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**“But I can do the job”: Examining Disability Employment Practice  
Through Human Rights Complaint Cases**

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## **ABSTRACT**

Natural data on the Australian Human Rights Commission's website outlining the complaint cases generated from Disability Discrimination Act, 1992 (DDA) was used to examine the social construction of disability employment discrimination. Using a social model and human rights citizenship lens, some 987 complaint cases were analysed to assess the prevalence of disability discrimination in employment, and its relationship to the types of disability, gender, entity undertaking the actions and organisational context. Of all complaint cases across the Australian Human Rights Commission's operations, by far the greatest proportion involve disability discrimination. Within the disability discrimination complaint cases, the employment makes up the greatest proportion of these cases. In examining the patterns of discrimination seven major themes emerged involving: distinctive patterns across disability types; access to premises; human resource mis-management; selection of new employees; integration of assistive technology; perception of cost of disability inclusions; and inflexible organisational workplace practices. The discussion examines the underlying reasons for the emergent themes where employers miss understood key legal concepts that underpin the DDA including: unjustifiable hardship; inherent requirements; reasonable adjustment; direct; and indirect discrimination. The paper concludes by discussing the implications of the findings as a way of understanding the social construction of disability discrimination in employment and signal ways to better develop inclusive organisational practice.

**Keywords:** employment; disability; discrimination; citizenship; human rights; legal concepts;

### **Points of Interest**

- the research design used “natural data” emanating from disability complaint cases under the Australian *Disability Discrimination Act, 1992*
- complaint case and Federal Court narratives were analysed qualitatively and quantitatively to examine patterns of employment discrimination
- the statistical analysis of the complaint cases showed significant differences in discrimination between groups for the entity, sector and disability type
- the emergent employment discrimination themes identified were disability type, access to premises, workplace injury, selection processes, integration of assistive technology, perceptions of cost and inflexible workplace protocols
- discrimination was direct and indirect, with demonstrated misunderstandings of inherent requirements, reasonable adjustment and HRM practices

## **Introduction**

In neoliberal society, gaining employment is presented as a key to opportunity, choice and control over one's life whether a person has a disability or not (Wilton & Schuer, 2006). Employment has become such a dominant ethic of government disability services that it does little to value the diversity of people with disabilities including those who are unable to work. Those who are receiving welfare support are subjected to a neoliberal governmentality where they are made to feel inferior to those in paid work through political and media discourses that challenge their worthiness to receive benefits, their trustworthiness as to their level of disability and the burden their disability places on the economy (Soldatic & Chapman, 2010; Taylor, 2016). For people with disability their movement from welfare support to employment is the focus of a great deal of contemporary government policy and programs (e.g. Australian Commonwealth Government, 2013). Paid employment is seen as a foundation for accessing many of life's opportunities. It opens economic, social and personal doors (Blustein, 2006), all of which are social determinants of health (World Health Organisation, 2008). In addition to the basic advantages of employment, the sense of a career contributes to positive identity development, feelings of satisfaction and purpose in life (Blustein, 2006; Konrad et. al., 2012).

Employment and careers are an individual's vehicles for choice and change in neoliberal society that have both rights and obligations. Yet, for those people with disability who can and want to work a great many are denied access to

employment and the career narrative remains just a dream. This paper seeks to contribute to a better understanding of why this occurs through examining cases of discrimination against people with disability either seeking or in employment. The paper will firstly examine global approaches to human rights and disability, social approaches to disability, the research that examines the experiences of people with disability seeking or in employment, employer perspectives, and legislative approaches. This will provide the basis for identifying research questions and the research design that was employed to examine disability complaint cases under the Australian *Disability Discrimination Act 1992* (DDA). This will be followed by a presentation of the findings and a discussion on the various conceptual and practice based issues the analysis raises.

### **International and National Approaches to Disability**

In 2006 the United Nations' *Convention for the Rights of People with Disabilities* (2006, 2008) specifically identified the rights of people with disability to work and employment. Nonetheless, the research consistently shows that in all countries people with disability are employed at significantly lower rates than the general population and are seriously underrepresented in paid employment (OECD, 2010). The Australian Bureau of Statistics (2009) note that 20% of Australians have a disability but only 53% of those who are of an employable age are in the workforce, and that for people with certain types of disabilities (e.g. vision impairment and high-level spinal cord injury) and/or higher support needs this figure is far worse. This is in contrast to 81% of

people without disability who are in the paid workforce. Moreover, people with disability who are employed, are more likely to work part-time (37%), forced onto work for the dole or unpaid internship/work experience, thus curtailing their career opportunities and access to economic resources. In the global context Australia is ranked 29 out of 29 developed nations in terms of disability in paid employment (OECD, 2010). Some 45% of Australians with a disability live in or near poverty, in this Australia is ranked last out of the OECD countries, where the average is 22 % (OECD, 2010). This indicates that even when people with disability achieve employment they are more likely to be classed as 'working poor', and lack the career mobility assumed in the grand career narrative of working life (Blustein, 2006).

While the reasons for lower employment are complex and multifaceted, one consistent finding is that people with disability are discriminated against in all aspects of social participation (Hall, 2009). The rights of people with disability were first recognised in the United Nations' *Declaration on the Rights of Disabled Persons* 1975. The Australian DDA came into effect in 1993 and overrides previous state legislation to bring a uniform approach to disability rights in Australia. Its premise is that all people should be treated equally before the law whether they have a disability or not and not to do so is discriminatory. In 2007 Australia became one of the first signatories to the United Nations' (2006) *Convention on the Rights of People with Disabilities* (CRPWD).

However, as previously noted with regards to employment statistics, it begs the question how successful these conventions and legislation been? This paper

aims to contribute to a broader understanding of the type of disability discrimination faced in the workplace by analysing complaint cases brought under the DDA.

In order to conceptually review the legislative and policy initiatives it is useful to establish the theoretical positions used to understand disability. In constructing social reality John Searle (1995) noted there is the 'brute fact' of impairment. For example, with paralysis there are the 'mental facts' which are the paralyzed person's feelings, interpretations and judgments, and there are the 'institutional facts' which are current societal practices and policies in relation to disability and employment. In particular, the ways of conceptualising disability affect our interpretation and understanding of how that disability is treated socially and in an employment sense. The next section examines changing conceptualisations of disability from the dominant world view of medical conceptualisations to social model approaches that underpin the CRPWD.

### **Models and Approaches to Disability**

There are two main models that dominate the theoretical debate on understanding disability. The first dominant worldview is the 'medical model'. It starts with the premise that there is such a person as a biologically normal healthy human being and variations from this are abnormal. The different variations are referred to as different types of impairment or disability. In this model the disability is the province of the individual and their intrapersonal

domain. Adjustments and solutions are focused on normalising the individual through preventions and treatments. Any economic or social deprivation encountered by people with disability is located within the individual and their impairment (Swain et al., 2004). This model of disability is evident in the mindset of the medical, therapeutic and some not-for profit disability charity organisations as evidenced by antenatal screening, safety advertising and fundraising campaigns.

To counter the medicalised worldview of disability the social model of disability emerged from the disability politics and advocacy movement of the 1970s. Social model approaches were developed in an attempt “to break the linear causal link between impairment and the state of being disabled” (Reindal, 2010, p.126); a fundamental link outlined by the medical model. The social model of disability takes a socio-political perspective that draws substantially on social constructionism, which recognises that culture is a reality that exists prior to an individual or group of individuals’ actions and that it shapes views and perceptions that act as a point of reference. The constructionist position maintains that a person’s position in the social world is not static but dynamic going through a constant process of change and formation as a result of the actions and reactions of individuals (Becker, 1982, p. 521).

The ‘social model’ of disability separates impairment, the physical condition or restriction (brute fact), from the personal experience of being disabled (mental fact), which is the state that occurs within a specific environment or context

(institutional fact). It addresses relational specificity between impairment and disability (Vehmas & Mäkelä, 2009). Its focus is on three major areas: (1) the lived experience of people with disability, (2) the social barriers encountered by people with disability and, (3) developing transformative solutions to the barriers they face in everyday living (Oliver 1996, p.38). A simplified example is that a person with macular degeneration resulting in a loss of sight (brute fact) does not experience any limitations (mental fact) because she can access text to speech technology (institutional fact) and be fully able to complete work tasks. The social model of disability takes the fundamental premise that the lived experience of people with disability is central to understanding the phenomenon of disability. Moreover, in terms of research, understanding of disability rather than impairment should be the focus of the research (Kitchin, 2000; Oliver, 1996)

The social model of disability focuses on the disabling environmental and attitudinal barriers that transform a person's impairment to a disability. This firmly places disability on the economic, political and social agendas. In doing so, the social model like other critical theory seeks transformational outcomes as part of a broader commitment to a social justice ethic rather than merely identifying barriers to social inclusion and participation (Swain et al., 2004). Not surprisingly, policy makers in the UK and in Australia have been called upon to transform the disability employment model from a predominantly segregated medical approach of old-style "sheltered workshops", or disability employment services, which perpetrate "personal tragedy" and charity



approaches to disability, to a social paradigm that enshrines employment through equity, dignity and empowerment (Humpage, 2007; Woodhams & Corby, 2007). This call was reinforced through the CRPWD, which was framed on a social model to disability.

With this basic foundation, social approaches to disability have advanced over the last two decades to include many conceptualisations involving political science, the law, sociology, psychology, and economics. In particular we have seen major medical based institutions like the World Health Organisation present a hybrid understanding hoping to bridge the medical and social divides through their biopsychosocial approach to disability (WHO, 2001). While arguably still medically focused, there is an understanding of the importance of context and environment that is presented alongside “body structure”.

There have also been calls for a greater understanding of the corporal body and the agency of the individual that may have been obscured by focusing on social structures only. Thomas (1999; 2004) and other feminist disability studies scholars argued for a more sophisticated understanding of the ‘impairment effects’ within social approaches. They argue that while focusing on barriers that disable people with impairments across social, economic, political and cultural arenas, the individual and their “impairment effects” are overlooked in what should be a direct connection of the corporal body to the lived experience. Others examined an “embodied ontology” of disability, which seeks a space and place for embodied diversity within social model conceptualisations

(Shakespeare & Watson, 2001). Rather than a dichotomy of impairment and disability, there is a relationship between structure and agency that is recognised and valued within conceptualising social approaches. More recently, Sherry's (2016a) articulation of the sociology of impairment builds on the concerns of Thomas (2004) 'impairment effects' suggesting that impairment is overlooked within disability theorising. Sherry believes that impairment is not simply personal but a deeply political experience shared by people with disability through a phenomenology of inequality. Hence, examining impairment sociologically provides insights into cultural constructions of the impaired identity and uncovers the role of power, subjectivity and ethics played out through cultural construction and a shared essence of experience. When seen in context to his work on disability hate crimes (Sherry, 2016b), the connection with human rights and discrimination resonates powerfully.

As the context of this paper becomes clear, to deconstruct our cultural understandings of employment and discrimination, it is important to understand the powerful symbolism of employment as a foundation of neoliberal approaches to policy. Employment symbolizes effective 'self-governance' as part of the neoliberal policy of shifting social risks from the state onto the individual. People in employment are viewed as responsible, rational and enterprising, as opposed to passive, dependent and irrational. Human rights approaches to disability clearly identify lived experiences of people with disability, the barriers that they face legally and seek solutions to the discrimination through financial compensation and other changes to

organisational practices deemed to be directly or indirectly discriminatory (Bichenbach, 2001). The connection between social model approaches, human rights and the sociology of impairment is, as Sherry (2016a; 2016b) suggests, incorporates the political complexity of the employment and legal system, the shared experiences of those with impairment and the resulting oppression through economic disadvantage and the neoliberal society. Using these three approaches as part of the analytical frame will provide a deeper understanding of disability discrimination cases. The CRPWD was expressly written from a social model and human rights approach to understanding impairment and disability (Kayess & French, 2008; Megret, 2008) and sought to create an empowered position for people with disability through identifying discrimination, indignity and inequality across disability citizenship.

It is argued that analysing current research on employment and disability from a human rights legal context provides insights into shared experiences of those with disability. This approach challenges **normative attitudes that** exclude people with disability from the workforce. Social model understandings in all their variety are also useful in analysing and understanding how to create transformative solutions to the challenge social inequity. Within social policy and employment, social model understandings have begun to bring new understandings to conceptualising disability and developing inclusive practice (Bingham, Clarke, Michielsens, & Meer, 2013). Nonetheless they only provide part of the picture.

## **Employment experiences of people with disability**

There is an extensive body of scholarship on disability and employment internationally. This research has been categorised into seven major themes: (1) specific disabilities such as spinal cord injuries (Krause & Reed, 2010, Murphy & Young, 2005) and psychiatric disability (Shankar, 2008), (2) specific sub groups of people with disability such as women of colour (Vaughn & Boston, 2010) and people with criminal histories (Tschopp, Perkins, Hart-Katuin, Born & Holt, 2007), (3) disability employment in specific industries such as accounting (Duff & Ferguson, 2012) and hospitality (Bengisu, & Balta, 2011), (4) school transition programs to disability specific or open employment (e.g. Winn, & Hay 2009), (5) vocational and rehabilitation counselling for both injured workers (e.g. Fadyl et al., 2010) and people with a pre-existing disability (e.g. Hershenson & Liesener, 2003), (6) government support systems and policy (Mamun, O'Leary, Wittenburg, & Gregory, 2011; Soldatic & Chapman, 2010) and, (7) work place attitudes of employers (Waterhouse, et al. 2010; Mik-Meyer, 2016), and supervisors (Blackman & Chiveralls, 2011; Dibben, James, & Cunningham, 2001). Australian research studies follow similar approaches tending to concentrate on specific disability groups or specific circumstances (Fadyl et al., 2010; Murphy, & Young, 2005; Shankar, 2008, Soldatic & Chapman, 2010; Waterhouse, et al. 2010; Winn, & Hay 2009).

The majority of this work is underpinned by the medical model of understanding disability. It is based on individualised or psychological frameworks where the individual's impairment is regarded as the subject of the research/interventions and solutions are sought through 'normalising' the

individual in readiness for the work environment (Oliver, 1996). The premise here is that the individual learns to manage both the physical impairments their disability creates and the psychological adjustment that goes along with this. Hence, medical approaches fit within neoliberal policy frameworks of individualising risk factors.

One area of research that undertook social understandings of disability focused on the overall systems of support offered to people with disability not in employment. Gosling and Cotterill (2000) found that the welfare benefits system approach of “one size fits all” became a barrier to employment. The low awards and the inflexible, punitive rules of the system made it difficult for people and their families to survive financially. It was suggested that the system needs to be more simplified yet flexible. The welfare approach focused on the demand-side (employment) but did little to up skill, empower or motivate people to take these opportunities (Lewis, Doobs & Biddle, 2013). The social approach model places emphasis on both the demand-side (employment) and supply-side (disability) in what has been referred to as the social recovery model (Secker et al., 2002). In such a system, people with disability would be supported in the job search process by using expert medical professionals to conduct an in-depth assessment of the client’s needs and be involved in addressing employment barriers. However, to adopt this model and provide long-term follow-up support, funding structures would be required. These papers would suggest that the welfare benefits system and the ‘one size fits all’ approach were less effective in assisting people with disability into employment

while the social recovery model was shown to be a more effective solution. Yet, this assumes that employers wish to deal with disability whereas previously stated research suggests that many employers overlook, omit or deliberately discriminate against this group.

Wehbi and El-Lahib (2007) found that people with disabilities were unemployed because of a lack of awareness of their abilities and potential. Being paid lower wages compared to the average and issues relating to employers were other reasons for the low employment rate among people with disabilities (Wehbi & El-Lahib, 2007). Lindsay et al (2014) recommended that people with disabilities should be provided with training to gain necessary skills, such as well-prepared job applications and soft skills. Education was an empowerment tool for people with disabilities to enter the labour market (Lamichhance, 2010). For self-employed people with disabilities, it was suggested that they should be provided training in terms of the labour market and essential skills about management and development of small enterprises (Wehbi & El-Lahib, 2007). Other studies suggest that these barriers to entering the workforce were compounded if people had ongoing health issues; there was a high-level of competition, and the lack of social networks to enhance job hunting (Wehbi & El-Lahib, 2007). While many of these issues are structural, other studies noted intrapersonal and interpersonal issues with people having a lack of self-belief, difficulties in adapting to a new environment, low expectations and a lack of others' support (Roet et al., 2007). Roet et al., (2007) suggests the provision of individualized and flexible support for people with

disabilities to adapt to the work environment was essential. The other significant barrier was employer practices and attitudes (Edwards & Boxall, 2010; Shier, Graham & Jones, 2009).

Once employed, other studies identified employment disparities between workers with disability and the nondisabled workforce. For example, in the U.S. Schure et al. (2009, p. 402) found that people with disability reported a number of employment disparities, “including lower pay and benefits, less job security, higher levels of supervision, lower participation in job and department decisions, and lower levels of company-sponsored formal training and informal training from co-workers.” In recognising the existence of this less than fair treatment, others have noted that where discrimination occurs there is a significant gap between the incidence of discrimination and the actual reporting of it with underreporting being a significant issue (Goldman et al., 2006).

Further contributions from feminist disability studies approaches, indicated that women with disabilities face an additional set of social barriers in terms of the norm of ‘being disabled’ including a lack of supply for their basic needs, trying to juggle their roles between family and work, and feeling an individual responsibility for any failure above or beyond their gender alone (Vandekinderen et al., 2012). They face a double set of discrimination in the workplace (Vandekinderen et al., 2012). For instance, in Canada the transformation of the state toward neoliberal forms of political economy and the concomitant changes in social programs that flowed from this painted women with disability without employment as passive, dependent, unable to take

responsibility for themselves, lacked power and were not contributing to society (Chouinard & Crooks, 2005). While most of this research has taken place in western contexts, Lamichhance (2010) also noted that in Nepal women with disabilities faced more challenges than men with disabilities with male teachers with disability much more likely to be employed than female teachers with disabilities. Recommendations from these studies suggest that specific training and support programs should be targeted at women to develop their capacities and support the transition to employment (Vandekinderen et al., 2012).

For those who were employed and considered themselves to have a career, there were other barriers that stifled their employment and career development.

Research from the U.K. and U.S. have employed social constructionist approaches to understanding major career barriers such as transportation, lack of job opportunity, career information, fear of losing social security income and health benefits, fear of illness and relapse, employers' inadequate knowledge of disability and lack of physical and technological support (Wilson-Kovacs, Ryan, Haslam, and Rabinovich, 2008; Fabian, Ethridge, and Beveridge, 2009). Employees with disability tended not to receive the same career outcomes as their non-disabled peers. These career outcomes included promotions, training opportunities, acting-up opportunities, mentoring, job rotations and increased wages.

Nonetheless, some people with disability do progress and pursue rewarding and successful careers. Wilson-Kovacs, et al., (2008) found that successful



professionals with disability approached career barriers as risks to realising their potential and not as risk for failure. Consequently, the risks they took emerged as essential elements in their professional development and career progression. Leiulfstrudm et al. (2014) believed that employment was the main vehicle for people with disabilities to participate in society. Lewis, Doobs and Biddle (2013) found that people with disability felt positively about their experience in terms of employment as it provided benefits including enhanced social and personal identity, status, well-being and income. However, it has been shown that the career successes of professionals with disability are often viewed as the result of diversity quotas or are judged on the basis of disability rather than the expertise of the individual (Bell & Heitmueller, 2009; Ferguson, 2010). These views placed people with disability as 'the other' in the workplace; undervalued by colleagues and viewed with suspicion or derision derived from dominant medicalised worldviews of disability that looks at the individual as the exclusive site of the unemployment or workplace barriers. Where success was achieved their efforts were not lauded as it was felt they received 'special consideration' or were treated affirmatively to undermine their merit-based appointments.

### **Employer Perspectives**

Employer perceptions of disability discrimination legislation and their attitudes towards employing people with disability has been a focus of disability employment research (see Hernandez, 2000, USA; Waterhouse, et al. 2010).

This research suggests that some employers feel threatened by the imposition of

disability discrimination legislation and deliberately camouflage their attitude towards people with disability, making public statements that are "politically correct" while privately excluding people with disability from employment or certain types of employment (customer service positions and senior management) (Schultz et al., 2011). Other employers openly embraced disability employment due to labour market shortages and a belief in equity or corporate social responsibility programs (Luecking, 2008).

Many employers disproportionately focused on the impairments of individuals rather than employees' capacities and qualifications. These studies suggest that to address employer discrimination strategies, such as having a strategic approach to change exclusionary practice, a shift was needed from a medicalised gaze to one that identifies social barriers to employment inclusion through clearly developed employment support policy (Edwards & Boxall, 2010). Other studies went further suggesting well developed employer disability education programs (Shier, Graham & Jones, 2009). A Canadian study on corporations and disability found that negative attitudes and stereotyping of people with disability were key barriers to their employment (Canadian Centre on Disability Studies, 2001). This is particularly the case with mental illness and HIV/AIDS where positive role models are thin on the ground, the impairment or condition is not obviously apparent or visible and media images and representation are predominantly negative (Roth Edney, 2004; Greeff, et.al., 2008; Rüsçh, Evans-Lacko & Thornicroft, 2012). Disclosing invisible

disabilities was tantamount to 'coming out' and just as unpredictable from the perspective of being supported or victimised by employers and colleagues.

The Australian Commonwealth Department of Education, Employment and Workplace Relations' (DEEWR, 2008) study of employers' attitudes to employing people with mental illness found that employers were concerned that they and their staff were not equipped to cope with the perceived difficulties involved in employing people with mental illness. Their perceptions reflected common stereotypes such as unreliable, unpredictable, disruptive and dangerous behaviours. What was interesting was the same employers' preparedness to retain and support existing employees in the event that they developed a mental illness (Bloom et al. 2008). This suggests that stereotypes can be countered by having direct personal experiences with individuals with disability - a view that was supported by the evaluation of the Commonwealth Disability Strategy and others (Erebus International, 2006; Daruwalla & Darcy, 2005). It found that the most progressive government workplaces in terms of accessibility and adjustments for workers with disability, had managers with personal experience of disability issues through knowing a family member, friend or colleague.

In a meta-analysis of 23 published articles and eight unpublished theses and dissertations Ren et al., (2008) assessed the main effects of disability on human resource (HR) judgments (i.e., hiring decision, performance expectation, and performance evaluation). They found "clear negative effects for disability on performance expectations and hiring decisions, ... but a positive effect on

performance evaluations, ... because of the opportunity for negative stereotypes to be overcome through working with the person with a disability and/or because of social norms” (p. 199). In concluding they noted that within the studies “having a disability, and particularly a mental disability, is causally linked to suffering negative HR-related judgments. However ... there was still a great level of heterogeneity” (p. 200).

An examination of the effect of top management vision on management support, practice, and the employment of managers with disability within the US sport industry indicated a significant path between supportive practices and the representation of managers with disability (Moore, Konrad & Hunt, 2005). They argued that management vision facilitated supportive practices, which can increase the representation of persons with disability in managerial positions.

In Australia Waterhouse et al. (2010) identified three areas for change that would positively contribute to improved employer attitudes: (1) committed leadership, (2) credible and reliable information on disability and employment and, (3) appropriate networks for linking with and recruiting people with disability. With these areas for change in mind, there are specialist services available to assist employers to successfully employ people with disability (e.g. Australian Network on Disability, Disability Employment Services, AHRC, and Commonwealth Employment Assistance Fund). Yet, even with these resources available the material position of people with disability employment has not undergone significant structural change.\*

## *Legislative Approaches*

Goss, Goss and Adam-Smith (2000) noted that the UK's *Disability Discrimination Act* 1995, which applies to all employers with 15 or more staff, made the point that "disabled employees and job seekers in the UK are likely to have a better chance of keeping or securing employment with larger employers with a specialist HR function, although even these attributes are not a guarantee of encountering good practice" (p. 816). Whereas in New Zealand, the *Human Rights Act* 1993 and the *Employment Relations Act* 2000 strengthened anti-discrimination provisions and established significant individual employment rights but were not disability specific. Disability complaints are the largest group (Rasmussen and Lamm, 2005). Rasmussen and Lamm (2005. p 481) suggested that

"having anti-discrimination provisions under both the Human Relations Act and the Employment Relations Act has had a major effect on the relationship between working parties where employers have had to be specifically mindful of the systems and structures within their organisations that determine such relationships."

Bagenstos (2000) suggested that in Australia discrimination against people with disability is rooted in stereotypes, stigma and the neglect of disability as a human difference. The Australian DDA is designed to challenge these practices through the prevention of unequal treatment before the law, provide legal mechanisms to challenge discriminatory practice and to provide opportunities to educate society. The DDA, as in all human rights approaches, sees people with

disability not as problems but as rights holders. The ‘problem’ of disability is located outside the individual and in the socially constructed world (Degener, 2006; Barnes & Mercer, 2004). Yet no empirical studies have examined complaints or cases across disability discrimination. Legal journals have a tendency to focus on individual cases for precedent-setting.

### **Summary of the background and approach taken for the research**

Apart from the broader literature examining disability employment outlined above, this journal has become a significant international journal of record with respect to global social approaches to disability research and employment. Of the 47 articles identified as having the keywords disability and employment (and their truncated variants) in either the title or the abstract, 20 articles substantially dealt with empirical research directly examining the employability of people with disability. Table 1 reveals a summary of the literature which has been integrated into the literature review of this paper. These papers demonstrate the key issues in employment involving applied social approaches, work experience and best practices, barriers and gendered discrimination. From the review of the earlier general literature on disability and employment, and the review of Disability & Society employment related research, no research has examined employment related disability discrimination as examined by national disability discrimination cases. This paper seeks to examine these records as a way of identifying the key areas of discrimination in employment. This type of study would add to our contemporary knowledge base and provide insights into explaining why disability discrimination occurs from a human

rights and legal perspective. This type of study also adds to the previous research designs that predominantly used smaller qualitative based interviews, survey methodologies or secondary data analysis of employment data.

## **Research Questions**

We propose to examine the AHRC disability discrimination complaints cases through a social model of disability framework examining the lived experiences of people with disability, and the direct and indirect discrimination they were subjected to. The social model of disability framework is then supplemented with human rights and legal understanding through the UN Convention on the Rights of Persons with Disabilities and the Australian DDA. This approach to research and frame for analysis aims to provide an understanding of the complexity of employment relations involving disability, the nature of the barriers, the reasons for discrimination and how disability discrimination is constructed in the workplace. Five critical research questions are proposed:

1. How prevalent is disability discrimination in comparison to other legislative acts of discrimination administered by the AHRC?
2. How prevalent is employment discrimination across all disability discrimination complaints?
3. What was the relationship between disability discrimination on the grounds of employment with respect to types of disability, gender, the entity undertaking the complaints and the industry sector where the complaint originated?

4. What were the discriminatory practice themes that emerged from the disability employment complaint cases? and
5. What understanding do these themes bring to the construction of disability discrimination in the workplace?

### ***Methodology***

The research design took direction from Silverman's (2006) call to researchers to find their data rather than 'manufacturing' data through small selective samples of individuals in interviews or focus groups. As Silverman suggests, qualitative researchers should spend more time observing, listening and reading the large volumes of data that exists naturally without the need for a specified researcher intervention. In drawing on the work of Potter (1996), he suggests every qualitative researcher should implement the 'Dead Social Scientist Test' is their intervention by its nature contributing to the aim of the research question itself? The research employs a mixed methods approach by undertaking both an interpretive qualitative analysis of the publicly available case summaries and a quantitative analysis of group differences on key variables (Veal & Darcy, 2014). The use of 3 data sources from the AHRC management information provides a form of data and data analysis triangulation that is appropriate for a mixed methods research approach (Sandelowski, 2000).

With this in mind, the first part of the research drew on the Australian Human Rights Commission (AHRC) complaint cases and Federal Court actions brought under the Australian DDA. To address research questions 1 and 2, AHRC



annual reports were reviewed to compare the prevalence of disability discrimination against other legislative acts, and disability discrimination based on employment within the DDA. For research questions 3 and 4 the data is the publicly available summary on complaints cases (pre-2000 HREOC hearings) and Federal Court cases. The difference between the complaint cases and HREOC hearings compared to the Federal Court cases are that only Federal court cases can create common law precedent. An analysis of the outcomes of the processes provides insights into disability experiences of employment discrimination.

These data are part of the management information system of AHRC, where people with disability have been empowered by the DDA to make complaints if they feel they have been discriminated against because of their disability.

Surprisingly, the data has received limited use within social science research [reference withheld for anonymity; Taylor et al., 2004). Due to the confidential nature of complaint cases, the research has to limit itself to those outcomes made publicly available on the AHRC website complaints register (1998–2012<sup>1</sup>). To better understand disability discrimination faced in the Australian workplace this study analysed complaint cases, HREOC hearings and Federal Court actions that were publicly available on the AHRC website (n=987).

### ***Data Treatment Method***

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<sup>1</sup> the practice of putting summary complaint cases on the website was stopped after 2012. The practice is expected to be resumed by the end of 2016.

The secondary data examining the prevalence of disability discrimination across AHRC administered legislative acts and the prevalence of employment as a component of discrimination within the DDA was sourced from AHRC annual reports. Once the data was located, it was tabulated in Microsoft Excel and prepared for graphic representation. The graphic representation provides an understanding of prevalence over time as well as providing totals and averages for 1996-2012.

The quantitative data preparation for statistical analysis was based on the textual description of the complaint summaries. It was first read as qualitative data and the cases prepared for quantitative data for entry. As fully outlined in a previous study by the authors [reference withheld for anonymity] a data file was constructed in the Statistical Package for Social Sciences v22 with the qualitative data organised into discrete variables involving:

- year;
- type of disability/dimension of access (defined by DDA);
- industry sector;
- business type;
- category of discrimination (defined by DDA);
- entity bringing case (defined by DDA);
- gender; and
- outcome and compensation (defined by DDA); and

- A new variable was constructed to act as a dichotomous variable for employment cases identified as one category and all other discrimination as a second category.

The quantitative analysis employed frequencies, cross tabulations and Chi-square tests for independence. The qualitative analysis utilised an interpretive approach to analysing reoccurring themes affecting people with disabilities' employment and involved a constant comparison (Glaser & Strauss, 1967) of the complaint case circumstances, the spirit and intent of the DDA and social approaches to disability framework including feminist approaches, impairment effects, embodied ontology and a sociology of impairment (Thomas 2004; Shakespeare & Watson, 2001; Oliver, 1996; Sherry, 2016 a & b).

## **Findings**

This section firstly presents the outcomes of research question 1 and 2 by outlining the prevalence of disability discrimination across AHRC responsibilities and the prevalence of employment discrimination within the DDA. The section then addresses research question 3 by examining employment complaint cases, the relationship between key variables and employment/other areas of discrimination. Research question 4 is then addressed through examining the themes that emerged from the qualitative analysis of the cases are presented. The discussion then addresses Research question 5 that looks at the contribution of the findings towards a deeper

understanding of the social construction of disability discrimination in the workplace.

### ***Prevalence of disability discrimination***

As shown in Figure 1, disability discrimination is by far the largest category of discrimination comprising 37% of the AHRC complaint cases across the legislative acts that it administers (AHRC, 2013). Employment accounted for 33% of all complaints under the DDA. Figure 2 illustrates that there were approximately 11,600 complaint cases lodged under the DDA from 1996-2012, with an average of 680 per year. 987 complaint cases, HREOC hearings and Federal court cases were publicly available and included in the database for analysis. Of these cases, 217 or 22% of these were primarily employment related. The following analysis is based on these complaint cases and the recurring themes of the complaint cases are supplemented with the HREOC hearings and Federal Court actions.

### **Figure 1: Complaints Cases as a Proportion of AHRC complaints By Each Area of Legislation**

### **Figure 2: Number of Complaint Cases taken under the DDA 1996/97-2012/13**

As Table 1 identifies, there were statistically significant relationships between the types of discrimination by entity, sector and disability type. The Pearson coefficient (P) value is significant if less than  $< .05$  and the phi or Cramer's V coefficient value indicates the effect size using Cohen's (1988) criteria of small, medium or large effect taking into account the degrees of freedom (Pallant, 2016). In this study, gender was not found to have a statistically significant effect on disability discrimination. The entity taking the action and the sector where the discrimination occurred were both significant to the 99% level and regarded to have a small effect, where disability type was significant to the 99% level and regarded to have a large effect.

### **Table 1: Test for Independence based on Employment & All Other Discrimination**

With regard to entity (whether the cases brought by an individual, an associate of an individual or an organisation), there were more individuals with disability than associates or organisations taking employment cases at a much higher proportion than other cases due to the individual nature of employment cases as opposed to the collective nature of organisational cases. The analysis of the sectoral relationship showed a higher proportion of cases against the Commonwealth Government rather than other levels of government or the private or not-for-profit sector. Interestingly at the Commonwealth Government level, there had been a deplorable decline in the employment of people with disability over the decade (Woodley, 2011). The most significant relationship

was disability type. Simply put, there was a significant relationship between the types of disability and the likelihood of being discriminated against in employment. While people with mobility disability took the greatest number of employment cases, the two groups bringing the highest proportion of employment cases, in comparison to other types of discrimination cases, were people with mental health issues and those with HIV AIDS.

### ***Emergent Themes***

The discriminatory themes that emerged from the complaint cases and Federal Court actions included: disability type; access to premise; disability discrimination as a result of workplace injury; selection of new employees; integration of assistive technology; perception of cost of disability inclusions; and inflexible organisational workplace practices and protocols.

### ***Disability Type***

As noted above, people with mental health issues and those with HIV AIDS had a higher proportion of employment discrimination than other types of discrimination. These cases involved discrimination in the selection process or discrimination when the disability was acquired by an individual because of an accident or medical condition outside of the workplace. Mental health and HIV both have high levels of social stigma that continues to place these people at significant risk of discrimination that directly affects their ability to earn an income. Yet as shown in Figure 3 as an overall proportion of complaint cases people with mobility, vision, hearing and learning disabilities constitute a

greater number and proportion of overall cases. What is evident is that the discriminatory practices context is different for each of these groups and there is specificity to the type of discrimination based on the access needs of the disability type.

### **Figure 3: Disability Type/dimension of access for employment**

#### ***Access to premises***

For people with mobility and vision impairment, a substantial amount of the discrimination occurred because of literal barriers in the built environment. These are a combination of indirect and direct discrimination that had a result of excluding people from an array of buildings, premises and common domain structures. Due to the lack of basic physical access inclusions (e.g. pathways, kerb cuts, ramp, etc.) incorporated under the Building Codes of Australia and the Australian Standards for Access and Mobility, and more recently the Disability Standard for Access to Premises sought to harmonise the building environment considerations into one document. The concept of a *continuous pathway* is central to understanding access in an employment sense. Quite simply if a person cannot get into a building or if they can get into a building and cannot have basic access and mobility considerations accommodated then they cannot be employed. For all disability groups the considerations for a *continuous pathway* is defined as:

“An uninterrupted path of travel to or within a building providing access to all required facilities. For non-ambulatory people, this accessible path shall not incorporate any step, stairwell or turnstile, revolving door, escalator or other impediment which would prevent it being negotiated by people with disability” (Standards Australia, 2009, p5).

While mobility access is probably the best understood of the major dimensions of disability and access provision, it still remains the most common barrier that complaint cases are under taken. The DDA has been in existence for 24 years and the Australian Standard for access and mobility for over 45 years, however, key considerations involving accommodating people for employment are still lacking including basic egress (ramps and lifts), parking provisions and accessible toilets. Any number of the complaint cases exhibited very general mobility access barriers to the built environment, or in the case of people who are blind or vision impaired, the lack of wayfinding systems that allow their independent and dignified navigation. A great number of cases involved a lack of built environment access to premises of potential employment or continuing employment after traumatically acquired disabilities or medical conditions. For people with mobility disabilities, the three most common omissions of access were physically being able to get into the place of employment, parking and toilets. For many people public transport is not accessible for their needs. For people with mobility access requirements who can drive, accessible parking becomes a key consideration for employment. While providing accessible parking seems relatively simple, the complaint cases suggest there are a series



of complexities given the type of vehicle, the area where employment is located and the cost of commercial parking. These issues were critical in major central business district areas where parking is a premium for organisations. Issues involving accessible toilets included a number of issues to do with the provision of accessible cubicles within male or female toilet blocks or the lack of provision of a designated unisex accessible toilet. The availability of unisex accessible toilets is important where the individual requires assistance from an attendant who is the opposite gender of the person with disability. In the same way that women coming into male dominated workplaces had to deal with the lack of female toilets, this is a critical issue for individuals with bladder and bowel related management issues for their primary disability (e.g. spinal cord injury).

### ***Human Resource Management and Disability Discrimination***

The two most common human resource management issues are related to a person acquiring a disability due to a workplace injury and discriminatory selection processes for new employees. Systems of workplace occupational health and safety were found to be an issue with 28% of complaint cases from workers who acquired a disability and were systematically discriminated against and forced from their jobs or not allowed to return to their job after the injury. The other types of discrimination involved being overlooked for promotion, denied access to training and not being considered for other work development opportunities. In these cases, the judgements identified a lack of

understanding of the DDA concept of the "inherent requirements of the job" and "workplace adjustment" or "workplace redeployment".

Inherent requirements are the essential duties that are required to carry out the job. Frequently, there were assumptions as to what a person's disability meant when it came to the job that they were performing or had applied to perform. If the person was the best applicant for the job, rather than discussing the job with them and working through any essential elements that may have been problematic, employers either did not select the person based on their assumption of what they thought they would not be able to do rather than discussing their abilities directly with them. A number of cases highlighted the perception of what a person's job duties are, how the perception of the person changed when they were injured and the presumption by employers that the ability of the person was not up to the task because of their disability. A person in a sales assistant position in retail had broken their wrist, taken time off from work and returned to the workplace. However, rather than providing "reasonable adjustment" for the wrist injury or making negotiated changes to the person's position description, the employer noted on their employment record "poor performance" and terminated their employment on grounds of disability. In this case a "workplace adjustment" to duties would have saved both parties goodwill, recruitment and the compensation involved. Together with the recruitment processes and the selection of new employees, many organisations initial reaction to an employee with an injury resulting in

disability that requires adjustment or in the selection of new employees was to invoke "unjustifiable hardship".

### ***Selection of New Employees***

Approximately 20% of the complaint cases involved people who were rejected for employment by organisations. Most of these cases involved employers directly communicating that the applicant's reason for being unsuccessful was due to the disability. The circumstances involved everything from the perception of the applicant's ability, invoking deficit presumptions akin with a medical model paradigm, to a range of reasons that more closely reflect the social model of disability; such as the assumed cost for making workplace adjustments were overestimated; perceptions that a person with disability would not fit with the organisation's public image; and employer's belief other employees would be upset having colleague with a disability. What is interesting about this theme is not what has been discovered but that employers were so ill informed that they directly told the individual with a disability that they were not being employed because of their disability. The implication is that many other employers who may be savvy with respect to disability discrimination, would not be as honest or naive as the employers uncovered in this research. If this information could be determined what would be the level of rejection of job applicants purely because of their disability?

### ***Integration of Assistive Technology***

Part of the reasonable adjustment process and understanding the inherent requirements of the job, is related to the use of assistive technology by people with disability. The integration of assistive technology into the workplace was an area where workplace practices varied considerably for both existing employees who acquired a disability, and in the selection of new employees. In some cases this involved misconception of the likely cost of the assistive technology to the organization, even where those concerned already had their own assistive technology for workplace use. In other cases, workplace protocols and procedures, particularly around computer technology, were at the centre of the issue. In one case a person who was blind had applied for a position in a financial organisation where the use of “screen reading” software was required for the person to perform the essential duties of the job. However, the software package was not approved for use within a corporation and instead of making a “reasonable adjustment” to the computer software policy of the organisation and approving the screen reading software for use as a “workplace adjustment” the employer instead judged that the individual was not appointable to the position because they did not understand the person’s abilities with the correct software and policy in place. In these cases, the person was employed only after protocols were undertaken to verify the compliance of the software with the organisation's IT department. There were a number of other assistive technology issues for people with hearing impairments in particular and these included hearing augmentation systems, captioning and sign language interpreters.

### *Perception of Cost of Disability Inclusions*

Closely linked to all previous themes, was the incorrect or ill informed perception of the cost of making reasonable adjustments for disability to the workplace. Unjustifiable hardship is a term that is not defined under the act but tested through the federal court system. However, some of the principles as to what makes a cost an unjustifiable hardship includes the size of the organisation, their turnover and the cost of the reasonable adjustment in proportion to these factors. Hence, it is unlikely that a one-off software purchase or the provision of a relatively simple warning system (e.g. flashing lights to complement an alarm system for a person who is deaf) is going to be regarded as unjustifiable for a small business. However, if that small business was on the third story of a building without a lift, then the retrofitting of the lift to the building which would have a significant cost associated to it would be regarded as unjustifiable. There were circumstances where a person with disability was the best candidate for a job; they were excluded because of an assumption about the cost of disability inclusions to the organisation. For those who had this reason clearly communicated to them, the complaint cases gave an opportunity for the individual, together with their representatives, to negotiate through the AHRC with the organisation. The outcome of such negotiations was a clearer understanding about the actual cost, awareness raising of external government funding schemes to alleviate the higher costs of workplace adjustment, and acknowledgement that the circumstances for "unjustifiable hardship" were mostly overestimated by organisations.

## ***Inflexible Organisational Workplace Practices and Protocols***

The DDA together with carer and family responsibility legislation/policy in all states of Australia requires employers to accommodate family caring responsibilities where it is reasonable to do so. The cases contained a series of situations where the disability discrimination was proven due to the inflexibility of workplace practices and protocols. Rather than looking for solutions under "reasonable accommodation", employers chose to apply strict practices and protocols that were deemed to deliberately discriminate either directly or indirectly against the individuals involved. For example, a woman was directly discriminated against when after acquiring a disability she was redeployed to another position without discussion even though she could still carry out the inherent requirements of her original job. The situation created a great deal of attention in the workplace and the employer had made assumptions about her abilities and the essential elements of the job that were unfounded. Together with education about inclusive practice, an outcome was developed where she was able to carry on in her previous position with relatively minor workplace adjustments. While we have predominately given examples about an individual being directly or indirectly discriminated against, sometimes it is their families or associate who face discrimination. The DDA covers these groups and they have the same status under the law as a person with a disability. Where a person's individual or family circumstances are known then the employer must make changes that are reasonable to accommodate worker and their carer responsibilities. In one case a police officer was given ongoing duties that would make it impossible for him to provide the care required for his child with

a disability. This was found to be a case of indirect discrimination where the consequences of the action were discriminatory but unintended due to the style of rostering arrangements. A change in the employer's approach to rostering provided the flexibility for the individual and their family circumstances. In all cases, the action of the employer was regarded as disability discrimination because of the inflexibility of workplace practices and protocols, with the outcomes involving changes in practice and protocols and/or compensation for loss of income.

## **Discussion**

As outlined in research question 5, the discussion examines what understanding the themes bring to the construction of disability discrimination in the workplace. In addressing this question the contribution of the paper will be referred back to the contributing literature. The discussion examines: the human rights and legal perspectives; oversight, omission and othering; barriers in selection and social recovery; understanding structure and agency; improving inclusion through assistive technology and other support; increasing prevalence of invisible disability; and the contribution of method and approach.

This study has contributed to a much broader understanding of disability discrimination from a human rights and legal perspective. From this perspective, many of the discriminatory practices were directly conveyed to the person by the employer and were deemed unfair under the DDA. In doing so they were also in contravention of the human rights principles of the CRPWD,

which was brought about for these very reasons (Kayess & French, 2008). The cases demonstrated a lack of understanding of basic human rights and disability discrimination considerations under the DDA of “reasonable adjustment”, “inherent requirements” and “unjustifiable hardship”. This lack of understanding of the law, consideration of people with disability having a right to work and having an accommodating workplace was manifestly discriminatory. The numerous barriers identified and the angst caused to the individual was foreseeable with a basic understanding of inclusive employment practice. As such, the lived experiences actively contributed to the identification of these barriers, the solutions developed provide a much deeper understanding of the construction of discriminatory disability employment practices. From a material social model perspective these outcomes are laudable but should not have occurred in the first place.

The discrimination by employers was notable not just because of the direct nature but also for the volume of cases, which indicates a widespread pattern of injustice in the workplace. Whether the discrimination was because of oversight, deliberate omission or othering, it highlighted the lack of consideration for people with disability in the workforce. It is likely that many others were discriminated against, rejected as employees before they even got a chance to be employed as other employers may have "camouflaged" their actions so that the individuals involved had no recourse under the DDA. Other people with disability may have been exposed to similar behaviour but through a lack of understanding of their protections under the law or a lack of support in



lodging a complaint action they failed to report the situation. In all likelihood there is probably a major underreporting of discrimination in employment (Goldman et al., 2006). Camouflaging by managers is well noted in the literature (G. A. Ross, 1994; G. F. Ross, 2004; Schultz, et al., 2011) and allows those influenced by the dominant discourses for reasons of assumptions about what disability means in relation to employment performance or through their hostile attitudes to people with disability as the different “other” to exert their domination over marginalised groups (Mik-Meyer, 2016; Waterhouse, et al. 2010; Wearing & Darcy, 2012). The consequence of such behaviour demonstrated that beyond the physical barriers, it is the disabling attitudes of other staff, supervisors and organisational culture that was a major obstacle facing many people with disability. Rather than treating individuals in a considered way, talking with them and being open and frank about their concerns, people with disability were deliberately omitted, overlooked and not considered in the same way that nondisabled people were in job selection or within a workplace (Wilson-Kovacs, Ryan, Haslam, and Rabinovich, 2008; Fabian, Ethridge, and Beveridge, 2009).

This study demonstrated that much of the discrimination is related to socially created (constructed) disabling environments (Barnes & Mercer, 2010; Oliver, 1996). As outlined in the findings, the traditional social materialist model focus on environmental barriers is still a major issue for people with mobility, vision and hearing disabilities. The actual structuring of the environment created a series of exclusionary barriers for people with disability. This supports the

previous literature but clearly identified that employers did not feel they had a responsibility under the DDA to create “reasonable adjustments” to modify the workplace to be more inclusive for a potential new worker with a disability or a staff member who had become injured. There were a significant number of disability discrimination cases about rehabilitating injured workers who had not previously had disability. While a new worker may have been excluded by not being selected, injured staff members were not even considered for social recovery programs (Secker et al., 2002) but instead had their employment terminated through the use of underhand tactics whereby managers would terminate their contracts based on under-performance.

What became apparent was that the corporeal body was not considered beyond the able-bodied norm and regarded the impairment of the individual as their personal tragedy, a risk for which they were responsible and must now suffer the consequences. Many cases brought against employers were due to misconceptions about what the abilities of individuals were, what the “inherent requirements” of their employment were and how these could be harmonised within the workplace. While the literature identified a series of programs to assist employers in these matters, they were generally not known of or utilised by employers. The outcomes of the complaint cases suggest that, it is likely that better awareness, greater flexibility and broader use of imagination would lead to the amelioration of both explicit and implicit discrimination. Whether the consideration of an individual’s “impairment effects” (Thomas 1999; 2004) or an embodied ontology (Watson & Shakespeare, 2001) would

allow for the individual nature of impairment be considered beyond the structural inclusions of access would need to be investigated by other research. However, the outcomes showed that when a dialogue was entered into in the conciliation process with an openness to creating non-discriminatory opportunities then both parties, employee and employer, had a better understanding of each other's perspective and it was relatively easy to accommodate flexibility within protocols and procedures. We hope others would research the essence of these experiences as suggested by Sherry (2016) to provide an understanding of the sociology of impairment within employment. Does awareness of the other create empathy towards different embodied understandings within workplaces?

Not providing physical access is a very obvious example of a disabling environment that prevents full and equal participation. In contemporary workplaces, assistive technology (e.g. JAWS screen reader and speech recognition technology) is an area that leads accessibility solutions through the development of inclusive practice for temporary and permanent disability. The cases also identified the increasing use of assistive technology together with changes in protocols and procedures to be accommodating of assistive technology as well as flexibility in employment practice. Failure to provide such accommodations suggests a lack of knowledge of available resources and supports for the employment of people with disability beyond getting into buildings. This is despite the extensive education initiatives through the AHRC and advocacy/training providers like the Australian Network on Disability,

workplace health and safety considerations, disability related access standards and the significant investment in open employment services and the Employment Assistance Fund. As the statistical findings suggest there was also a difference between employment based discrimination by sector that need to be considered in future strategies in inclusive employment practice. Given that the supports exist, why don't employers or employees take more command of these opportunities? As we enter into new paradigms of funding people with disability through the NDIS and individualised funding, can a more direct pathway be found to educate employers about non-discriminatory approaches and the creation of enabling environments?

The other consideration that became apparent through the data was that employers may be more aware of people with visible impairments (e.g. wheelchair user) but unaware of those with invisible impairments. This in itself may produce an awareness of inclusive practice for physical or mobility related impairments but a relative lack of understanding of inclusive practice for other groups. This was evidenced by the increasing numbers of cases involving people with varying degrees of invisible disability including vision, hearing, mental health and HIV. It is possible that many managers and employers are unaware of the prevalence of people with disability and view it as a marginal issue unrelated to them. This situation may also reflect the more pervasive medical model assumptions that disability is the problem of the individual and not part of workplace considerations or society more broadly. This points to "discourses of responsabilization" that have become part of government

discourse in “which individuals, families, communities and workplaces – rather than publicly-funded services – appear as key resources in responding to experiences of mental distress” (Teghtsoonian, 2009, p. 28). This discourse not only maintains a shift in responsibility it also transforms social barriers into individual psychological problems.

Consequently, rather than being informed, and identifying and addressing barriers in advance, they effectively become part of a workplace culture where inclusive practice is not considered until somebody takes action in the form of discriminatory practices. However, analysis of the AHRC complaint cases and the Federal Court actions suggest that they are underscored by long standing prejudice based on little or no direct personal contact with a person with disability, stereotypes and stigma. It places people with invisible or hidden impairments such as mental illness and HIV/AIDS in a double bind. Disclosing could result in discrimination and social isolation or it may challenge preconceptions and change attitudes for the better. As research has shown, it is direct experience with a person with disability that creates positive attitudes and an ‘accessible’ mindset reinforcing the social model of disability (Erebus International 2006; Daruwalla & Darcy, 2005). This research is based on the theory of the ‘contact hypotheses’. If contact is to challenge prejudicial beliefs, Allport (1954) maintains, then it needs to meet six main conditions, one of which is an acknowledgement of the law (‘support from authorities, laws and customs’) and another is positive ‘personal interactions’. Nevertheless, this approach needs to be balanced with an acknowledgement that prejudicial

thinking is more than just a cognitive error on the part of the individual.

Prejudice has its origins in institutional discourses such as neoliberalism which stigmatises those with disability because of their seeming inability to compete with others in the marketplace (McDonald & Wearing, 2013). The irony is that government policy seeks to facilitate the employment of people with disability, however, it fails to educate employers, challenge the discourses upon which prejudice is assumed

Lastly, the research design and approach taken to examining disability discrimination in employment was a contribution of the paper itself. In drawing on natural data from AHRC management information systems, the approach did not seek to create an artificial sample and undertake standard research methods in this area of either surveys or interviews, which are always open to a degree of bias. Instead it identified the cases, read the cases from both a qualitative perspective and then prepared them for quantitative analysis. As such the data represents an attempt at creating a national database of disability discrimination in employment and adds a new understanding to the body of literature as outlined in Table 1. It did so by examining them from a social science perspective rather than a legal perspective where the focus on precedent sometimes overlooks emergent patterns of discriminatory practice. The approach may offer other researchers similar opportunities in organisational management information systems. The findings identified that the employment cases and all other cases were significantly different based on disability type, entity and sector. Yet, unlike other studies (Vandekinderen et al., 2012) gender

was not considered as a statistically significant area of difference in employment discrimination.

## **Limitations**

The use of “natural data” (Silverman, 2016) in this research in the form of the AHRC complaint and federal court cases was an excellent way to examine discrimination against people with disability in employment. However, while providing insights into discriminatory practice there was a limit on the relative depth and richness of the data that could be explored using the natural data approach due to the reported nature of the complaint cases. This is because complaint cases are deemed “in confidence” the complaint file is not available to the researcher only a summary of the complaint case. While federal court cases provide a richer deeper understanding of the discriminatory practices on the lived experience of people with disability, these are relatively few in comparison to the complaint cases and processes under the Australian system. While this research has shed light on the legal concepts that are misunderstood by those discriminating against people with disability, the way that people with disability felt during and after discriminatory practice and the subsequent impact that this had on them personally and socially are issues to be explored. As Sherry (2016) suggests a sociology of impairment focusing on the essence of the experience of the group may provide direction for future research.

## **Conclusion**

In conclusion, employment constituted the largest proportion of Commonwealth discrimination cases generally and disability discrimination complaint cases. It was noted that there were statistically significant differences in the proportion of discrimination based on disability type, the entity bringing the discrimination and the industry sector where the complaint originated. While mobility, vision and hearing made up the greatest number of employment complaint cases, it was people with mental health and HIV AIDS who were proportionally the most discriminated. For employers there is extensive material available that addresses strategies for increasing the number of employees with disability in the workplace. For individuals with specific impairments or conditions there is extensive information available on work place adjustments, technologies and supports that reduce barriers and make work accessible. The evidence in this paper suggests that the problems inherent in ‘medical model’ assumptions in the workplace and the value in reframing disability through social approaches, reinforces its importance as a theoretical framework for future research on disability and employment that challenges current misconceptions, stereotypes and prejudice. In particular, the circumstances of the individual within social approaches to either the “impairment effects” or “embodied ontology” understandings seeks to bring the nature of structure and agency into a more considered understanding of the complexities of an individual’s circumstances.

This research identified a number of basic elements critical in the employment of people with disability, but equally notable was the variety and scope of employer circumstance. To this end, further research would benefit from



longitudinal examination through organisational case studies of disability that draws on quantitative and qualitative data, and that identify a greater depth and richness to our understanding. This may assist to develop inclusive recruitment and employment policies and practices that benefit people with disabilities and employers. As the current research only focussed on complaint cases and Federal Court actions it has not aided our understanding of employees with disabilities in full compliant supportive workplaces. As previous research has found that the impact of company culture on employees with disabilities is significant (Schure et. al. 2009), greater knowledge and better understanding about positive cases is required. Finally, employees with disability in the general workforce need to increase in number from the currently low figures that make them uncommon to a 'tipping point' that makes them commonplace members of the workforce. In addition to a change in attitude on the part of employers, it is important to recognize that this will only happen with the courage of people with disability who are prepared to face potential prejudice and ignorance and 'come out' as here and able to challenge disability discrimination in the workplace.

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	Author(s)	Year	Country	Method Sample	Population	Major findings related to this paper	Contributions
1	Chouinard and Crooks	2005	Canada	In-depth interviews - 10	- Women with disabilities - Receiving ODSP income support	Changes in the ODSP: <ul style="list-style-type: none"> <li>• Negatively influenced disabled women's daily lives</li> <li>• Administrative barriers</li> </ul>	Transformations in neo-liberal forms of state and changes in social programs: <ul style="list-style-type: none"> <li>• Discourages the use of state assistance.</li> <li>• Making disabled women feel like they lack power and are not involved in society.</li> </ul>
2	Edwards and Boxall	2010	The U.K	1 self-answer questionnaire 2 audiotaped telephone interviews. - 23	Adults with cystic fibrosis (CF)	Barriers to employment: <ul style="list-style-type: none"> <li>• Security</li> <li>• Maintenance</li> </ul>	<ul style="list-style-type: none"> <li>• 'Manifesto or checklist for employer change' (p.451)</li> <li>• A shift from medicalization to a 'barrier removal' approach</li> <li>• Social model analysis and the development of employment policy solutions</li> </ul>
3	Lewis, Dobbs and Biddle	2013	The U.K	Semi-structured interviews - 98	WORKSTEP participants - Disabilities - Learning disabilities - Condition restricting mobility - Hearing and/or speech impairment - Visual impairment - Mental health condition - Neurological condition - Long-term medical condition	<ul style="list-style-type: none"> <li>• The positive benefits of employment support.</li> <li>• Unaccommodating work environments</li> <li>• Adopting a 'one size fits all' approach (focusing on the demand-side)</li> </ul>	<ul style="list-style-type: none"> <li>• Encouraging the individualistic approach</li> <li>• The social programs should be emphasized on both demand-size and supply-size in employment and disability.</li> </ul>
4	Vandekinderen et al.	2012	Belgium	Semi-structured in-depth interviews - 11 (3 guides & 8 travellers)	- Women with mental health problems - Involved in the activation program	Social barriers: <ul style="list-style-type: none"> <li>• The norm of 'being disabled'</li> <li>• An inadequacy of supply for women's sanitary requirements and clothes</li> <li>• It is difficult to balance women's roles in the family and at work</li> </ul>	<ul style="list-style-type: none"> <li>• Double discrimination in the workplace</li> <li>• The value of trained women</li> <li>• The usefulness of female bodies and minds</li> <li>• Justifications provided by the neo-liberal rationale.</li> </ul>

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						<ul style="list-style-type: none"> <li>Individual responsibility for the failure</li> </ul>	
5	Shier, Graham and Jones	2009	Canada	One-to-one and focus group interviews - 56	<ul style="list-style-type: none"> <li>People with disabilities</li> <li>Participating in employment training programs in Calgary and Regina, Canada</li> </ul>	Barriers to employment: <ul style="list-style-type: none"> <li>Security</li> <li>Maintenance</li> </ul>	<ul style="list-style-type: none"> <li>The significant influence of perceptions of being disabled on participant's ability.</li> <li>Suggestions:               <ul style="list-style-type: none"> <li>The collaboration between policy-makers and employers</li> <li>Emphasis on employer education</li> <li>Examples of successful cases in terms of recognizing discrimination in history of Canada</li> <li>Vocational service organizations can implement solutions to support disabled people based on the findings</li> </ul> </li> </ul>
6	Secker et al.	2002	The U.K	Semi-structured interviews - 17	Employment project clients, their project workers and workplace managers	Strengths of the social recovery model in terms of offering support for employers.	Suggestions: <ul style="list-style-type: none"> <li>The collaboration with mental health professionals</li> <li>The requirement of funding structures</li> </ul>
7	Roet et al.	2007	Norway	Narrative inquiry - 5	People with long-term 'mental health problems'	Hindrances and barriers to employment: <ul style="list-style-type: none"> <li>The very first thing in their mind when entering the labor market is their disadvantages.</li> <li>A lack of self-belief</li> <li>Difficulties in adapting to a new and strange workplace.</li> <li>Low expectations and lack of support from others</li> <li>Signs of resilience and resistance</li> </ul>	<ul style="list-style-type: none"> <li>To build fairness in employment, people with mental health problems should be provided with individualized and flexible support to adapt to the work environment.</li> </ul>
8	Lindsay et al.	2014	Canada	In-depth interviews (semi-structured guide) - 19	Youth employers and employment counselors	Desirable skills for youth with disabilities: <ul style="list-style-type: none"> <li>A well-prepared job application</li> <li>Attitude and fit</li> <li>Soft skills</li> </ul>	<ul style="list-style-type: none"> <li>Job readiness, soft skills and practical skills are important for youth employment</li> <li>Discrimination against youth with disabilities</li> <li>Future research should focus on exploring the ways to help youth with disabilities</li> </ul>



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							overcome barriers to employment
9	Lantz and Marston	2012	Australia	Face-to-face semi-structured interviews - 80	People with disabilities currently accessing either the Disability Support Pension or Newstart (the unemployment benefit)	<ul style="list-style-type: none"> <li>Operationalizing welfare to work</li> <li>The 'self-productive individual'</li> <li>Lack of motivation among participants</li> <li>Reforming the disability welfare sector</li> </ul>	<p>Suggestions:</p> <ul style="list-style-type: none"> <li>The development of welfare-to-work programs</li> <li>Setting policies for a variety of capabilities and the motivation among people with disabilities</li> </ul>
10	Lamichhane	2010	Nepal	Face-to-face interviews - 227	People with three kinds of disabilities (visual, hearing, and physical)	<ul style="list-style-type: none"> <li>There are a number of positive changes that disabled employees experience when working.</li> <li>The empowerment of education towards people with disabilities.</li> <li>Women with disabilities face more challenges than disabled men</li> </ul>	<p>Suggestions:</p> <ul style="list-style-type: none"> <li>Developing training programs for employees with disabilities</li> <li>It is necessary for disability community influencers to understand disabled employees' issues in employment</li> <li>Analyzing issues related to entering the labor market and what disabled employees experience in the workplace.</li> </ul>
11	Harris, Renko and Caldwell	2014	The U.S	Focus group and face-to-face interviews - 27 - 19	(1) Social entrepreneurs with disabilities (2) Key stakeholders	<ul style="list-style-type: none"> <li>Government, funding and culture play important roles in developing and supporting social enterprises among people with disabilities</li> </ul>	<ul style="list-style-type: none"> <li>Encouraging change of attitude toward people with disabilities in terms of developing and running business ventures</li> <li>The need for funding can help people with disabilities overcome political-economic and socio-culture barriers</li> </ul>

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12	Gosling and Cotterill	2000	The U.K	Semi-structured interviews & Observation - 16 - 20 - 9	(1) All existing workshop staff and newly employed project staff (2) Users attending the four workshops of the North West project. (3) Carers whose relatives attended the workshops	<ul style="list-style-type: none"> <li>• The welfare benefits system was a barrier for disabled people.</li> <li>• The workshops brought high value to participants.</li> <li>• Lack of people to plan, implement and monitor the new service approaches</li> <li>• The attitudes of employers</li> <li>• Most participants did not have access to role models and networks with employees who have experience in learning difficulties</li> </ul>	<ul style="list-style-type: none"> <li>• The welfare benefits system should be more flexible and simplified.</li> <li>• The need for education and networking with local communities</li> <li>• Essential elements for disabled people to fulfill their employment opportunities</li> </ul>
13	Wehbi and El-Lahib	2007	Lebanon	Surveys - 200	- Various mobility impairments - Sensory impairments (speech and hearing difficulties) - aVisual impairments - Intellectual disabilities	<ul style="list-style-type: none"> <li>• Most participants are unemployed because of lack of awareness of their abilities and potential.</li> <li>• Participants are self-employed because of lack of educational qualifications, physical access issues, and transportation difficulties.</li> <li>• Participants tend to be paid lower wages compared to the average.</li> <li>• Barriers to employment include discrimination, health/disability issues, lack of opportunities, competition and lack of networks.</li> </ul>	<ul style="list-style-type: none"> <li>• The need for providing training for essential skills in terms of development and management of small enterprises for self-employed people.</li> <li>• Activities to raise parent's awareness, and follow-up visits</li> </ul>

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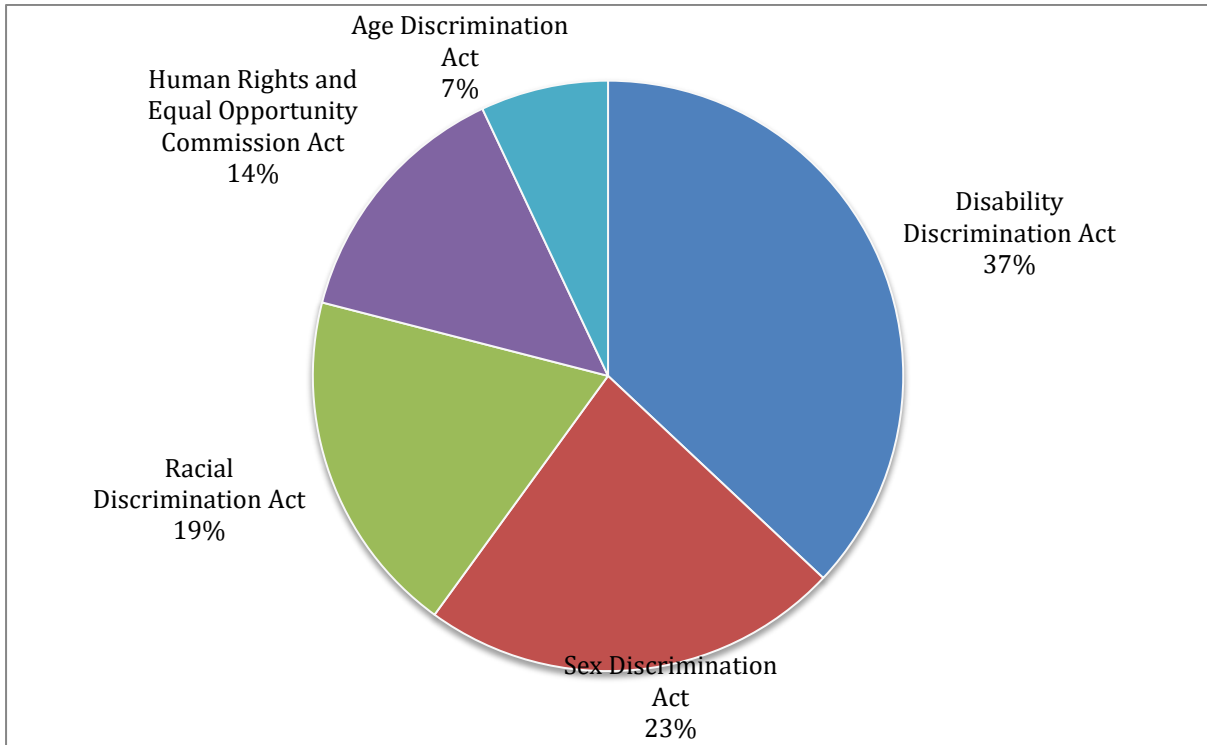
14	Leiulfstrudm et al.	2014	Norway	Interviews - 31	Spinal cord injury	Four general themes: <ul style="list-style-type: none"> <li>• Personal confidence and confirmation of identity</li> <li>• Contribution to society/ the moral dimension of work</li> <li>• Functional equivalents to full-time employment</li> <li>• The importance of paid work for short-term employment</li> </ul>	<ul style="list-style-type: none"> <li>• A strong belief that employment is a major vehicle to participate in Norwegian society.</li> <li>• Suggestions: more flexible work arrangements and a change of attitude</li> </ul>
15	Kitchin et al.	1998	West Ireland	Focus group interview - 12	Disabled people	Employment issues: <ul style="list-style-type: none"> <li>• Training</li> <li>• Maintenance</li> <li>• Ignorance</li> <li>• Discrimination</li> </ul>	Potential solutions: <ul style="list-style-type: none"> <li>• Focusing on disability awareness</li> <li>• Removal of employment barriers</li> <li>• Stronger legislation</li> </ul>
16	Pagán	2009	European Community Household Panel (ECHP) - 13 European countries	Annual longitudinal survey (1995-2001) - 443, 119	Disabled and non-disabled people	<ul style="list-style-type: none"> <li>• Disabled people tend to be self-employed compared with non-disabled people.</li> <li>• Self-employed disabled people gain more job satisfaction than employed disabled people</li> </ul>	Suggestion <ul style="list-style-type: none"> <li>• Encouraging self-employment to increase well-being and employment among disabled people.</li> </ul>
17	Lamichhane	2012	Nepal	Face-to-face interviews Questionnaire-based survey - 423	Three kinds of disabilities (visual, hearing and physical)	<ul style="list-style-type: none"> <li>• To gain benefits from working requires: - employment opportunities - elimination of discrimination</li> <li>• The importance of education</li> <li>• Valuable employment opportunities are provided by the government</li> </ul>	<ul style="list-style-type: none"> <li>• The necessity of training programs</li> <li>• Encouraging the interaction between experts on disability and other stakeholders such as government officials and policy-makers.</li> <li>• Developing policies in terms of increasing employment opportunities and making the labor market more accessible.</li> </ul>
18	Pallisera, Vila` and Valls	2003	Spain	Interviews - 19 centers	Professional workers	<ul style="list-style-type: none"> <li>• Employment programs lack political and economic support</li> <li>• Need to increase the economic benefits for companies hiring disabled individuals</li> </ul>	To improve the employment situation of disabled people requires: <ul style="list-style-type: none"> <li>• Effective promotion and facilitation by the government</li> <li>• Applying quota systems and compensatory contribution systems.</li> <li>• Putting effort into coordinating projects</li> <li>• Disabled people need to be involved in the decisions that influence their lives.</li> </ul>

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19	Harwood	2014	The U.K	Semi-structured interviews - 52 Collecting 250 documents	From local authorities	<ul style="list-style-type: none"> <li>Reasonable adjustments-related practice is negatively influenced by the spending cuts and legal changes</li> </ul>	<ul style="list-style-type: none"> <li>Managers: taking action to minimize the influence of budgets cuts on reasonable adjustments</li> <li>National policy-makers: having responsibilities for cutting spending and legal protection.</li> </ul>
20	Boyce et al.	2008	The U.K	In-depth interviews - 20	Severe and enduring mental health problems	<ul style="list-style-type: none"> <li>Barrier: perceiving stigma associated with mental illness</li> <li>Positive views: right balance (work demands and challenges), improving work skills, a supportive workplace</li> <li>Problems at work: discrimination, working conditions, lacking support and the influence of mental health</li> </ul>	<p>The need for long-term:</p> <ul style="list-style-type: none"> <li>Focusing on job quality, employee satisfaction, length of job tenure and career development</li> </ul>

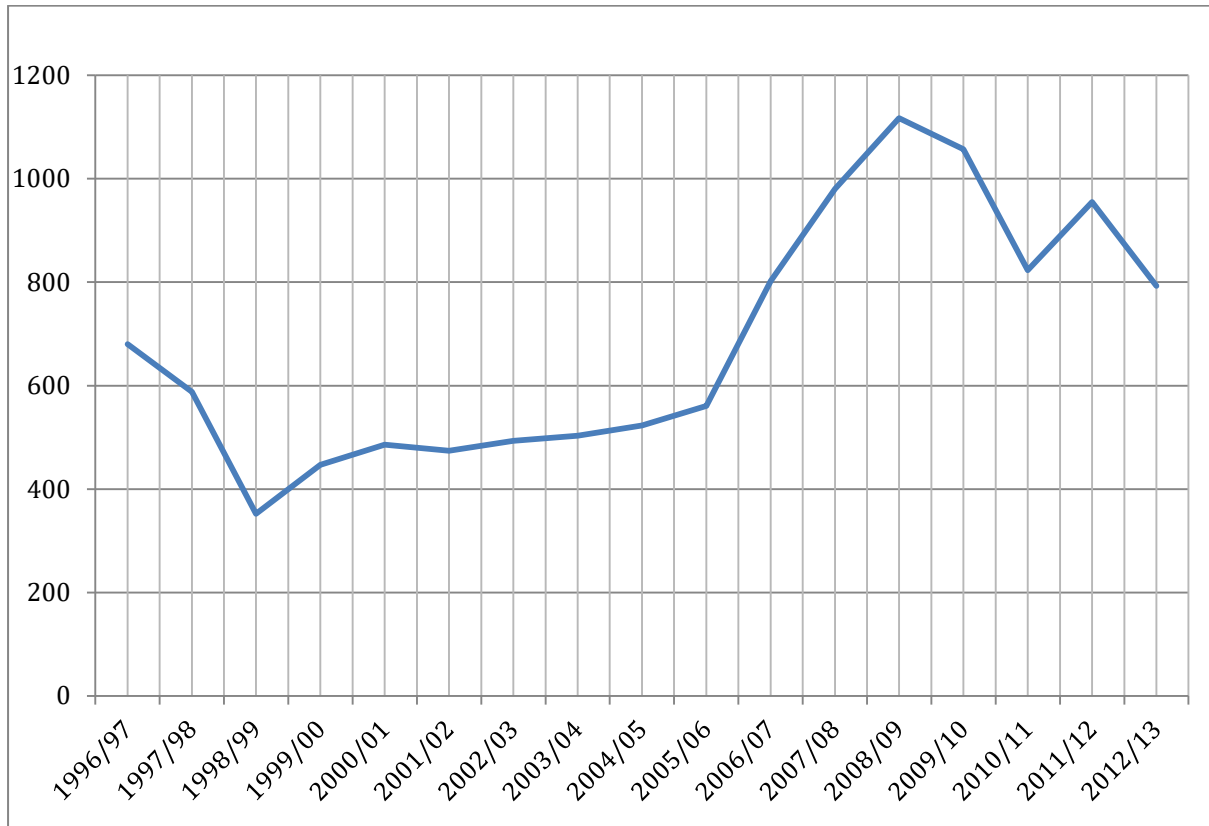
**Table 1: Systematic Literature Review of Disability & Society employment papers**

**Figure 1: Complaints Cases as a Proportion of AHRC complaints by each Area of Legislation**



**Source: Australian Human Rights Commission 2013**

**Figure 2: Disability Discrimination Act – No. of Complaint Cases**



**Source: AHRC Annual Report 1996/97-2012/2013**

**Table 2: Chi-Square Test for Independence Based on Employment and All Other Discrimination**

	<b>N</b>	<b>Df</b>	<b>P</b>	<b>Phi</b>	<b>CramerV</b>
<b>Gender</b>	<b>970</b>	<b>1</b>	<b>.705</b>	<b>-.012</b>	<b>.012</b>
<b>Entity</b>	<b>869</b>	<b>1</b>	<b>.000**</b>	<b>-.178</b>	<b>.178</b>
<b>Sector</b>	<b>968</b>	<b>3</b>	<b>.000**</b>	<b>.165</b>	<b>.165</b>
<b>Disability</b>	<b>972</b>	<b>7</b>	<b>.000**</b>	<b>.438</b>	<b>.438</b>

**Figure 3: Disability Type/dimension of access for employment cases**

