current anti-discrimination laws for people with disabilities are
a necessary, but insufficient, policy condition in themselves for the attainment of human rights and social justice.

**Equality in Anti-discrimination Legislation**

Rights promulgated at international levels have been reproduced in varying ways and to varying extents in different domestic legal systems, although they all have in common a commitment to the protection of marginalised and vulnerable citizens. In general, the members of the majority culture and community in liberal welfare regimes have their rights fairly well protected and are able to exercise them. But human rights, particularly if conferred by law, are a means by which disadvantaged citizens, such as people with disabilities, can achieve greater equality and parity of participation (Bailey, 1990). Historically, disability was overlooked as a civil or human rights issue in domestic legislation, in part due to perceived economic circumstances. Ameliorating discrimination against people with a disability via modification of the physical environment required more resources than insisting that employers treat them equally (as in the case of the two sexes for example) (Blanck et al, 2004). However, as noted in previous chapters, during the 1980s liberal welfare states undertook substantial modifications of policy affecting working-age people with disabilities. The disability movement in countries such as Australia and the United States emerged in response to a variety of triggers, some of which included anger over exclusion from employment on the grounds of disability; poor housing and other services; reduced expenditure on disability services by government; growth of key lobby groups (particularly in the United States); and extensions of state action through struggles over legislation (Meekosha and Jakubowicz, 1999).

Anti-discrimination legislation for people with disabilities follows directly from the perceived success of such laws in addressing gender and race discrimination. Prior to the development of anti-discrimination laws for people with disabilities, the adoption of a human rights approach had led to tangible results for many other marginalised groups, such as the American civil rights movement, the South African anti-apartheid movement, and the international women's rights movement – which have all framed their claims in international rights-based language, thereby securing significant success in national legal reform initiatives (National Council for Disability {NCD}, 2002). However, as is demonstrated further on in the chapter, rights-based legislation
is a necessary but insufficient condition in itself for persons with a disability to secure equal rights. As Bailey (1990:33) states, "If the disadvantaged group is very much below the general norm of equality, mere elimination of discrimination may not enable its members to attain equality". One of the key arguments in rights-based or anti-discrimination legislation concerns the issue of what types of rights should be protected. At both the international and national levels, the trend is towards what is called 'equality of opportunity'. This is defined in the 1982 World Programme of Action Concerning Disabled Persons:

Equalisation of opportunities means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilitates, are made accessible to all (Quinn and Degener, 2002:18).

Equality of opportunity entails both formal equality – which rules out favourable treatment for people with disabilities – and substantive equality – which allows for some measures to be taken to ensure disadvantaged groups have access to opportunity. There is general agreement that for people with disabilities, formal equality, while necessary, is insufficient to address systemic or structural barriers as formal equality advocates that all individuals be treated the same regardless of whether they are members of advantaged or disadvantaged groups. Conversely, substantive equality is based on the view that equal treatment against a background of social and structural barriers can perpetuate disadvantage, while differential treatment or 'reasonable adjustment' can be warranted to overcome barriers and provide disadvantaged individuals with equal access to opportunities (Productivity Commission, 2004; Jones and Marks, 1999b). Substantive equality, at least in its theoretical form, embodies Fraser’s twin principles of recognition (via difference) and redistribution (via equality); therefore it may offer one means by which differently-abled individuals could make claims for parity of participation and citizenship.

However, while an increasing number of nation-states now promise equality of opportunity for people with disabilities, very few, if any, come close to delivering it. Operationalisation of these principles in domestic legislation and policy has proved a much harder task (Quinn and Degener, 2002), and people with disabilities continue to experience injustice in all socio-cultural and political-economic realms. Having a form of equality in rights-based legislation that (theoretically) allows for simultaneous
claims against misrecognition and maldistribution is only the first step. What is also needed is a commitment to equality in welfare practices if social citizenship is to be achieved. As Quinn and Degener (2002) note, equality of opportunity calls for several forms of governmental action. It entails addressing structural exclusion, preparing people for greater participation through education and training, and addressing instances of discrimination that exclude people with disabilities. The rapidly changing policy climate in liberal welfare states, in particular the shift to neoliberalism as the preferred policy response to a number of significant domains of public policy, has resulted in a limited policy and legislative focus that fails to account for all the policy steps needs to ensure equality of opportunity. Rights-based principles in legislation and policy are insufficient unless accompanied by right-based practices. This chapter will now turn to an examination of the extent to which Federal governments in the United States and Australia embody these values, beginning with the United States.

**Transforming Federal Disability Policy in the United States**

Federal legislation in the United States was initiated for people with disabilities in 1973 with the Rehabilitation Act. Section 504 of this Act renders unlawful discrimination in employment against both the physically and mentally disabled, as well as mandating affirmative action (e.g. reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new building construction and alterations, Scotch, 2001) for government instrumentalities receiving Federal funding and for private corporations which have entered into Federal contracts above a certain value. The ADA was an important extension of Section 504 (Thornton, 1990; Scotch, 2001; NCD, 2002; Switzer, 2003; Blanck et al, 2004) and is a civil rights statute designed to aid and protect qualified people who want to work. Unlike previous disability laws, it was not a benefits or welfare program, but an equal access law (Miller, 2004). It has been instrumental in the evolution of disability discrimination law in a number of other countries. It was enacted in 1990, in a period of growing international action for disability rights, and key events of the time were the UN International Year of the Disabled (1981) and the UN Decade of the Disabled Persons (1983-92). The ADA, coupled with the UN Standard Rules (as discussed in Chapter Two), served as the model law for the development of domestic legislation in other
jurisdictions. It constitutes the federalisation of the legal rights of people with disabilities, which had previously been included in State legislation and limited Federal legislation (Degener and Quinn, 2002).

The eventual efficacy of the ADA came from the combined efforts of two key organisations: the Disability Rights Education and Defence Fund and the Consortium of Citizens with Disabilities (Switzer, 2003). However in contrast to the public consultations that were held in developing the DDA in Australia (to be discussed further on), and in contrast to other civil rights movements in the US, the ADA came into law with relatively little notice or public discourse, and employers and business in the United States began to be regulated by the ADA without public discussion about the obstacles confronting people with disabilities. Miller (2004) believes that, due to the lack of context and public education, much of the public continues to remain uninformed about the moral framework and philosophical underpinnings of the ADA. Further to this, unlike other civil rights movement in the US, the disability rights movement was relatively invisible. One factor compounding the invisibility was that there was no single individual or group identified as the leader of the disability rights movement (Switzer, 2003). The invisibility of persons with disabilities has meant that the legal structures created to advance civil rights either were not applied, or were applied with less rigour in the case of people with disabilities (Quinn and Degener, 2002; Switzer, 2003). This is not isolated to the United States, as similar nations have faced such circumstances of invisibility.

The lack of understanding of the reasons why persons with disabilities should have human rights has contributed in part to their systemic marginalisation at the ‘status’ level of the intersubjective recognition of their condition. In raising this issue, Miller (2004) argues that the key problem is that disability is often analysed in purely economic (or ‘objective’, structural) terms, rather than from the perspective of an individual’s right to be free from discrimination, the right to participate in the economy, and the right for full integration into the larger society (or ‘intersubjective’ terms).

While there is a long history of invisibility of the rights of people with disabilities, the disability movement has made important contributions in promoting the rights of persons with disabilities beyond one simply of market participation (Shapiro, 1994;
Fleischer and Zames, 2001; Longmore and Umansky, 2001; Longmore, 2003). The disability movement in the United States is grounded in the same fundamental concepts as those of other civil rights movements. It asks not for different rights, but instead moves to embrace rights already enjoyed, and to a large extent secured, by non-disabled people. In speaking of the civil rights law, Miller (2004:xxxiv) states that “These statutes seek to integrate people with disabilities into the mainstream of economic and social law. Importantly, the laws seek to achieve integration without paternalism or pity”. Throughout the 1980s, the grass roots movement of disability rights groups expanded rapidly, epitomised by such organisations as the Americans Disabled for Accessible Public Transportation. The demand for equality of people with disabilities was consistent with earlier struggles for civil rights, as disability rights activists gave convincing accounts of discrimination against people with disabilities that were reminiscent of the experiences of African Americans whose battle for equal rights had led to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act (Mezey, 2005).

The National Council of Disability (NCD) (2002) argues that the current call for attention to the human rights of people with disabilities in the United States is a natural continuation of the civil rights tradition and has emerged to challenge existing notions of human rights that have frequently trivialised and ignored the lives of people with disabilities. During the fight for the ADA, leaders were careful to illustrate how they were not seeking any form of ‘special’ rights for persons with disabilities. Rather, they wanted the extension to people with disabilities of basic civil rights grounded in the concepts of equality, non-discrimination and human dignity (NCD, 2002; Switzer, 2003). This contrasts with the disability rights movement in Australia, which focused on securing specialised services for people with disabilities. While the following point will taken up further on in the chapter, it is important to note here the contrasting paths in Australia and the United States to securing rights and justice for people with disabilities. In the United States, rights were located in a framework of social equality (Fleischer and Zames, 2001) whereas in Australia rights were couched in terms of recognition and respect for difference and the redistribution of resources (Meekosha and Jakubowicz, 1996). The problem with drawing primarily on civil rights to locate claims for rights (as did the disability advocates in the United States) is that this focus, while importantly promoting ‘sameness’ and raising the need for
social equality of people with disabilities, sacrificed the other twin principle of social justice: recognition and respect for difference. This meant that anti-discrimination laws were limited in offering the potential for full and equal participation of people with disabilities.

One important identifiable event in the history of American disability civil rights movements was the protest held in 1988 at Gallaudet University in Washington D.C. The campus was founded under a Federal Charter in 1864 as the Columbia Institution for the Deaf and Blind, and was closed down for six days in a protest led by student demands of 'Deaf President Now'. The trustees had once again chosen a hearing person as president, one that had no experience with deaf culture, and who did not know American Sign Language. After a week of protest, the Board agreed to the protesters' demands and named a deaf person president (Switzer, 2003). What makes this event important was the international coverage that the protests received – an unusual occurrence for matters involving persons with a disability. Furthermore, the analysis of the media's coverage of events focused on themes of self-determination and overcoming oppression, rather than the usual stereotypical images of persons with a disability as victims rather than as active agents (Switzer, 2003).

However, the Washington DC disability movement made a conscious decision not to engage in media coverage in the lead up to the ADA being passed there (except for the coverage at the University). Chief lobbyist Pat Wright said that if the movement had sought press attention "We would have been forced to spend half our time trying to teach reporters what's wrong with their stereotypes of disability" (cited in Sayce, 2003:631). Sayce (2003) notes that this tactic, however, meant that views of the disability movement and their supporters about why the law was needed, what they hoped it would achieve, and what it meant for American people, were simply not conveyed to the wider public. While the Gallaudet University protest is not an event remembered by many outside of the disability field, it remains a crucial step towards promoting the idea that persons with disabilities not only have fundamental human rights, but also civil rights and rights accorded as a consequence of their disability. The later development of the ADA was a symbolic commitment to these rights, as it intended to represent not only recognition that people with disabilities have rights, but also to address the equally important and necessary policy of redistribution. In spite
of a long history of invisibility surrounding disability rights, the genesis of anti-discrimination legislation for people with disabilities did offer the possibility (at least in theory) for defensible citizenship claims at both the objective (via redistribution) and intersubjective (via recognition) levels, and there was hope that this Act would be effective in enabling parity of participation in the public arena, particularly in the redistributive area of employment.

**The Americans with Disabilities Act (ADA)**

Prior to the 1970s, legislation for people with disabilities in the United States was a subcategory of social welfare law. During the 1970s the civil rights model began to influence American government policy, and there was a shift in disability policy from one based on health and budget considerations, to one examining architectural, institutional and attitudinal barriers to full participation and integration. During this time, there was a great deal of support for ending discrimination against people with disabilities, which was fuelled by the disability community's association with the ideology and rhetoric of the civil rights movement. Activists with disabilities sought to change the social welfare orientation of disability law, which was considered to be oppressive, towards an inclusion of anti-discrimination and accommodation of disability in all institutional contexts (Mezey, 2005; Bagenstos, 2004; Switzer, 2003; Blanck and Schartz, 2002).

The ADA was enacted as a result of several specific, identifiable factors that might have failed at any other time. The policy window for the passing of this Act opened during the late 1980s, partly due to the policy environment of the time (Switzer, 2003). Disability advocates believed that Section 504 of the 1973 Rehabilitation Act — which prohibits recipients of federal funds from discriminating on the basis of physical or mental disability — was inadequate to achieve their goal of removing barriers to their participation in society. The idea of a successor to section 504 was supported by Justin Dart Jr., Vice-Chair of the National Council on the Handicapped (NCH – later renamed the National Council on Disability) from 1982 to 1985. Dart headed the Task Force on the Rights and Empowerment of Americans with Disabilities from 1987 to 1989. In May 1988, the taskforce was directed by the Federal Administration to compile national data on discrimination against people with disabilities. It conducted sixty-three open forums in all fifty states, gathering
testimony from a broad range of people with disabilities about discrimination in a variety of settings (Dart, 2001 cited in Mezey, 2005). Most members of the NCH were Reagan appointees who supported the idea of the civil rights model and disability rights legislation. Some commentators argue that support for this policy was due to a belief that such legislation would, in part, reduce dependency among people with disabilities and lower welfare costs (Pear, 1987; Broeck, 1993). This policy reasoning was actually contrary to the notion that people with disabilities have fundamental rights.

In 1986, the NCH was charged with advising the President and Congress on public policies relating to people with disabilities. Its first report, Towards Independence (1986), recommended that Congress enact “A comprehensive law requiring equal opportunity for individuals with disabilities ... perhaps under such a title as ‘The Americans with Disabilities Act of 1986’” (NCH, 1986:18 cited in Mezey, 2005:25). With Dart’s encouragement, the bill was drafted by Robert L. Burgdorf Jr., who had long advocated a stand-alone civil rights law prohibiting discrimination on the basis of disability. In part because of his belief that section 504 was limited (this was Dart’s belief, too), his disability rights law, termed an ‘equal opportunity law’, was modelled after the 1964 Civil Rights Act. On April 28 and 29 1988, the ADA was introduced in the Senate and the House. The Bill received little attention at the time, and although it passed in the Senate, it died in the House. Disability rights remained on the public agenda with President George Bush’s endorsement at the Republican National Convention. His promise, “I’m going to do whatever it takes to make sure the disabled are included in the mainstream”, helped him secure votes from the disability community in 1988 (Shapiro, 1994:124). Over the next two years, Burgdorf’s ideas were transformed into law that would eventually become the ADA. On July 26, 1990, President Bush (Snr) signed the Americans with Disabilities Act into law in a ceremony on the White House Lawn witnessed by over 2,000 disability rights advocates. At the ceremony, President Bush characterised the ADA as a declaration of equality for persons with disabilities that would allow:

Every man, woman and child with a disability to pass through once-closed doors into a bright new era of equality, independence, and freedom ... Let the shameful wall of exclusion finally come tumbling down (cited in Scotch, 2001:176).
The eventual passing of the ADA was a rarity in that it was a piece of legislation that almost everyone supported. The House of Representatives approved the final version of the bill by a vote of 377 to 28 and the Senate followed suit, adopting the final ADA Bill 91 to 6 (Scotch 2001). Bipartisan support and presidential commitment to the ADA have continued to the present day. President Bush endorsed the Act and in February 2001 issued his ‘New Freedom Initiative’, committing his administration to ensuring (at least in political rhetoric) the rights and inclusion of people with disabilities in all aspects of American life (NCD, 2004).

The ADA articulates four goals of disability policy: to ensure equality of opportunity; full participation; independent living, and economic self-sufficiency (Silverstein, 2000). These goals stemmed from prior Federal laws that addressed the rights of people with disabilities, which were in existence since the first half of the twentieth century – although these were narrower than the ADA (Blanck et al, 2004). Current laws affecting people with disabilities in the United States can be separated into civil rights statutes (e.g. the ADA and Section 504 of the Rehabilitation Act of 1973), or entitlements program (e.g. Social Security Disability Insurance and Supplemental Security Income) (Silverstein, 2000). The introduction of the ADA sent strong messages that people with disabilities should be expected to be in paid work rather than be on the welfare rolls, termed a ‘passive’ condition (Bagenstos, 2004). This policy rhetoric contributed further to the notion that disability policy in the United States embodied either work or welfare. The idea that rights and justice involve a commitment to both was left unrecognised. When the ADA was enacted it did not change the disability entitlement programs, a fact rarely mentioned in the legislative history of the ADA. Diller (1998) argues that this oversight has resulted in two principal disability policies in the United States, each one grounded on a different set of assumptions about the nature of disability, and each dealing with disability in a very different way. The older view of disability – reflected in the benefit programs – perceives an inability to work as an inevitable consequence of disability (as discussed in the preceding chapter). This view co-exists with, and is mostly antithetical and contradictory to, the more recent approach of the ADA, which focuses on civil rights protections.
The development of parallel legislation for people with disabilities has had a significant impact on how people with disabilities are positioned as citizens. As Silverstein (2000) states, the definitions of disability are drafted so as to accomplish the goals of each piece of legislation, and it is in these systemic goals that the citizen is located. For example, in the civil rights legislation (the ADA), disability is defined for the purpose of determining which individuals will be protected by the legislation. In entitlement programs (e.g. SSI or DI), disability is defined for the purpose of determining which individuals will be eligible for benefits or services. These disparate definitions are ideologically opposed both in discourse and practice. Section 504 of the Rehabilitation Act of 1973 and the ADA define disability as “A physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment” (Silverstein, 2000). This definition is sufficiently broad to reflect the three types of discrimination that people with disabilities face: discrimination based on one’s impairments, discrimination based on a history of having an impairment (even though the individual no longer has the impairment), and discrimination through being regarded as having impairment (even though the individual does not actually have that impairment) (Silverstein, 2000). This is similar to the broad definition of disability used in the DDA in Australia, which similarly contrasts with the definition of disability in social security policy, which posit disability as a medical impairment (as highlighted in Chapter Three). The contrasting philosophies of disability that underpin Federal programs in the United States and Australia for people with disabilities has influenced the extent to which the rights advocated are translated into achievable measures in the key areas of social justice and citizenship, such as employment.

The ADA in Context: Promoting Rights of People with Disabilities

The National Council on Disability (2004) notes a number of positive influences that the ADA has had in the areas of architecture, transportation, and communication. Title II (covering state and local governments) and Title III (covering public accommodations) have also curtailed many discriminatory practices in private business and government agencies. The ADA has also had an impact on employment provisions by influencing hiring practices (e.g. by barring invasive pre-employment questionnaires and disability inquiries and the misuse of pre-employment physical
information). These provisions also increased the prevalence of job accommodations for workers with disabilities. Despite these advances, anti-discrimination legislation has failed to make significant improvements to one of the critical areas contributing to parity of participation—employment. Bagenstos (2004) argues that for literally millions of working-age persons with disabilities, the ADA has been entirely irrelevant to their ability to get jobs. While anti-discrimination requirements can prohibit employers from discriminating against qualified people with disabilities who apply for jobs, they cannot put people with disabilities in a position to apply for these jobs in the first place (Blanck, 1999; Blanck et al, 2004), nor eliminate the structural and attitudinal barriers that people with disabilities encounter.

Although there is evidence to suggest that the ADA implementation has coincided with larger numbers of persons with severe disabilities entering the US labour force, linking the increase of employment of people with disabilities directly to ADA has been problematic and a number of US writers have challenged this claim (see for example Blanck, 2000). In 1996, the US Census Bureau released data showing that the employment to population ratio of persons with severe disabilities increased from 23 per cent in 1991 to 26 per cent in 1994, reflecting an increase of approximately 800,000 additional people with severe disabilities in the workforce (Blanck and Schartz, 2002:25). However more recent studies have shown that employment rates vary according to different definitions of disability. How disability is defined therefore can have an important effect on the conclusions that researchers and policymakers draw about the employment rates of individuals with disabilities (Blanck and Schartz, 2002). The 1998 Current Population Survey in the United States found that approximately 27% of individuals with disabilities were employed, compared to 78% of their non-disabled peers, with about 64% of individuals with disabilities who were employed holding full-time jobs compared with 82% of employees without disabilities (Blanck et al, 2004). Numerous studies (e.g. in Blanck, 2000) have found that the employment rate for people with disabilities in the United States declined or remained stagnant throughout the 1990s—a period that overlapped both with the implementation of the ADA and with a booming economy. Although employment rates increased for men and women without disabilities during this boom, the rates for people with disabilities did not (Bagenstos, 2004).
There is little definitive evidence that disability law and policy alone will result in substantial increases in the numbers of qualified persons with disabilities participating in the labour force. As has also been found in Australian research (e.g. Thornton, 1990; Jones and Marks, 2000), anti-discrimination requirements are a singularly ineffective means of eliminating structural barriers in many spheres of participation, including civic participation, lack of personal-assistance service, lack of assistive technology, and inaccessible transportation (Blanck, 1999; Blanck et al, 2004). While the ADA aims to address injustices by outlawing discrimination at both the structural (e.g. discriminatory hiring practices) and status (e.g. discriminatory attitudes) levels, this has unfortunately not translated into consistent policy practices, and people with disabilities continue to experience significant levels of discrimination in all socio-cultural and political-economic spheres. This is not related just to employment. The NCD (2002) notes that in the 2000 elections in the United States, in at least 18 states, voters with disabilities found polling places inaccessible and ballots confusing, and were faced with a lack of privacy and independence in voting. As Batavia and Schriner (2001:699) state, "The ADA is a necessary, but insufficient law, based on a necessary, but insufficient, theoretical framework to address the many problems faced by people with disabilities in this country". A key problem compounding this is that anti-discrimination laws for people with disabilities do not remedy the underlying causes of injustices. This is, in part, why the ADA has failed to make any significant difference in the critical area of employment. Parity of participation in the labour force requires a plethora of policy responses: anti-discrimination laws; flexible workplace arrangements; adequate remuneration that accounts for the extra costs of disability (via income support arrangements); workplace education to address discriminatory attitudes, etc. This critical point will be discussed in more detail further on in the chapter, as this issue is not an observation which might be made only of the ADA in the United States. Similar problems are evident in other disability legislation and policies, and in other countries. This chapter will now turn to an examination of anti-discrimination legislation in Australia, beginning with an historical overview of the events leading up to the passing of the DDA. This will be followed by an examination of the extent to which the DDA promotes and embodies rights and social justice for people with disabilities, drawing comparisons with the United States where appropriate.
Transforming Federal Disability Policy in Australia

Natural rights-based legislation and policy came to the forefront in 1972 in Australia when the Australian Labor Party won a majority in the House of Representatives and formed a federal government for the first time in twenty-three years. Under Prime Minister Whitlam, the government emphasised the importance of international human rights instruments, evidenced by the signing of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) (as discussed in Chapter Two). In 1973, Attorney-General Lionel Murphy introduced a Human Rights Bill and a Racial Discrimination Bill into the Australian Senate. The Human Rights Bill stemmed from the ICCPR and provided for a right to non-discrimination. The Bill would create an Australian Human Rights Commissioner, who was empowered to investigate alleged human rights violations, and the rights listed in the Bill would be enforceable not only against governmental action but also against private action. However due to opposition from the States, Whitlam – fearing negative political fallout – decided to abandon the 1973 Human Rights Bill which Murphy had unexpectedly introduced to Parliament. In contrast to previous Attorneys-General, Murphy was committed to advancing human rights issues and used his portfolio to advance sweeping and radical social change. In this, he was assisted by three activist lawyers, Gareth Evans, Chris Ronalds and Peter Bailey, all three of whom would go on to play important roles in the development of Australia’s anti-discrimination law (Case, 2004).

Although the Human Rights Bill lapsed due to controversy and was not reintroduced in the new parliamentary session, the Racial Discrimination Bill proceeded and was re-introduced by Murphy in 1975. He indicated that it was along much the same lines as the earlier 1973 proposal, although the main changes were to extend the Bill to cover discrimination against persons on the grounds that they are immigrants (Bailey, 1990). The Racial Discrimination Act 1975 makes racial discrimination unlawful in Australia. The legislation covers all of Australia and aims to ensure everyone is treated equally, regardless of their race, colour, descent, or national or ethnic origin. The Act addresses discrimination in areas such as employment, renting or buying property, the provision of goods and services, accessing public places and in advertising (HREOC, 2002). It became the genesis for future anti-discrimination legislation in Australia, and embodied a philosophical and legislative commitment, at

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least in rhetoric, to social justice and human rights. Supporters promoted the conciliatory approach embodied in the Act, emphasising that this was the preferred approach in other liberal welfare states. However critics of the Act doubted that anti-discrimination legislation was capable of changing human motivations, and suggested that it might exacerbate tensions (Case, 2004). Such criticisms were also later targeted at disability legislation, particularly evident during the process of developing the UN Convention for disability rights (as discussed in Chapter Two). While there is little evidence to support the critique that specialised legislation results in further segregation of some marginalised groups, disability anti-discrimination legislation has had little impact on disabling attitudes. Legislation cannot on its own transform a society into one which fully values all its citizens equally, therefore its capacity to redress injustices at structural and status levels is limited.

In 1975, the Coalition of Liberal and National Parties under Prime Minister Fraser came to power and by 1977 the Government announced its intention to establish a Human Rights Commission that would examine both Commonwealth and state law and practice, and report on their consistency with the ICCPR. It was not until 1981 that the Fraser Government successfully passed a watered-down version of the original Bill that established a Human Rights Commission. The Commission was authorised to examine the extent to which Commonwealth, but not state, legislation was consistent with the ICCPR and three UN declarations: the Declaration on the Rights of the Child (1959), the Declaration on the Rights of Mentally Retarded Persons (1971), and the Declaration on the Rights of Disabled Persons (1975). While the Whitlam Government was committed to advancing human rights issues, Tahmindjis (1996, cited in Case, 2004) argues the Fraser government's pursuit of the Human Rights Commission Act was the result of political considerations and legal necessity rather than ideological commitment. Case (2004) argues that the Coalition's ambivalence can be seen in how the Human Rights Commission Act contained a sunset clause, whereby the Commission would be terminated on 10 December 1986, unless reauthorised. This was similar to the development of the ADA in the United States, which was underpinned by a notion that such an Act would reduce welfare dependency, rather than being imbued with ideological principles of rights and social justice.
In 1983, under the newly elected ALP government of which Bob Hawke was the Prime Minister, the Sex Discrimination Bill was introduced. While sex discrimination legislation had been enacted at the state level since the 1970s, it was not until the passing of the Sex Discrimination Act in 1984 that Australia fully realised its commitment as signatory of the 1982 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Sex Discrimination Act differed from the Racial Discrimination Act in that it contained a number of provisions that had previously been removed from the Racial Discrimination Act. These included allowing complaints not only by an aggrieved individuals but by other persons; powers were granted to the Human Rights Commission to obtain documents and other information relevant to the conciliation process; and the employers became liable for the discriminatory actions of their employees (Case, 2004). This Act came into force much quicker than the Racial Discrimination Act, in part due to the strength of the women’s movement, including international developments such as the International Decade of Women which begun in 1975, and the signing of the CEDAW. The development of this Act was to have a significant impact on the later development of disability anti-discrimination legislation, particularly in the area of employment.

Reform to federal disability policy in Australia had initially begun under the Whitlam government in 1974 with the Handicapped Persons Assistance Act. Although the Commonwealth Commission of Inquiry into Poverty in the early- and mid-1970s drew attention to the problem of poverty associated with disability in Australia (Clear and Gleeson, 2000), the recommendations in the report had little success (Meekosha and Jakubowicz, 1999). It was not until after the International Year of the Disabled Person in 1981, and the return of a Labor government in 1984, that a series of inquires and legislative reforms with respect to disability issues were established. During this time, there emerged a new reformist framework which embodied additional social supports and rights legislation (Meekosha and Jakubowicz, 1999; Clear and Gleeson, 2000). The 1980s saw a range of disability rights groups being formed, including the national disability lobby group, Disabled Peoples International Australia. Women with disabilities were considered also to constitute a small political force in Australia with the formation of a women’s network by feminists within Disabled Peoples International. Meekosha and Jakubowicz (1999) argue that while individual women with disabilities have been active around gender issues since the genesis of the
disability rights movements in Australia, collectively they remained on the margins of debate and political action until the 1990s. In 1994, Women with Disabilities Australia (WWDA) received funding from the Federal Office for the Status of Women following initial seeding support from the Federal Office of Disability. However, with the conservative Liberal/National Coalition return to power in 1996, the advances of the previous decade began to unwind (Meekosha and Jakubowicz, 1999). Under the impact of an economically rationalist conservative national government, WWDA’s experience of government changed. This was in line with the broader shift to neo-liberalism in liberal welfare states. Originally WWDA was supported by the Prime Minister’s Department through the Office for the Status of Women as an organisation of women, however under the Howard government, it was reclassified as a disability organisation. This meant that WWDA lost access to the National NGO Women’s funding program, and now depends on the disability development and research funding of the Department of Family and Community Services (Meekosha and Jakubowicz, 1999).

During the 1980s, two notable government bodies were central in furthering disability rights in Australia. In 1983, the Hawke Labor government established the national Disability Advisory Council, chaired by Graeme Innes (who was later appointed in 2005 as the Human Rights Commissioner and Commissioner responsible for Disability Discrimination), to provide direct advice to the federal government. This Council, alongside the Disability Anti-Discrimination Legislation Committee, chaired by Chris Ronalds (who had played key roles in the development of the racial and sex discrimination acts) were fundamental in translating group demands into government law (Case, 2004). Ronalds also later authored the 1990 National Employment Initiative for People with Disabilities: a Discussion Paper, and the 1991 Report of the National Consultations with People with Disabilities, which were influential in placing anti-discrimination legislation for people with disabilities on the government agenda (to be discussed below).

The Disability Discrimination Act (DDA)

The 1992 Disability Discrimination Act (DDA) introduced by the Labor Government covered all the same areas as other federal anti-discrimination laws, and was a symbolic commitment of the recognition of disability rights as well as a reflection of
the growing trends of integrating the social model of disability into government policy. As with the ADA in the United States, there was hope that this legislation would offer the possibility for defensible citizenship claims at both the structural (e.g. against societal barriers) and status (e.g. against attitudinal barriers) levels; and that it would be an effective policy response to ameliorating discrimination of persons with disabilities, particularly in the redistributive area of employment. Handley (2001) argues that the inception of the DDA demonstrated the Commonwealth government’s intention to address social exclusion for people with disabilities through recognising their legal rights. The principles underpinning the DDA (at least in rhetoric) brought together disability rights and social justice and offered one means for Australians with disabilities to seek parity of participation and citizenship. The objectives of the DDA are:

(a) To eliminate as far as possible discrimination against persons on the grounds of disability in the areas of:
   (i) work, accommodation, education, access to premises, clubs and sport; and
   (ii) the provision of goods, facilities, services and land; and
   (iii) existing laws; and
   (iv) the administration of Commonwealth laws and programs; and
(b) To ensure as far as practical, that people with disabilities have the same rights to equality before the law as the rest of the community; and
(c) To promote recognition and acceptance within the community of the principle that people with disabilities have the same fundamental rights as the rest of the community (Commonwealth Government of Australia, 1992).

In the second reading speech for the Disability Discrimination Bill, the then Minister for Health, Housing and Community Services, the Hon. Brian Howe, emphasised the DDA’s importance in the wider context of the Australian’s Government’s commitment to human rights and social justice reform:

People with disabilities are regarded as equals, with the same rights as all other citizens with recourse to systems that redress any infringements of their rights ... where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates difference (Howe, 1992 cited in Handley, 2001:517).

The DDA was intended to offer more than simply a legal recourse for individual injury, it was aimed to bring about fairness and justice for an oppressed group. In contrast to the passing of the ADA in the United States, there were public consultations held prior to the inception of the DDA, in order to examine options for national disability discrimination legislation, including the reports by Chris Ronalds.
These consultations helped raise awareness about why persons with a disability should have rights, and contributed in part to a shifting of the focus away from specialised rights (via disability-specific services) and towards equal rights. This was an important step towards ensuring that the eventual Act would allow for defensible claims against both maldistribution and misrecognition, as well as signalling that persons with disabilities required both social equality and recognition and respect for difference, if they were to receive parity of participation and citizenship.

In the consultations for the Ronalds reports, 95% of the people surveyed supported national disability discrimination legislation (Ronalds, 1991:29 cited in Productivity Commission, 2004). The greatest barriers to employment were reported to be discrimination by employers and co-workers, and harassment on public transport (Ronalds, 1990 cited in Tyler, 1993). The DDA was originally drafted as a limited Act intended to improve the employment opportunities of persons with disabilities (Tyler, 1993), but the Ronalds reports recommended that the Commonwealth enact national, comprehensive legislation to prohibit discrimination in employment as well (Ronalds, 1990, 1991, cited in Tyler, 1993). There was an expectation that, in the longer term, Australian society would change appreciably for the better for the majority of people with disabilities (Handley, 2001). Legislative reform was seen to be essential as it was believed that the legislation would:

Constitute the legal basis for the protection and promotion of the rights of people with disabilities and ... help to overcome social and economic disadvantage by assisting people with disabilities to participate as equals in Australian society (Howe, 1992 cited in Jones and Marks, 1999).

The new federal legislation was designed to align Commonwealth and State/Territory policies and programs. The state Acts had been criticised for the strict criteria of disability which focused on individual impairment and medical categorisations (Basser and Jones, 2002; Productivity Commission, 2004). Prior to the introduction of the DDA, Australia had a ‘charity-medical service paradigm’ (Tyler, 1993), which was created through an emphasis on the provision of specialised services to people with disabilities which created further negativity and stigma. This was personified in the 1986 Disability Services Act (DSA), which outlined principles for including participation by people with disabilities in the planning of service delivery. While the DSA was underpinned by notions of social justice, in that it promoted rights via a language of difference, by failing to include rights of equality as well it
unintentionally segregated people with disabilities. This meant that conceptions of
disability promoted the importance of recognising and respecting difference, but
although this is necessary, it is an insufficient condition for full and equal
participation.

The disability rights movement in Australia in the decade prior to the inception of the
DDA contrasted sharply with that in the United States. As discussed earlier in the
chapter, the rights movement in the US promoted the rights of citizens with
disabilities via a civil rights framework of social equality, however there was less
attention given to according and respecting the principle of difference in policy and
legislation. In Australia on the other hand, the disability rights movement focused on
securing specialised service rights for people with disabilities. While both rights
movements were successful in shifting national discourse and practice, neither path by
itself was able to secure full and equal citizenship and participation.

With the introduction of the DDA, there was a slight shift away from focusing only on
specialised services to a recognition that people with disabilities need social equality,
albeit not as advanced as the equality principles underpinning the rights movement in
the United States. Nevertheless, for the first time in Australia there was federal
legislation that, at least in discourse, was underpinned by principles that recognised
the rights of people with disabilities, as well as offering a legislative commitment for
equality of opportunity in the area of employment. In contrast to social security
legislation – which is underpinned by a medicalised notion of disability – the DDA
includes external factors in its definition of disability beyond that of individual
impairment. In this way, it embodies a social model of disability. The broad
definition of disability contained within the DDA, although not distinguishing
between impairment and disability (a distinction that is entailed in the philosophy
underpinning a social model of disability), does embrace the full range of
circumstances in which a person could be defined as disabled. It covers:

- Physical, intellectual, psychiatric, sensory, neurological or learning disabilities,
  physical disfigurement or the presence of a disease-causing organism.
- Disabilities people have now, have had in the past, might have in the future.
- Associations with people with disabilities including partners, relatives, friends, carers
  and people in business, sporting or recreational relationships.
- The need to use a palliative or therapeutic device.
• The need to be accompanied by a guide dog, hearing assistance dog or other trained animal or interpreter, reader, assistant and/or carer (Productivity Commission, 2004).

Unlike other state and federal legislation, the above definition moves beyond a medical 'snapshot' in time and instead offers a holistic interpretation of disability covering a range of fluid external influences, signalling its allegiance to a social model/rights-based approach. Furthermore, the DDA does not simply protect 'worthy' people with disabilities and deny protection to people with disabilities who are considered to be to 'blame' for being impaired — a significant limitation found in both the Canadian and US discrimination laws (Basser and Jones, 2002). This definition is markedly different to that within other federal legislation used to assess eligibility for benefits or services, such as the Social Security Act 1991 (as discussed in the previous chapter). Most notably, the DDA provides a focus on discrimination rather than on the nature and degree of the disability. It focuses not only on the fact of having a disability, but more pertinently on the actions of other individuals whose discriminatory behaviour can potentially create harm to the person with a disability.

The DDA in Context: Promoting Rights of People With Disabilities

Initially, there was optimism for the DDA with large numbers of complaints during the period of 1994-95, however since that time there has been steady decrease in the number of complaints lodged. While the DDA has made a number of significant changes in areas of transport, access to buildings and telecommunications (HREOC, 2003), it is now considered to be a considerable disappointment, particularly in the area of employment. Much of the criticism being targeted at Commonwealth political institutions, such as HREOC, is made by advocates and activists who consider that they have been let down by a failure to match political rhetoric, such as that exemplified by Howe (1992), with purposive action (Handley, 2001). This view is supported by Meekosha and Jakubowicz (1996) who argue that the passing of the DDA in Australia, unlike the mass rights movement in US legislation, was the outcome of a bureaucratic and political agreement, supported by traditional service delivery agencies. In their view, "It was legislation which claimed to be concerned with the rights of people with disabilities, but provided few resources to enable them to pursue their rights" (p.84). This is a critical issue for disability policy and legislation, which cannot be successful unless there are concurrent policy developments to support the stated aims of the federal legislation. Rights-based
legislation is only the first step towards securing full and equal rights in all socio-cultural and political-economic spheres. A willingness and commitment by the government is also required for real change to occur. Furthermore, even if legislative discourse were matched with necessary policy actions, a key problem remains. As noted earlier in the chapter, anti-discrimination legislation does not remedy the underlying causes of injustices. This is in part one of the reasons why the DDA (and the ADA in the United States) is limited in its potential to increase labour force participation. For people with disabilities to have equality of opportunity in the labour market, current federal policies (including both social security and anti-discrimination laws) need to address the underlying root-causes of maldistribution and misrecognition that generate such injustices in the first place.

In 2004 the Productivity Commission – the Australian Government’s principal advisory body on all aspects of microeconomic reform – undertook a public inquiry into the Disability Discrimination Act. The inquiry examined the social impact of the legislation on people with disabilities and on the community as a whole. It also analysed the costs and benefits of the DDA and its effectiveness in achieving its objectives, which in summary are: to eliminate as far as possible discrimination on the grounds of disability; to ensure equality of people with disabilities before the law; and to promote recognition and acceptance of the rights of people with disabilities (Productivity Commission, 2004). In their review of the DDA, the Commission remarks on how difficult it is to untangle the effects, both positive and negative, of the DDA from other influences such as:

- State and Territory anti-discrimination;
- The availability of disability services and the Disability Support Pension;
- De-institutionalisation and ‘mainstreaming’ of many people with disabilities;
- Improved diagnosis and treatment of people with disabilities;
- Demographic changes such as the ageing of the population; and
- Technological developments that have contributed to reducing barriers faced by people with disabilities.

The Productivity Commission concludes its review by stating that the situation of people with disabilities has not improved markedly since the introduction of the DDA, particularly in the key area of employment, where the Act has been relatively ineffective in reducing disability discrimination. Compared with other OECD countries, Australia has a relatively low proportion of disability pension recipients
employed – under 10% compared with an OECD average of 30%. This translates into the seventh lowest employment rate for people with disabilities among the OECD countries (OECD, 2003). Most people with a disability who are of workforce age acquire their disability as adults and subsequently lose their jobs, and once a person with a disability is unemployed there are numerous difficulties in returning to the workforce (Diamond, 2005). One policy response which has been successful elsewhere (e.g. Europe) in ameliorating the low levels of employment of people with a disability has been the existence of quota legislation. A quota system which is enforceable can contribute considerably to raising the employment levels of people with disabilities in the open labour market, however some important key criticisms exist. A quota system requires a clear definition of disability for recognising qualification, and strict rules and procedures for registration, and therefore it may increase the problem of stigma. There may also be the potential discomfort of a person with a disability being employed where s/he is not wanted by the employer, but is merely tolerated (ILO, 1998). When quota legislation is compared to anti-discrimination legislation, it appears that the latter is more appropriate for ensuring equality of opportunity as it promotes employers’ initiatives and social consciousness by means of environmental improvement, not employment obligation (ILO, 1998). However, for anti-discrimination legislation even to begin to be successful, it requires concurrent policies that focus not only on eliminating barriers to workforce return, but also on the workplace modification and work regime accommodations necessary for people with disabilities to retain their employment. This would require a commitment by both government and businesses to develop much more comprehensive programs of re-training, rehabilitation and job retention, potentially with wage subsidies provided by government.

The Human Rights and Equal Opportunity Commission (HREOC) conducted a public inquiry during 2005 on the issues that affect equal opportunity in open employment for people with disabilities. HREOC (2005) states that the purpose of the inquiry was to:

- Identify existing systemic barriers to equal employment opportunity for people with disabilities;
- Examine data on employment outcomes for people with disabilities including workforce participation, unemployment and income levels; and

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Examine policies, practices, services and special measures implemented to advance equal employment opportunities for people with disabilities.

As part of the preparation for the Inquiry, HREOC (2005), in consultation with the disability advocacy NGOs, identified some of the main barriers faced by people with disabilities. Firstly, there was no ‘one-stop-shop’ for people with disabilities looking for information, advice and ongoing support about how to enter the open workforce. This is compounded by a lack of coordination between Commonwealth and State services. Another key problem concerns the financial costs of education, training and employment participation (e.g. transport, health support and other costs associated with participation), compounded by losing access to the Disability Support Pension (DSP) and associated health benefits. One of the key concerns for people with disabilities when they move off benefits and into employment is a deep sense of insecurity. Will they lose their health and pharmaceutical benefits? What if their employment ceases or proves difficult to sustain? Will there be accessible and affordable transportation? How difficult will it be to regain disability income support eligibility? In a risk-laden employment environment for all (Borland, Gregory and Sheehan, 2001), it would be rational for people with disabilities to hold such fears and insecurities. It is apparent that there are a number of complex interrelated institutionally-situated issues for ensuring parity of participation for people with disabilities that go well beyond scope and reach of the DDA. To support and facilitate workforce transitions over a significant time period, it is essential that policy developments involve a range of options beyond legislation to address structural and attitudinal barriers. In sum, anti-discrimination laws for people with disabilities have limited capacity for redressing injustices at structural and status levels, particularly as such laws cannot remedy the complex socio-cultural and political-economic injustices that people with disabilities encounter.

It is important here to acknowledge the limitations of legislation in effectively addressing widespread discriminatory attitudes and practice. Tyler (1993) argues that the key to assessing the potential of the legislation to change attitudes is to recognise that legislation is not supposed to be the only tool through which progress is achieved. This is best summarised by Chris Ronalds speaking of the DDA in a 1992 interview, when she stated that:
Anyone who thinks that it is the sole or only answer is a fool. It’s simple. There are many people who obtain enormous benefits from the legislation. That in itself should justify its existence. It was always only one mechanism. I think that people criticise it a lot because they fail to understand: (a) the real politics of Australia, and (b) what the legislation could ever achieve and what it was designed to achieve. That’s why you need all sorts of other mechanisms, affirmative action being only one of them (Ronalds, 1992 cited in Tyler, 1993:227).

The drafters of the DDA were well aware that it would not constitute the ‘be-all-end-all’ policy response for redressing the complex inequalities that people with disabilities face, as evident in the objectives of the Act which acknowledge the limitations of using anti-discrimination law to address social injustices. The language in the DDA contains phrases like ‘as far as possible’ in addressing discrimination, which importantly recognises that no one legislation can completely eliminate discrimination. Although there are many areas excluded by the DDA, such as superannuation and insurance, social security and immigration (Jones and Marks, 1999), the Act does go well beyond what is usually included in other anti-discrimination legislation. While the complaint-handling processes of the DDA are similar to much of the other anti-discrimination legislation, there are four other mechanisms which have the potential to address structural inequalities affecting the lives of people with disabilities. These are action plans, standards, guidelines and investigations (Jones and Marks, 1999). These mechanisms allow for recognition of the importance of involving every member of society in the process of changing entrenched inequality, and are a commitment to the rights of people with disabilities beyond that of legislative redress. The architects of the DDA included a strategy for direct public involvement in responding to disability discrimination via Action Plans – documents voluntarily developed by ‘service providers’ which lay out the process by which the organisation proposes over time to eliminate practices discriminating against people with disabilities (Basser and Jones, 2002). Rather than the DDA only being a vehicle for legal redress within the confines of the court system (as with the ADA), it was envisioned that all of society would become involved in ameliorating disability discrimination. While the Action Plans have no legal weight, they are an important symbolic statement regarding the need for a holistic approach to ensuring that people with disabilities have full and equal participation.

However, Thornton (2000) argues that despite the action plans and the standards, the individual complaint mechanism remains the paradigm under anti-discrimination
legislation, and a rather ineffectual one at that. Clear and Gleeson (2000) note that under neo-liberal conceptions and policy in Australia, the commitment of government to rights has been diminished. This is supported by Thornton who argues that, "Over a remarkably short space of time – approximately a decade and a half – the language of social justice and the espousal of values associated with the communitarian side of the spectrum had virtually disappeared from the contemporary political rhetoric" (Thornton, 2000:15). This is most clearly evident in the recent welfare-to-work changes – which have re-organised citizens as market-workers and re-distributed resources via market participation – which have had an adverse impact on those who already experience high levels of discrimination in unregulated markets. Handley (2001) argues that the legal rights of Australians are contingent upon the discretion of government which has the constitutional power to repeal those rights should they see fit, for example, in response to the dictates of economic or political expediency. Although a person with a disability has the choice of employing State-based or Commonwealth-based procedures in Australia, choice in this matter and the extent to which one might want one’s rights to be protected and enforced remain dependent upon the amount of resources that each state is prepared to commit for that purpose. In substantive terms, Handley (2001) believes that these factors undercut the intent of the DDA, and people with disabilities are caught between Commonwealth financial retrenchments on the one hand, and the increased emphasis on the role of the States on the other. In a similar manner to the limitations facing implementation of international rights-based instruments (as discussed in Chapter Two), domestic rights-based legislation is also constrained by the social and political forces of that time. In Australia under the current government, this has meant an overall retreat from international or domestic rights-based laws.

The retreat from domestic rights-based policies under the Howard Coalition government since 1996 is most clearly seen through the diminished capacities and funding of HREOC over the past decade. The DDA gave HREOC the power to conduct hearings and make determinations (in the same manner as the sex and racial discrimination legislation that it already administered). Determinations were to be registered with the Federal Court of Australia, at which stage they became an order of the Court. However in 1995, the provisions to make determinations in all three federal anti-discrimination Acts (sex, racial and disability) were deemed
unconstitutional because they attempted to vest in HREOC (an administrative government agency) judicial powers that could be exercised only by the courts. From 2000 onwards, HREOC could only conciliate complaints and determinations could be made only by the Federal Court (Productivity Commission, 2004). Further to this, under the current government the dedicated Disability Discrimination Commissioner position in HREOC has been terminated, and the responsibilities merged into those of the Human Rights Commissioner.

There have also been increasing calls by government to reorganise HREOC, which includes renaming the Commission as the Human Rights and Responsibilities Commission (Commonwealth Government of Australia, 1998a). Thornton (2000) argues that the shift from ‘equal opportunity’ to ‘responsibilities’ mirrors the conservative re-negotiating of citizenship that has occurred in other parts of the world such as the United States. There is a general shift in liberal welfare states towards neo-liberal based policies and legislation that are underpinned by notions of mutual obligation and individualism (as discussed in previous chapters), and this is impacting on the full potential and range of policies, programs and legislation necessary for people with disabilities to achieve socio-cultural and political-economic inclusion. The emphasis on ‘responsibilities’ over ideals of equal opportunity changes the direction of the rights/responsibilities nexus – away from what is ‘due’ to people with disabilities, away from recognition and redistribution, and towards a principle of ‘what can society and government expect of you in return’. This is likely to be a particularly onerous principle when applied to people with disabilities.

As noted previously, in spite of the UN conventions’ acceptance of employing a human rights approach to disability, enactment of legislation remains largely dependent on national partisan politics, particularly in Australia and to a lesser extent in the United States. Meekosha (2000) argues that the current political, economic and social climate in Australia is seriously undermining gains that have been made by the disability movement over previous decades. For example, the removal of the Disability Discrimination Commissioner as a dedicated position is inconsistent with either the government’s own Commonwealth Disability Strategy or its obligations under the United Nations International Covenant on Civil and Political Rights (ICCPR). Furthermore there has been a watering down of Federal Human Rights
legislation with increased costs for appellants, the stalling of the implementation of
disability standards, and a reduced commitment to overall human rights. Such moves
are constraining opportunities for people with disabilities to achieve full and equal
participation in all socio-cultural and political economic realms, and are in direct
contravention of the principles underpinning national and international disability
rights movements. In the United States in particular, one of the main policy barriers
constraining social citizenship for persons with disabilities stems directly from the
tensions inherent in and between Federal disability legislation. This is evident in the
two primary models of federal disability policy in the US: social welfare and civil
rights. This chapter will now turn to an examination of the national tensions in
disability policy, using the United States as one such example of how federal policies
can facilitate or impede rights and justice of people with disabilities. Comparisons
will be made with Australian policy where possible.

**Negotiating National Tensions in Disability Policy in the
United States**

A key problem in American policy and legislation for people with disabilities is the
contradictions within and between programs. The genesis of welfare programs in the
United States located disability policy in a social welfare law model, which continues
to influence policy and legislation. This model reflects key principles of the medical
model of disability (as discussed in Chapter One), positioning disability as a deficit in
the individual. Rather than adapting social institutions to accommodate disabilities,
people with disabilities are directed towards a segregated parallel track that provides
income and services separate from those that serve people without disabilities
(Waddington and Diller, 2002). Within the social welfare law model, people with
disabilities are not specifically ignored, rather policies and programs are developed to
address what the 'non-disabled' perceive as basic needs. People with disabilities may
be offered income support, housing, schooling and special jobs. Underpinning these
programs however, is a strong emphasis on selecting, categorising and labelling, and
this process is often viewed as an inquiry into medical fact rather than a moral or
social judgement, thereby reinforcing the idea that disability is a discrete medically
determined status (Waddington and Diller, 2002). The social welfare law model is
represented in US social security programs such as the SSI/DI, and to a lesser extent
can be seen through the DSP in Australia and in federal legislation such as the Disability Services Act.

With international shifts towards a rights-based approach to disability issues, policies in the United States have begun to incorporate a civil rights law model of disability alongside its social welfare model. The human rights model rejects the premise that social exclusion is an inevitable consequence of disability and instead locates the 'problem' as one of systematic discrimination rather than of medical limitations. This model reflects the principles outlined in the social model of disability (as discussed in Chapter One). Underpinning this model is the aim that disability policy should reform mainstream social institutions to include people with disabilities, rather than maintaining a parallel track (Waddington and Diller, 2002). The enactment of national civil rights law for persons with disabilities in the United States (the ADA) saw very little official attention being given to the relationship between the existing Federally-funded social security welfare programs and the newer disability discrimination laws. It was assumed by government that the ADA's emphasis on employment would reduce expenditure on income support. In the campaign to enact the ADA, Bagenstos (2004) notes that disability activists frequently posed a stark choice between welfare and civil rights approaches. The existing benefit programs are rarely mentioned in the legislative history of disability discrimination laws, which has resulted in two principal national disability policies – each grounded on a different set of assumption about the nature of disability and each dealing with disability in a very different way (Diller, 1998).

Viewed together, the civil rights law and income support programs send mixed messages as they stem from different assumptions and tend towards conflicting objectives. The social welfare law model is founded on the idea of separation, while the civil rights law model focuses on inclusion. Social security policy and welfare emphasise the inability of people with disabilities – an individual must confess their inability in order to gain entry to a separate disability track of income support (Waddington and Diller, 2002). The ADA on the other hand, promotes the notion that a person with a disability should be considered to be similar to non-disabled persons by emphasising the capabilities of the person with a disability. In sum, the former seeks to remove people from the mainstream because of their 'difference', whereas
the latter seeks to return them to equal participation. Neither model is sufficient for people with disabilities to achieve parity of participation and citizenship as they fail to embody both principles of recognition (via respect of difference) and redistribution (via social equality). As has been highlighted in this thesis, this is problematic as people with disabilities are denied the means and opportunities to achieve equal citizenship as well as being denied the status of equal citizenship. Diller (1998) argues that tensions between the civil rights law and disability benefit programs are in part a product of the way in which each has been presented. The primary focus within disability discrimination law on prejudice and lack of accommodation as a barrier to employment has simultaneously contributed to obscuring how people with disabilities face multiple barriers to labour market participation. More than just an anti-discrimination policy response is necessary. Redistribution of resources must go hand in hand with recognition that persons with disabilities require equal rights if justice is to be achieved. Policy responses that are underpinned by sharply contrasting assumptions cannot achieve the objective of socio-cultural and political-economic equality, particularly when such policy responses do not seek to remedy the underlying causes of injustices.

Reconciling the social welfare law and civil rights law model in US federal policy is akin to moves by the British disability rights advocates to integrate the medical model of disability with the social model of disability (discussed in Chapter One), whereby impairment is situated in a framework that acknowledges the influence of a disabilist society. A recurrent theme in attempts to reconcile contradictory disability policy in the United States is to create conceptual clarity by disentangling the two policies, thus allowing the two programs to avoid conflict because they never intersect (Diller, 1998). The coexistence of these legislative models has been rationalised by various US governments over the years on the basis that the two models serve different people. Some individuals are classified as severely disabled, and tracked into a separate social welfare system, while others are viewed as less impaired and encouraged to join the economic mainstream. Given the heterogenous and diverse nature of disability this solution has some appeal, however Waddington and Diller (2002) argue that this depends on some method of sorting individuals into these categories and there is no clear way of drawing such a line. Furthermore, it still involves establishing a category of people with disabilities that is segregated into a
separate track. Diller (1998) points out that by forcing people into an ‘either/or’
disability track, a substantial number of individuals would be caught in the gap
between the two statutory schemes: they would be denied benefits based on the
theoretical availability of accommodations, without any assurance that such
accommodations, in particular workplace accommodations, are in fact available. In
addition, as liberal welfare states move towards a ‘post-welfare’ climate – a climate
that has shifted traditional principles of citizenship, participation and equality – the
contradictions and policy tensions will only be further perpetuated if a parallel
disability policy track is maintained.

One possible means of reconciling pre-existing social welfare programs with the civil
rights model is to broaden the concept of equality underpinning the model.
Waddington and Diller (2002) show that anti-discrimination legislation is based on a
narrow notion of equality of opportunity, and this notion assumes that all job
applicants have had an equal chance prior to job application. Yet many people with
disabilities encounter barriers that others in the labour market do not encounter. For
example, they may have limited access to housing and transportation, two vital
prerequisites to employment. A principle of equality that accounts for the full range
of disadvantages experienced by people with disabilities calls for policies that extend
well beyond traditional civil rights legislation. In addition, affirmative policies must
also begin to address the underlying causes of injustice if they are to redress
maldistribution and misrecognition. As Waddington and Diller (2002:279) state:

A system based on a broader notion of social justice that stressed the right of each
individual to basic income and opportunity for economic success would move social
policy beyond the basic dichotomy between social welfare and civil rights based
policies.

As well as expanding the notion of equality beyond the scope of many non-
discrimination requirements, the policy dilemma could be addressed, Waddington and
Diller (2002) suggest, by abandoning many of the premises of the social welfare
model in favour of a social justice model that emphasises the rights of each individual
to participate fully in the economic and social mainstream of society. This point is
similar to Fraser’s (1998) theory of social justice (discussed in Chapter One), in the
sense that, although the politics of recognition and redistribution have mutually
contradictory aims – the former promoting group differentiation and the latter
undermining it – the tensions can be resolved. A commitment to rights, while a
necessary part of ensuring the possibility of equality for all, remains insufficient in itself to address the multiple discrimination and human rights violations of persons with disabilities. By incorporating notions of social justice (or a recognition of the importance of difference) into human rights discourses, the principles underpinning rights – alongside the practices of rights-based policies – may better facilitate the amelioration of structural and attitudinal barriers that impede the participation of people with disabilities.

Another method of reconciling contradictory models of disability policy and legislation in the United States would be to restructure the benefits programs to harmonise with the ADA. This approach is evident in the focus on returning disability benefits recipients to the workforce (Diller, 1998). Federal laws in the United States such as the Work Incentives Improvement Act, the Ticket to Work Act and the ADA, are indicators of official support for enhancing employment opportunities for working-age adults with disabilities and preventing discrimination in the workplace (Blanck, 1999; Blanck et al, 2004). Waddington and Diller (2002) note that policy initiatives which have attempted to draw connections between the disability benefits programs of the Social Security Act, and policies designed to integrate people with disabilities into workforce, make links between older social welfare programs and the more recent legislative emphasis on inclusion in the workforce. Such attempts can be seen as an effort to integrate components of the social welfare approach into the newer civil-based model. However, as highlighted in the previous chapters, such ‘workfare’ programs, in both the United States and in Australia, have had limited success. Programs that have attempted to reconcile work with welfare may impede market participation for persons with disabilities, or conversely extend the poverty traps. For example, as noted in the previous chapter, reforms to disability income support policies in Australia, while characterised as promoting incentives for social and economic participation, have instead systematically retreated from including the wider conditions that influence the capacity for equality of opportunity. This has in effect removed notions of rights and justice from ‘welfare reform’ debates, inserting instead principles of ‘responsibility’ and ‘obligation’ of people with disabilities, and the moral imperative to market participation.
One important item missing from the research and policy agenda is the link between disability and asset accumulation. When addressing issues of low income, poverty and labour market discrimination for people with disabilities, the focus is primarily on income or income support payments – underpinned by the idea that to maintain human dignity, one requires a basic income subsistence. While this is a necessary and worthy area to be included in policy research and development, in highly industrialised societies such as Australia or the United States a broader issue pertaining to asset accumulation has largely been neglected. For people with disabilities, access to employment-based superannuation and private homeownership is diminished by lack of opportunities for lifelong, secure and adequately remunerated employment (Shaver, 2001). The inherent contradictions in income support policies and employment programs for people with disabilities – where a push-pull effect occurs – is becoming glaringly evident as the ‘new welfare’ embodies ‘workfare’ as the preferred policy, with little or no consideration of the adequacy of remuneration. It is evident that people with disabilities who have a history of part-time, casual and interrupted employment, or with a relatively short employment history, have little superannuation entitlement when they finally leave the labour force.

It is apparent that people with disabilities face similar issues across liberal welfare states in attempting to secure equality in citizenship and parity of participation. However, national policy and legislative response have been quite varied over the years, and are underpinned by differing philosophies. Although Australia and the United States share similar federal legislation such as social security and anti-discrimination, the policy path through which nations achieve equality can be markedly different. This chapter will now turn to a comparison of anti-discrimination legislation in Australia and the United States.

**Comparing National Regimes of Equality**

Basser and Jones (2002) illustrate the fundamental differences between the Australian approach to disability rights and the approach of the ADA in the United States, which are indicative of the different attitudes to, and experiences of, equality. As with the ADA, the DDA provides the right for a person with a disability to substantive equality – the right to have the same opportunities as others. This type of equality requires that people and organisations must ensure that persons with disabilities can take advantage
of the same opportunities as other people, even if this means treating them differently. It is up to the individuals to turn equal opportunities into outcomes based on individual merit (Productivity Commission, 2004). However, the DDA was motivated by a vision of fairness and respect for difference, whereas in contrast, the ADA has somewhat conflicting aims that involve elimination of arbitrary prohibitions, ending inequality of opportunity, and reducing the costs of unnecessary dependency (Basser and Jones, 2002). The difference between the objectives of the DDA and the ADA is a reflection of the differing cultural, political and social environments of the two countries. The American commitment is to the ideals of individual liberty, equality and freedom whereas the Australian commitment, at least in rhetoric, is to the ideals of social justice and equal rights (Basser and Jones, 2002).

In Australia, due to the absence of an enforceable Bill of Rights, a distinction can be made between the anti-discrimination and the general human rights legislation. Anti-discrimination has legal recourse, but there is no equivalent for human rights. While it is beyond this thesis to discuss the advantages and disadvantages of a bill of rights in Australia, it is important to acknowledge that advent of such a bill does not necessarily translate into achievement of parity of participation and citizenship for all individuals. This is evident in the United States, where a bill of rights exists concurrent with widespread violation and marginalisation of minority groups. Human rights are complex and are embedded moral and ethical components, requiring more than just the letter of law. Bailey (1990) makes the point that if violation of rights is of a ‘moral’ rather than legal kind, there is little remedy except through the force of public opinion. For people with disabilities to have justice and rights in all socio-cultural and political-economic realms, legislation is only one part of what is required.

Anti-discrimination law in both Australia and the United States has a fundamental inability to do more than make slight gains, particularly as it is legislation that embodies an inherent contradiction of proving ‘difference’ to establish ‘sameness’. For people with disabilities, the quest to be treated as ‘ordinary’ members of the community is challenged by laws which are only available on proof of ‘abnormality’ (Jones and Marks, 1999b). Thornton (1990) argues that the equal treatment versus special treatment approaches continue to generate a significant and irresolvable tension. As noted earlier on in the thesis, this is also recognised by Fraser (1998) when she contends that recognition claims often take the form of calling attention to
the specificity of some groups, thus tending to promote group differentiation, while redistribution claims tend to promote group de-differentiation.

Further to this, although anti-discrimination legislation is designed to benefit all persons with disabilities, an analysis of cases and complaints suggests that only a very small group do in fact benefit. Jones and Marks (1999b) note that the primary beneficiaries of the DDA have been middle-class people from English-speaking backgrounds, very often with adult acquired disabilities. The ability to use the law requires familiarity with the law, sufficient funds, emotional reserves to survive the legal process, and generally the support of an advocate or legal practitioner. This has also been found with civil rights statutes in the United States. Russell (2002) argues that these statutes are based on the premise that the individual citizen is an equal actor in the judicial process, with the legal power to redress injustice though court challenges to discrimination. However, circumstances of social, economic and cultural inequality, such as class position, education, gender or race, play an important role in determining access to the courts. Anti-discrimination laws tend to resolve complaints by way of conciliation, which is problematic as it fails to account for the power imbalance between parties. It is also a privatised method of dispute resolution, therefore it does not have the desired educational effect (Jones and Marks, 1999b).

As noted earlier, the key problem with affirmative strategies for redressing injustice are that they aim to correct inequitable outcomes of social arrangements without disturbing the underlying social arrangements that generate them (Fraser, 2003). This observation is certainly true for both anti-discrimination legislation and social security arrangements in liberal welfare regimes. In Australia and the United States, social security does not ameliorate the causes of poverty nor account for the extra costs of disability (as discussed in the previous chapter). Furthermore, anti-discrimination legislation also does not address the source of the discrimination in the areas covered by these laws, such as education or employment. It is the underlying root-causes of maldistribution and misrecognition that must begin to be redressed if parity of participation and citizenship is to be achieved in all socio-cultural and political-economic realms.

In sum, anti-discrimination legislation does not have the capacity in itself to address the fundamental problems confronting people with disabilities generally. Thornton
(1990) argues that anti-discrimination measures devised in Australia and elsewhere in the western world tend to be 'schizophrenic'. While they acknowledge the structural injustice of discrimination based on group membership, such measures are bound to support the ideology of individual merit. Therefore a commitment by government to more than rights-based legislation is warranted. Jones and Marks (1999b) suggest that if rights-based legislation is part of a package of legislation dealing with specific aspects of the law relating to people with disabilities, then it may offer a different level of empowerment. Where legislation regulating the provision of goods and services to people with disabilities includes a charter of rights as well as a complaints and enforcement mechanisms, the position of people with disabilities may be greatly enhanced. Bagenstos (2004) argues that the reason why anti-discrimination laws have not met expectations is that such legislation is ill-suited to the elimination of deep-rooted structural barriers to employment. This is not unique to people with disabilities. There are strong parallels between the structural barriers to employment for people with disabilities and those faced by other groups, e.g. on the basis of race, while the lack of flexibility in job design also impacts on those with caring duties.

Despite the fact that they do not envision success from the ADA and the DDA, Quinn and Degener (2002) maintain that it is still important for national institutions to be involved in the promotion and protection of human rights, as these institutions help bridge the gap between international human rights law and domestic debates about disability law and policy reform. As Jones and Marks (2000:3) state:

Law constitutes some people as incompetent and others as competent; law classifies and declassifies people as disabled for a variety of purposes; and law confers the rights of citizenship on some people and denies them to others. But in many ways, law can also be seen to offer a path to equality – to be part of the solution as well as part of the problem.

Batavia and Schriner (2001) argue that anti-discrimination law for people with disabilities remains essential to prohibiting existing and future discrimination; to ensuring people with disabilities do not lose the ground they have gained in recent years; and to continuing to provide a strong statement that people with disabilities are entitled to all of the rights and privileges of citizenship. There are a number of studies that demonstrate the benefits of employing people with disabilities. In a longitudinal study conducted on the ADA practices of Sears, Roebuck & Co – a US company with 300,000 employees, 20,000 of whom are persons with impairments – the average
direct cost of providing accommodations to qualified workers with disabilities was less than $50. The economic benefits to Sears (e.g. avoiding turnover costs) of employing workers with disabilities far exceeded the costs of accommodations (Blanck and Schartz, 2002). Despite evidence that highlights the benefits of employing people with disabilities, there continues to be widespread discrimination and resistance towards doing so. It is apparent that people with disabilities require restructuring of laws/policies so that there are measures to redress injustices at both the structural and attitudinal levels. Neither alone is sufficient.

Conclusion

For the most part, societies have not done enough to enable people with disabilities to exercise their right of self-determination. Policies that embody substantive equality are incomplete for people with disabilities unless they are well supported by inclusive policies in key social justice areas – such as income support and employment. A commitment beyond legislation is necessary, as “Rights can be human rights even if they are not legally enforceable” (Bailey, 1990). This is an important issue for people with disabilities as the twin pillars of justice and rights are not always bound in legislation. Current legal mechanisms, both national and international, to protect and promote the rights of people with disabilities are generally inadequate. In most, if not all, highly industrialised western nation-states, people with disabilities face similar violations and these have persisted despite the existence of civil rights legislation. A number of commentators have shown that the DDA and the ADA are inadequate in addressing the complex and multiple injustices that persons with disabilities face. Such laws are rapidly reaching their limit in achieving the broader social reform that will be necessary (see for example Batavia and Schriner, 2001; Handley, 2001; Quinn and Degener, 2002; Russell, 2002; Waddington and Diller, 2002; Bagenstos, 2004).

Rights legislation is not, and cannot be effective in isolation. It is just one component of the wide range of necessary legislative and policy responses needed. It is important to note the dangers in over-emphasising the role of legislation in social justice issues. Although both the ADA and the DDA are inadequate in securing parity of participation for people with disabilities, particularly in the area of employment, one Act cannot be expected to remedy the complex socio-cultural and political-economic injustices that persons with a disability face. Liberal welfare states have implemented
and drawn upon rights-based legislation for people with disabilities, but such measures have not influenced to any great degree the structures that constitute a disabbling society. Legislation cannot on its own transform a society into one which fully values all its citizens equally, particularly as legislation can also be implicated in the creation of social barriers, just as it is implicated in the construction of disability.

Despite the existence of domestic disability rights laws, people with disabilities continue to be subjected to widespread violation of their civil, political, social, cultural and economic rights. As this chapter has demonstrated, national policy and legislative regimes of equality do not encapsulate all the steps necessary to address the profound marginalisation that people with disabilities face. Current anti-discrimination laws for people with disabilities are a necessary but insufficient policy condition for achievement of human rights and social justice. It is apparent that it is not enough to simply have the ‘letter of law’ as a means for social change, but a willingness and commitment by the domestic government is also required for real change to occur. Of most importance, is the recognition that that rights-based laws/policies in themselves do not significantly challenge the systems and practices that oppress people with disabilities, therefore anti-discrimination legislation remains just one part of the policy puzzle required to ensure people with disabilities have equality in all socio-cultural and political-economic spheres.
CONCLUSION
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*Only by looking to integrative approaches that unite redistribution and recognition, can we meet the requirements of justice for all* (Fraser, 2003:94).

This thesis has examined the extent to which international and domestic policy discourses and practices facilitate or impede parity of participation and citizenship rights of people with disabilities. It explored how the United Nations (UN) and two nation-states (Australia and the United States) accommodate human rights and social justice for people with disabilities in three key policy domains: (i) international rights-based instruments; (ii) domestic social security laws/policies; and (iii) domestic anti-discrimination laws/policies. As outlined at the start of this thesis, the key questions under consideration involved the following investigations:

- How might an enabling theory of citizenship which accounts for social justice and human rights be envisioned? 
- To what extent do international and domestic disability policy discourses and practices constrain or facilitate parity of participation and citizenship for people with disabilities? 
- What capacity do domestic legislation and policies have in redressing injustices at structural and status levels? 
- To what extent does the emphasis on welfare-to-work (or ‘workfare’) policies exacerbate key tensions and contradictions in current federal disability policies in both Australia and the United States?

To answer these questions, this thesis used Nancy Fraser’s theory of social justice as a framework for locating the three key policy domains under investigation. This proved to be a useful framework in which to analyse important issues of citizenship, human rights and social justice for people with disabilities. Although Fraser does not specifically refer to disability in her work, this thesis developed her theory to take into account the circumstances of people with disabilities. In particular, her two-dimensional conception of justice (embodying the twin policy principles of redistribution and recognition) was used to highlight the ways in which international and domestic discourse and legislative/policy practices must begin by redressing injustices simultaneously at the structural and status levels, if people with disabilities are to have greater possibilities of equality in all socio-cultural and political-economic realms
Overview of the Analysis

The first chapter of this thesis examined dominant theories of disability with a specific focus on the medical model and social model of disability, two models that have been operationalised in international and national disability policies, programs and legislation. To briefly note again, the medical model situates disability as inherent in the individual, and as a personal tragedy or illness. The social model is the antithesis of the medical model as it focuses on a disabling environment and oppressive structural barriers, rather than on an impaired individual. Since the post-war period, both international and domestic disability discourses and policy practices have seen numerous changes that have shifted from a medical model to more of a rights-based, social model conception of disability. However, liberal welfare states are increasingly institutionalising disablist structures and attitudes that are reminiscent of a medical model conception of disability. This is most evident in the restructuring of the welfare system in Australia and United States (as discussed in Chapter Three), where potentially redistributive policies, in particular social security, are underpinned by the belief that an individual with a disability is a 'problem' within the welfare system.

In addition to discussing key theories of disability, the first chapter established the theoretical framework in which the subsequent comparative analysis of international and national social policies is located. It provided an analysis of dominant citizenship theories including liberal citizenship, civic republicanism and key feminist theories of citizenship. It was demonstrated here that although citizenship theory offers an influential framework for positioning human rights and social justice, as currently envisioned and practiced such theories are inadequate to explore and establish signposts towards the full and equal participation of people with disabilities. This thesis argues that citizenship discourses are theoretically and practically limited for people with disabilities because they are underpinned by a notion that all individuals have equal capacity for self-sufficiency. To address the first key question under consideration (how might an enabling theory of citizenship which accounts for social justice and human rights be envisioned?); Chapter One argued that Fraser's theory of social justice may offer the best potential for an enabling theory of citizenship for differently-abled people; primarily as it embodies a two-dimensional conception of justice that may be adapted to account for simultaneous misrecognition (e.g. marginalised status) and maldistribution of resources (e.g. disabling structural
barriers) that people with disabilities experience in all socio-cultural and political-economic spheres.

After the theoretical framework was established, this thesis then moved onto an examination of citizenship, human rights and social justice at the international level. This chapter investigated the second key question under consideration: to what extent do international and domestic disability policy discourses and practices constrain or facilitate parity of participation and citizenship for people with disabilities? UN rights-based treaties/instruments were selected as the domain of analysis since such conventions have been drawn upon to accord symbolic and material rights for people with disabilities both internationally and domestically. Chapter Two used Fraser’s framework of social justice as a means of assessing the UN instruments for people with disabilities. In sum, it was concluded that such instruments are currently limited (both internationally and domestically) as they fail to redress injustices and rights-violations at both the objective (structural) and intersubjective (status) levels.

This second chapter began with an analysis of the ‘binding’ international treaties (e.g. the ICCPR and the ICESCR), demonstrating their relevance for people with disabilities. It was found that, while a number of articles contained within both these treaties remain critical for people with disabilities, generalised binding rights-treaties have been inadequate in addressing the profound marginalisation and discrimination that people with disabilities face. In drawing on examples from Australia, this chapter demonstrated the limited potential of such treaties for ameliorating domestic rights-violations of people with disabilities in national contexts. Briefly, the main reasons suggested for this are: (i) disability was historically overlooked in the treaty system of the UN, primarily due to the medical or ‘charity/welfare’ notion of disability rather than the recognition that people with disabilities have human rights equal to non-disabled people; (ii) domestic implementation of international treaties is constrained by both social and political forces and in Australia under the Howard Coalition Government there has been a distinct shift away from engaging with the UN rights-based treaty system; and (iii) generalised treaties are insufficient as they fail to address discrimination and marginalisation specific to disability at both structural and status levels. Following on from the analysis of the ‘binding’ treaties, this chapter then delineated key ‘non-binding’ UN instruments. It was argued that these
instruments (e.g. the Standard Rules) offer greater potential for integrating the principle of social equality with a recognition and respect of difference in international and national legislative and policy frameworks. The Standard Rules are underpinned by social model principles of disability, importantly recognising that disablist structures and attitudes impede the full possibility of rights and equality for persons with a disability. However, as this chapter argued, the extent to which these ‘non-binding’ instruments facilitate parity of participation for people with disabilities is constrained by the same political and social forces as the ‘binding’ instruments. In particular, these ‘non-binding’ instruments offer little to no legal possibility domestically, and therefore ultimately constitute only a symbolic (or status level) commitment to justice, without contributing to the amelioration or redress of structural injustices.

Despite the shortcomings of international treaties/instruments, there is hope for the future with the recent passing of a ‘binding’ treaty specific to the rights of people with disabilities. For the first time in UN history, there exists a rights-based treaty that contains articles addressing both structural and symbolic injustices for people with disabilities. In addition, this new Human Rights Convention embodies the twin policy principles of redistribution (as this treaty will join existing rights-based treaties signalling social equality), and recognition (as this treaty represents the need for a disability-specific treaty rather than subsuming disability rights within generalised treaties as has occurred in the past). This new treaty offers a way forward for achieving equality of citizenship for people with disabilities. However, it remains too soon to assess the full potential that it has in advancing parity of participation, citizenship, human rights and social justice both internationally and domestically. Presumably, as with the other Conventions, it will only be as effective as the Member States allow it to be. Although a new thematic convention is essential if the human rights of people with disabilities are to be recognised as having the same status as the human rights of others, international norms concerning people with disabilities are useful predominately to the extent that they can set common standards at the national level.

The remaining two chapters of this thesis undertook a comparative analysis of domestic legislation and policies for people with disabilities in Australia and the
United States. Chapter Three dealt with social security legislation and policies. This domain of social policy was chosen as income support is a fundamental social right, and may promote and entrench social citizenship, at least if provided with respect for difference (that is, recognising disability as a set of circumstances militating, often severely, against labour force participation) and if provided at levels which allow for an adequate standard of living, taking into account the additional costs of disability. Chapter Four examined anti-discrimination legislation and policies – selected because the outlawing of discriminatory practices and legislation providing for equality of opportunity for people with disabilities, particularly in the labour market, are also necessary to achieve social citizenship. Together, these chapters set out to investigate the final two questions under consideration: (i) what capacity do domestic legislation and policies have in redressing injustices at structural and status levels? and (ii) to what extent does the emphasis on welfare-to-work policies (or ‘workfare’) exacerbate key tensions and contradictions in current federal disability policies in both Australia and the United States?

In Chapter Three, it was argued that social security arrangements was a potential basis for conferring social citizenship on people with disabilities, in order to provide adequate income support which recognises structural and attitudinal barriers to employment and the additional costs of disability. However, it was demonstrated that contemporary social security policies in both Australia and the United States (while characterised as promoting incentives for social and economic participation) have instead systematically retreated from taking into account for eligibility purposes the wider economic, attitudinal and workplace conditions that constrain the capacity for labour market participation. This limits their potential for redressing injustices at both structural and status levels. Fraser’s theory of social justice was used for exploring social security arrangements for people with disabilities and it was argued that income support must contain both principles of recognition (recognising, respecting and giving legitimacy to differential abilities for market participation), and redistribution (having social security arrangements that allow for an standard of living and compensating for the extra costs of disability).

In addition, this third chapter traced important developments in social security policy and legislation in Australia and the United States, demonstrating that such
arrangements are increasingly re-embracing notions that individuals with a disability are a 'problem' within the welfare system. This is most evident in the significant tightening and restriction of eligibility criteria and assessment procedures for disability income support, and with the introduction of a much more rigorous system of categorisation and surveillance of recipients' adherence to regulations. This chapter placed these specific changes to disability income support within the context of overall restructuring of welfare states, and argued that in the new 'post-welfare' neo-liberal policy environment, shifts in welfare discourse and policy have repositioned and redefined what it means to be a citizen. The emphasis is increasingly placed on independent market participation as the essence of adult citizenship – a condition that may be very difficult for people with a disability to attain, particularly if structural barriers to labour force entry are not addressed and workplace conditions not adapted to take account of differing abilities.

Importantly, a cross-national comparison of social security arrangements revealed that in both Australia and the United States, the emphasis on welfare-to-work (or 'workfare') policies does exacerbate key tensions and contradictions in current federal disability policies. These two liberal welfare states are increasingly converging under a 'post-welfare' environment, evident in how they have both: (i) increasingly placed emphasis on independent market participation as the essence of adult citizenship while concurrently failing to include measures to facilitate participation, such as allowing for the extra costs of disability and adapting workplaces and employment conditions; (ii) strengthened a medicalised discourse of disability by focusing the reforms on individual blaming and demands for behavioural change, rather than attempting to redress the underlying causes of disadvantage and poverty; (iii) placed stronger emphasis on (in Australia) and re-emphasised (in the United States) welfare receipt as 'dependency', rather than as a fundamental social right; (iv) modified eligibility criteria and assessment procedures so that the risk of loss of benefit increases as employment increases, thereby creating disincentives for employment participation; and (v) entrenched a contradictory welfare-to-work climate where the policies and programs intended to facilitate participation are instead exacerbating disablist structures and attitudes. In addition, as the Australian social security law reforms converge with the more recent labour law reforms (which reflect the individualised employment relations principle inherent in US labour markets), it is
argued that Australia will move closer to the US liberal regime prototype (as outlined by Esping-Andersen). This is an area that will require further research as the effects of these changes are realised over the coming years. However, it is likely that this restructuring will increase the constraints to parity of participation and citizenship of people with disabilities. In sum, it was argued in this chapter that social security laws/policies would be effective and equitable for people with disabilities only if they are accompanied by strong and sustained investment in education, training and subsidised employment programs, and by policy action to establish workplace practices which take account of the particular circumstances of employees with disabilities. Without such additional facilitative policies, increased stringency in disability income support law and its administration is most likely to exacerbate social and economic exclusion, rather than promote participation.

Chapter Four provided a comparative analysis of anti-discrimination legislation in Australia and the United States. It began with an historical overview of the ADA in the United States and the DDA in Australia, tracing the respective political events that led up to the passing of each piece of legislation, and outlining the role of the disability rights movement in each nation. This chapter again drew upon Fraser’s theory of social justice within which to understand anti-discrimination legislation for people with disabilities. It was argued that prior events leading up to the passing of this legislation influenced its full capacity to promote parity of participation for people with disabilities. A comparative analysis proved useful to support this argument, as it revealed two very different paths in Australia and the United States. Both countries saw the development of anti-discrimination legislation for people with disabilities to follow directly from the perceived success of such laws in addressing gender and race discrimination. In Australia however, anti-discrimination laws were embedded in a philosophical and legislative commitment (at least in rhetoric) to social justice, while the United States had a strong individualised civil rights tradition entrenched in their anti-discrimination legislation. Prior to the inception of the DDA in Australia, rights-based policies for people with disabilities were primarily centred around specialised services. This focus meant that conceptions of disability promoted the importance of difference, however this is a necessary but insufficient condition for achieving parity of participation and redistribution of resources. Conversely, in the United States, disability advocates drew upon the general framework of civil rights
law in which to locate their claims. This focus resulted in a strong disability rights movement which promoted ‘sameness’ and raised the importance of the social equality of people with disabilities, but which sacrificed recognition and respect of difference. Fraser’s theory of social justice was useful in highlighting that each of these responses, by themselves, is only one part of the policy puzzle.

This fourth chapter then moved on to show how, despite the stated aims of the legislation (to reduce and eliminate discrimination), its potential is constrained by wider social and political forces, and are embedded in legislative and philosophical contradictions. Anti-discrimination laws in both countries embody an inherent contradiction, particularly evident in the area of employment (one of the key targeted areas within these Acts). If an individual is to call upon anti-discrimination laws to redress injustices, they must prove ‘difference’ (e.g. showing that there has been a discriminatory act made against an individual who has an impairment) to establish ‘sameness’ (e.g. showing that the impairment will not affect ability of that individual to participate equally alongside others). Even with the principle of ‘substantial equality’ underpinning this legislation (which theoretically allows for accommodations of difference), operationalisation of this principle has proved a challenge for liberal welfare states.

This chapter also drew upon examples from the United States to demonstrate that this issue is compounded by wider contradictions across federal disability polices. In brief, the assumptions and principles underpinning anti-discrimination laws (e.g. capability, inclusion, mainstreaming) are contradictory to those within social security legislation (e.g. impairment, exclusion, segregation). This in turn hinders the full potential of anti-discrimination legislation for people with disabilities. It is argued that these contradictions have become further exposed over the past decade under conservative federal governments, as the entrenchment of welfare reform in these particular liberal regimes has shifted notions of citizenship, participation and equality. Participation has been increasingly equated with market participation and equality is expected to be achieved predominantly through market earnings rather than through redistribution of resources through public policies and adequate income support.

People with disabilities face similar injustices across different liberal welfare states, and these have persisted despite the existence of anti-discrimination legislation.
Hence, it is important to acknowledge the significant limitations of anti-discrimination laws. One law alone cannot be expected to remedy the complex socio-cultural and political-economic injustices that people with disabilities encounter. Legislation cannot on its own transform a society into one which fully values all its citizens equally. In brief, it is argued that right-based frameworks in themselves do not significantly challenge the systems and practices that oppress people with disabilities. It is apparent that it is not enough to simply have the 'letter of law' as a means for social change, but a willingness and commitment by the government is also required for real change to occur, and this requires redistribution of resources, as well as recognition and respect for difference.

**Enabling the Absent Citizen**

It has been argued throughout this thesis that if parity of participation, citizenship, human rights and social justice are to be achieved for people with disabilities in all socio-cultural and political-economic realms, then international and domestic legislation, policy and practice must begin by redressing injustices at the objective (structural) and intersubjective (status) levels *simultaneously*. This thesis has argued that one means of achieving this is via the twin policy principles of redistribution and recognition (adapting and extending Fraser’s theory of social justice). Current international and domestic socio-legal mechanisms designed to protect and promote the rights of people with disabilities are generally inadequate. Despite decades of reform and restructuring, which have seen the introduction of disability rights, anti-discrimination and social security laws/policies internationally and nationally, and despite efforts by disability advocates to promote parity of participation and citizenship – people with disabilities continue to be subjected to widespread discrimination and marginalisation. The dismantling of structural and attitudinal barriers that constrain human rights and social justice for people with disabilities requires laws/policies that enable defensible claims to be made successfully against misrecognition and maldistribution. The consequences of the ‘post-welfare’ policies of Australia and the United States have been shown to further entrench rather than redress disablist structures and attitudes.

Overall, this thesis offers an important contribution to the key issues of disability, citizenship, social justice and human rights. By extending and developing Fraser’s
theory of social justice to include an analysis of policies and practices pertaining to people with disabilities, it is a theoretical advance to the area of disability, citizenship and social justice. This is an area of research that until now, has been given scant attention. Fraser's theory was used as a framework for locating the disability policy domains of UN rights-based instruments, and domestic social security and anti-discrimination legislation and policies. The analysis undertaken here adds an essential dimension of understanding the extent to which principles and practices of rights and justice are facilitated at both international and domestic levels. Knowledge of policies and practices relevant to disability is critical, as people with disabilities continue to be constrained in their achievement of parity of participation and social citizenship. This examination brings a key element to the theory of social justice that was otherwise lacking. It also offers a significant empirical contribution to disability policy and human rights by its comparative analysis of three domains of interrelated policies that are required for people with disabilities to have full and equal participation in all socio-cultural and political-economic spheres.

In the opening paragraph of this thesis, it was shown that millions of people with disabilities across the world experience profound socio-cultural and political-economic exclusion in a number of human rights domains. Therefore, transnational and cross-national comparative analysis of key policy domains is increasingly important if we are to understand the circumstances of people with disabilities under different policy settings, and the extent to which different policy settings provide or withhold redistribution and recognition. While the direction of international reforms to disability laws/policies (at the UN level) are hopeful, the trajectory of welfare reform in the two liberal welfare states compared in this thesis poses significant challenges to enabling the promise of equality, rights and justice for citizens with a disability to be realised.
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