Australian Human Rights Commission

Human Rights and Technology Project.

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Public submission
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Introduction to the submission

This submission concerns all disabling technologies, however has a particular focus upon access to digitized books, more commonly referred too as E-Books.

This submission draws heavily from my monograph, Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print Disabled*, published in 2017 by Cambridge University Press.

Proposed reforms

Recommendation 1: What, if any, changes to Australian law are needed to ensure new technology is accessible?: Reasonable to consider disability inclusion

It is recommended that the following two paragraphs are added to section 11(1) of the *Discrimination Act 1992* (Cth) to provide:

11 Unjustifiable hardship

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

...  
(f) The availability and cost of adopting universal design in the design and implementation phases;  
(g) Whether universal design was considered or adopted by the first person;

Recommendation 2: What, if any, changes to Australian law are needed to ensure new technology is accessible?: Designers and manufacturers publish on disability inclusion
While anti-discrimination laws do not impose duties upon those who design or manufacture products or systems, the model Work Health and Safety laws do impose such duties. Sections 22 and 23 of the model Work Health and Safety Act requires designers and manufacturers to, inter alia,

“carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary for safe use and must “give adequate information to each person who is provided with the design for the purpose of giving effect to it or to whom the manufacturer provides the plant, substance or structure.”

The regulations and codes of practices expand on designers and manufacturers duties.

It is recommended that a new section 24A be introduced into the Disability Discrimination Act 1992 (Cth) that requires designers and manufacturers to consider how universal design could be adopted in the design or manufacturing process and further require that such data is made available to the public. This would enable the public to make informed choices.

If a designer or manufacturer made false or misleading statements on universal design, then this should be actionable under existing consumer protection laws.

Recommendation 3: What, if any, policy and other changes are needed in Australia to promote accessibility for new technology?

How can the private sector be encouraged or incentivised to develop and use accessible and inclusive technology, for example, through the use of universal design.

New enforcement options are required that more fairly balance the interests of rights-holders with the human rights of persons with print disabilities. Research demonstrates that many parties fail to comply with their regulatory obligations due to inattention or miscalculation, not because key actors have actively decided not to comply with the law. Enabling persons with disabilities to consume digital content and use technologies is a technical process, which harried line managers may devote inadequate resources to in order to ensure compliance.

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There are, however, situations where parties intentionally deny access. The analysis of the Amazon Kindle reader in chapter 1 of *Discrimination, Copyright and Equality* is an example of a rational and lawful decision to deny access to persons with print disabilities. In contrast, chapter 1 also identified that a significant number of publishers are actively seeking to reduce the book famine by working with Bookshare to provide books to print disabled readers. There is no doubt that sanctions remain a vital tool in the regulatory framework; however, moving forward regulators should continue to seek additional strategies to achieve desired targets.

There is arguably great scope for regulators to engage further with regulatory theory to craft new vehicles to promote equality. Professors Robert Baldwin, Martin Cave and Martin Lodge have identified the key regulatory models which can be used to craft interventions. These options include:

- To command—where legal authority and the command of law is used to pursue policy objectives.
- To deploy wealth—where contracts, grants, loans, subsidies or other incentives are used to influence conduct.
- To harness markets—where governments channel competitive forces to particular ends (for example, by using franchise auctions to achieve benefits for consumers).
- To inform—where information is deployed strategically (e.g. so as to empower consumers).
- To act directly—where the state takes physical action itself (e.g. to contain a hazard or nuisance).
- To confer protected rights—where rights and liability rules are structured and allocated so as to create desired incentives and constraints (e.g. rights to clean water are created in order to deter polluters).

As analysed in chapter 12 of *Discrimination, Copyright and Equality*, a large number of interventions rely upon a variant of the command and control model. Enforcement often relies upon a survivor of ableism to carry the burden of enforcing the laws. State support and enforcement will help combat the worst forms of ableism; however commands and sanctions are only one regulatory option. Civil rights laws continue to play a vital role in promoting equality, although more regulatory options need to be explored.

A theme throughout this submission is that the parties who attract legal obligations are not always the parties in the best position to remedy the inequality. Rather than imposing anti-discrimination duties on every party in the product life cycle who can impact upon disablement, perhaps incentivising equality activities may be an option which could operate along side anti-discrimination laws.

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4 Ibid.
There are already incentive schemes surrounding disability employment in the form of tax credits.\footnote{Lennard J Davis, ‘Bending Over Backwards: Disability, Narcissism, and the Law’ (2000) 21(1) \textit{Berkeley Journal of Employment and Labor Law} 193, 203.} Tax credits could foreseeably be granted for the research, development and adoption of disability inclusive digital spaces.\footnote{Delia Ferri, ‘Does Accessible Technology need an “Entrepreneurial State”?: The Creation of an EU Market of Universally Designed and Assistive Technology through State Aid’ (2015) 29(2-3) \textit{International Review of Law Computers and Technology} 137.} Where there is a disabling digital environment persons with disabilities currently experience harm in their cultural, educational, economic, employment and general lives. Rather than requiring persons with disabilities to carry the cost of disabling spaces, incentives would shift part of the burden onto the state and encourage equality activities from parties who can make digital spaces disability inclusive.
Consultation Question 1. What types of technology raise particular human rights concerns? Which human rights are particularly implicated?

Introducing the right to read in the Convention on the Rights of Persons with Disabilities

The paradigm shifting nature of the CRPD can be illustrated by considering how this Convention has shifted the debate around persons with disabilities’ right to read. Persons with disabilities have enjoyed a limited right to read prior to the CRPD. The continuation of the book famine suggests that, to the extent this right exists, it has failed to provide meaningful access. The framers of the CRPD arguably recognised the need to protect persons with disabilities’ right to access and consume information and accordingly have facilitated the right to read in the Convention. While the CRPD has been said to restate rights and not create new rights, the introduction of a right to access information communication technologies and a right to access cultural materials in the CRPD arguably represents a significant paradigm shift under international human rights law.

The right to read can be divided into rights pertaining to how people read and rights that pertain to what people read. In other words, one group of rights focus on the medium by which information is transferred and the other group focuses on creating rights to what information should be available. Where information is already in a digital format, then reading equality will be achieved where the E-Book, E-Library and E-Reader are accessible to persons with print disabilities.

The right to access using information communication technologies prior to the Convention on the Rights of Persons with Disabilities

One of the benefits of the CRPD is that it has taken existing human rights and restated them in a way that is more relevant for persons with disabilities. While this is the general position, the CRPD plays a more significant role in promoting the right to accessible information communication technologies. The CRPD has not simply restated an existing human right in a way relevant to persons with disabilities. Rather the CRPD has also clarified the existence of the underlying human right: the right to information communication technologies.

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There was no right to disability accessible information communication technologies prior to the CRPD. Scholars had argued that information rights should entitle all people to the free and unfettered right to access internet content.\(^9\)

There is uncertainty how the right to information communication technologies might operate outside the jurisdiction created by the CRPD. The strongest indication that there is a right pertaining to access different forms of media is sourced in the Universal Declaration of Human Rights. Article 19 of the Universal Declaration of Human Rights provides

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights also reflects the right to receive information where it states

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.\(^10\)

Scholars have contended that there is a ‘reasonable case’ that the right to media creates a right to access the internet.\(^11\) There seems, however, to be insufficient certainty to say that the right to the internet, or more broadly a right to access information communication technologies, exists at the global level outside limited situations.

The use of information communication technologies enhances the flow of information and thus individuals’ capacity to exercise their human rights.\(^12\) Access to information communication technologies is recognised as enabling people with disabilities to exercise a range of human rights, including education, work and freedom of expression. This right is also associated with enabling people without disabilities to exercise their human rights. People in isolated locations or people who have their freedom of movement reduced can utilise information communication technologies to identify and exercise their rights.\(^13\) Access to the internet also operates as a vehicle to access new markets and ideas, and is associated with economic development. Indeed, the digital divide between information haves and have-nots is associated with a large range of civil, economic and social disparities.\(^14\)

Some jurisdictions have recognised the role of the internet in promoting human rights and have introduced restrictions limiting interference with users’ access.\(^15\) Recognising the importance

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\(^12\) Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN GAOR, 17\(^{th}\) sess, Agenda Item 3, UN Doc A/HRC/17/27 (16 May 2011) [67] and [78].


of communication technologies, article 1(3)(a) of the European Union’s new Framework Directive Article explains that:

\[m\]easures taken by Member States regarding end-users’ access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons... Any of these measures regarding end-users’ access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards ... including effective judicial protection and due process.\[16\]

Accordingly, even though the right to access information communication technologies does not have universal support by states, there is certainly growing recognition of the importance of this right.

The Convention on the Rights of Persons with Disabilities enshrines the right to access using information communication technologies

Whether or not a right to information communication technologies exists within the broader international human rights regime, the CRPD has clarified the situation. Article 9 of the CRPD posits access to information communication technologies as a human right, and details state obligations to enable persons with disabilities to exercise this right.\[17\] The CRPD recognises that the right to access is critical for persons with disabilities to exercise their fundamental rights, including rights to social, economic and cultural equality, health, education, information and communication.\[18\] The right to access also requires state signatories to ‘ensure’ persons with disabilities equal access ‘to the physical environment, to transportation, to information and communications, including information and communications technologies and systems...’\[19\]

Universal design

To protect the right to access the CRPD adopts a two pronged regulatory approach. The first prong focuses on rendering communication systems accessible at the design and manufacturing stage through the concept of ‘universal design’.\[20\] Universal design is defined in the CRPD to mean:

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17 CRPD, art 9. This right of access impacts on various other rights. For example, the right to participate in political public life and the right to vote found in CRPD, art 29. See for discussion: Ron McCallum, ‘Participating in Political and Public Life: A Challenge for We Persons with Sensory Disabilities’ (2011) 36(2) Alternative Law Journal 80.
18 CRPD, (v).
19 Ibid art 9(1).
20 Ibid art 9(2)(h).
The design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.21

The importance of universal design/inclusive design can be evinced by how widely it is referred to in the CRPD. The focus on inclusive design also appears with reference to ‘inclusive education’,22 workplaces that are ‘open, inclusive and accessible’ to persons with disabilities23 and ensuring that international development programs are ‘inclusive … and accessible’.24

A key concept behind universal design is the notion of universal application.25 Universal application does not seek to satisfy every person’s individual preference for consuming information. Achieving universal preference can make design and commercial sense, however this is not a target that is promoted by the CRPD. Universal design focuses on the capacity to use by the majority people with the majority of abilities. Universal preference focuses on individual preferences (which can alter), whereas universal design focuses on impairments which should be required to be altered as a requirement for using a product.

Universally designed products should be usable for disabled people.26 Universal design seeks to ensure that products are usable by the entire community with as little adjustment as possible.27 Where universal design is adopted, many access barriers are not created in the first place and thus the need to engage in retrofitting is reduced or eliminated. Universal design, however, does not mean universal access. The definition of ‘universal design’ in the CRPD acknowledges that inclusive access cannot always be provided. Under universal design access should be provided ‘.... to the greatest extent possible’.28 Where universal design cannot be achieved, then the second prong becomes relevant.

Right to reasonable accommodation/adjustments

The second prong to protect the right to access in the CRPD requires states to ensure that ‘reasonable accommodations’ are made to enable persons with disabilities to obtain access.29 Reflecting approaches in other international conventions, the CRPD does not provide specifics on what is required to achieve access, but instead explains what parties need to do to enable

21 Ibid art 2.
22 Ibid art 24(1).
23 Ibid art 27(1).
24 Ibid art 32(1)(a).
28 CRPD, art 2.
29 Reasonable Accommodation is used in the definition of disability discrimination in CRPD, art 2; to promote equality and non-discrimination in CRPD, art 5(3); to ensure the liberty and security of the person in CRPD, art 14(2); to ensure the right to education in CRPD art 24(2) and (5); to exercise their right to work in CRPD art 27(1)(i).
access. In addition to imposing obligations directly upon the state, the right to receive reasonable accommodations requires non-state actors, such as telecommunication providers, employers, educators and the like, to engage in positive conduct to enable persons with disabilities to obtain access.

In addition to requiring certain groups in society to make reasonable accommodations and adjustments, state actors are required to provide funding for and facilitate the development of assistive technologies. Funding research and development is aimed at increasing the range of technologies that can be utilised to promote equality. Ideally this funding targets the development of universally designed products as well as disability adaptive technologies. Overall the duty to accommodate persons with disabilities requires states to strive for substantive equality for persons with disabilities.

Analysing how the right to read impacts on rights in the Convention on the Rights of Persons with Disabilities

To clarify how the right to read is operationalised, this submission will now analyse how the right to read will alter the legal regulation of information flows in education, work and public affairs. Prior to the CRPD there was no clear statement that persons with disabilities were entitled to inclusive educational and work environments. When these rights to inclusive environments are combined with the right of access this arguably creates a new paradigm that promotes access to information and reading equality.

Operationalising the right to access in promoting inclusive education

While states have duties to provide access to instructional materials under anti-discrimination laws, as well as under novel legal regimes, and possibly under state constitutions, prior to

36 See especially discussion in chapters 8 and 11.
37 See for example the Supreme Court of Africa held in Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198 (2 December 2015) that the right to education in article 29 of the South African Constitution that creates a requirement that each learner must be provided with a textbook for each subject before commencement of the academic year.
the CRPD there was no specific international human rights law that persons with disabilities could rely upon. The lack of clear guidance on what the right to education required from states encouraged some to question the extent of state responsibility in educating people with disabilities.38

The International Covenant on Economic, Social and Cultural Rights and the Universal Declaration on Human Rights recognised that people have a right to education, but did not consider the right of people with disabilities to exercise this right.39 Indeed, it is telling that people with disabilities did not even feature as a target category worthy of special attention in the International Covenant on Economic, Social and Cultural Rights. Article 13 of the International Covenant on Economic, Social and Cultural Rights grants everyone a right ‘to education’ that promotes ‘understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’

The United Nations specifically considered the rights of young people with disabilities by adopting the Convention on the Rights of the Child.40 The Convention on the Rights of the Child recognizes the right of all children to an education.41 This has been interpreted to apply to children with disabilities.42 More relevantly for this discussion, the Convention on the Rights of the Child requires states to provide assistance, whenever possible, to disabled children and their families.43 This assistance should ‘ensure that the disabled child has effective access to and receives education ... in a manner conducive to the child’s achieving the fullest possible social integration and individual development.’

Subsequent to the Convention on the Rights of the Child, the Salamanca Statement and Framework for Action on Special Needs Education proclaimed the right of every child to an education in ‘regular schools.’45 Similarly, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities encouraged states to educate children with disabilities in mainstream schools.46

44 Ibid.
The CRPD specifically recognises the rights of persons with disabilities to inclusive K-12 and lifelong education. This requires States, and those who receive State funding, such as universities, to comply with the standards posited in the CRPD. At a minimum, the right of inclusive education includes the right not to be segregated and to enjoy the same educational opportunities and support as students without disabilities. The CRPD goes further than this notion of equality. The CRPD explains that this inclusive education system must be ‘without discrimination and on the basis of equal opportunity.’ Simply providing an inclusive educational experience is not enough. The CRPD explains that the educational experience must be a ‘quality’ educational experience, with quality being judged against the experiences of students without disabilities.

The notion of what constitutes an inclusive educational environment reflects the principles discussed above on the right to access. Persons with disabilities are granted the right to demand that their education is delivered through ‘alternative modes, means and formats of communication.’ The right to education in the CRPD is accordingly a powerful right as it entitles persons with disabilities to be educated, and specifies that educational materials must be delivered through accessible modes of communication.

To comply with the right to education in the CRPD states should first seek to remove all barriers to full and equal education through adopting universal design. In relation to promoting universal design in education, the CRPD explains that where possible the education system should not create any environmental barriers to full inclusion. Where barriers to full inclusion are created, the CRPD requires states to ensure that reasonable accommodations are made so that people with disabilities can exercise their right to education. This includes providing the ‘support required, within the general education system, to facilitate … effective education.’ Relevantly for the book famine it is impossible to study without access to instructional materials and, accordingly, article 24 of the CRPD requires that states facilitate access to such materials for students with disabilities.

Article 24 of the CRPD represents a paradigm shift in how states and educators approach students with disabilities. Under existing anti-discrimination laws, analysed primarily in chapters 6, 7 and 8 of Discrimination, Copyright and Equality, duties on educators are

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51 CRPD, art 24(1).
52 Ibid art 24(2)(b).
53 Ibid art 24(3)(a).
55 CRPD art 24(2)(d).
56 Ibid art 24(2)(c).
57 Ibid art 24(2)(d).
generally enlivened once a person with a disability has approached the institution, demonstrated they have a disability and explained the accommodation they require. Article 24 of the CRPD adopts a significantly different approach. Under article 24 states and educators are required to proactively seek out and remove environmental barriers by universally designing the educational experience. At a minimum this would include taking steps to ensure procurement processes do not result in the acquisition of instructional materials that do not embrace inclusive design principles.

**Operationalising the right to access in promoting inclusive workplaces**

The capacity to access and consume digital content is equally important to persons with disabilities when they complete their education and enter the workforce. Prior to the CRPD, international human rights laws failed to provide persons with disabilities any meaningful protection at work. The capacity to exercise the right to work is connected with the capacity to exercise social and economic rights. Simply put, a person without work is unable to participate in the economy. More broadly, Professor Philip Alston claims that if economic rights are not realised, people will be denied many of the rights in the Universal Declaration of Human Rights.

The right to work has wide acceptance by states, and under international human rights laws notionally includes persons with disabilities. Despite this formal protection, this right has often not translated into substantive enjoyment of the right to work. The right to work in the Universal Declaration of Human Rights provides:

> Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

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Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* provides clear support for article 23 of the *Universal Declaration of Human Rights* through the following provision:

The States Parties to the present covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

The difficulty for persons with disabilities with the rights to work posited in the *Universal Declaration of Human Rights* and *International Covenant on Economic, Social and Cultural Rights* is that it is unclear precisely what states need to do to discharge these rights. The phrase ‘just and favourable conditions of work’ could include the right to fair pay, the right to not be unemployed, the right to use work to alleviate poverty, the right to employment for immigrants, and the right to decent work for people with disabilities. The right to work therefore could be said to contain a number of sub-rights. The challenge under the pre-CRPD human rights regime was defining precisely what sub-rights applied and how all these rights were to be implemented. In the absence of certainty it was arguably possible to adopt an approach that maximised or minimised persons with disabilities’ capacity to exercise their right to work.

Prior to the CRPD states could construe a worker with a disability through various understandings, including as defective and in need of cure (medical model), disabled by society generally (social model), or as a full person disabled by internal and external causes (critical disability studies). International instruments provided very little guidance on how to realise this right. Considering the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights* were posited in the 1940s when the medical model was the governing paradigm, it is not surprising that it took most of the twentieth century to implement workplace disability discrimination laws. It was not until the social model gained traction that states began to take concrete steps to provide workplace protections. In the United States, for example, the *Rehabilitation Act of 1973* and the *Americans with Disabilities Act of 1990* were not enacted until well after the adoption of the international bill of rights.

The uncertainty about what the right to work means for persons with disabilities has been substantially redressed by the CRPD. Unlike the earlier human rights conventions, the CRPD is a human rights convention that specifically deals with the issues concerning persons with disabilities.

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68 29 USC § 701-794.

69 42 USC §§12101-12117.

disabilities. Accordingly, article 27 of the *CRPD* provides significant detail on what states must do to ensure persons with disabilities can enjoy their right to work. Article 27(1) provides that:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

   (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

   (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

   (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

   (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

   (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

   (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

   (g) Employ persons with disabilities in the public sector;

   (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

   (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

   (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

   (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
Article 27 expressly provides that states have positive and negative obligations to ensure persons with disabilities’ right to work. Article 27, however, does not create a right to access information communication technologies at work. There is an obligation to create work environments that are ‘open, inclusive and accessible to persons with disabilities’, but this right does not go as far as the right to education in the CRPD. The right to education guarantees people with disabilities that they will be able to access education, and that this will be provided in modes of communication that are accessible. The right to work, in contrast, provides that people with disabilities will be free to seek work and, but for employment in the public service, the CRPD does not guarantee employment.

Many industries, such as the gig economy, are almost entirely digital, and failing to promote universal design will exclude persons with disabilities from this industry. Rebecca Brown and Janet Lord note that ‘affirmative steps must be taken beyond the guarantee of formal legal equality to move toward equality in fact.’ The assessment of reasonable accommodations under the CRPD differs substantially from the assessment of reasonable accommodations and adjustments under anti-discrimination laws (discussed in chapter 8 of Discrimination, Copyright and Equality). The assessment of reasonable accommodations under anti-discrimination laws focuses on what is reasonable to expect of an employer to help a worker with a disability. The reasonable accommodation assessment under the CRPD does not ask what it is reasonable to expect from an individual employer. The CRPD imposes the duty on the state to ensure reasonable accommodations are made for all workers with disabilities in that state. To achieve this end CRPD article 27(1) explains that ‘States Parties shall safeguard and promote the realization of the right to work.’ Accordingly, when considering what reasonable accommodations are under article 27, the question is whether it is reasonable to expect the state to ensure that a particular accommodation is made in workplaces. Whereas it might be unreasonable to require some employers to use information communication technologies that are accessible to persons with disabilities, it is far more reasonable to expect the state to mandate that, where possible, all information communication technologies used in workplaces adopt universal design principles. While this would be reasonable to expect from states the Committee on the Rights of Persons with Disabilities has not made a ruling to this effect. Nevertheless the Committee has noted that in other areas (such as banking) there is a high expectation that services will be fully accessible.

The Committee has ruled that anti-discrimination laws that qualify the employers’ duty with a reasonableness test are compliant with the CRPD. In Jungelin v Sweden a worker was precluded from employment as their employer’s computer system was not accessible to persons with disabilities. The Swedish courts held that in the circumstances the employer’s refusal to


72 Paul Harpur, ‘Protection of Minorities in the Global Gig Economy: Persons with Disabilities as a Case Study’ (14th Asian Law Institute Conference, Jointly organised by the Asian Law Institute and the University of Philippines, College of Law, 18 & 19 May 2017, Manila).


make accommodations was reasonable. The Committee on the Rights of Persons with Disabilities held that the Swedish laws were not in violation of article 27 of the CRPD.76

Operationalising the right of access by creating a right to information for freedom of expression

The right to obtain information on public interest matters and impart this information is regarded as a cornerstone of democracy.77 Publicity and transparency is a means to promote democracy and to combat corruption.78 People cannot hold political representatives accountable unless citizens are informed and can freely debate public issues.79 The right of expression can be observed through the rights associated with free speech,80 to obtain information on public affairs,81 and to be protected for making public interest disclosures.82 Accordingly the right of freedom of expression can be regarded as a core civil and political right.83

The right to freedom of expression strongly correlates with the right to information. The right to access information has been linked with the right to express public opinions in many human rights instruments. This link can be observed from the above discussion on the right to access information communication technologies, where article 19 in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights includes the right to impart and receive information in the same clause. The right to access information related to expression of opinion in accessible formats is an area where the CRPD imposes significant obligations on states.

The CRPD requires states to ensure that political discourse is accessible to persons with disabilities. Article 21 of the CRPD requires that member states

shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive

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76 Ibid.
77 James Madison in 1822 explained: ‘A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives’. See Gaillard Hunt (ed), The Writings of James Madison (1910) Putnam's Sons, 103.
78 Louis Brandeis, Other People's Money and How the Bankers Use It (1913) 92.
81 For a discussion of how the right to information/freedom of information has become a recognised right see Roy Peled and Yoram Rabin, 'The Constitutional Right to Information' (2011) 42 Columbia Human Rights Law Review 357.
and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

Article 21(1) expressly references the definition of ‘communication’ in article 2 of the CRPD. Article 2 defines communication widely to include

languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

To enable persons with disabilities to exercise their right to freedom of expression and opinion requires:

(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities; …

The considerable impact of article 21 of the CRPD is somewhat diluted by its requirement to only ‘[urge] private entities’84 and ‘[encourage] the mass media’85 to make information and services available in accessible formats. Regardless of these qualifications, article 21 arguably reflects the vital role that accessible public discourse plays in maintaining democracy and highlights the detrimental effect the book famine is having upon persons with disabilities, including their capacity to exercise their right to freedom of expression and opinion.

Operationalising the right to access cultural materials over intellectual property interests: a paradigm shifting development

The paradigm shift introduced by the CRPD is most apparent when analysing persons with disabilities’ right to exercise their right to participate in cultural life, recreation, leisure and sport. Generally, international human rights laws have strongly supported intellectual property interests such as copyright.86 The International Covenant on Economic, Social and Cultural Rights, for example, recognises that all people have a right to take part in cultural life and to

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84 CRPD, art 21(c).
85 CRPD, art 21(d).
enjoy the benefits of scientific progress and its applications. Under this Convention the right of people to access scientific, literary or artistic production is limited by a right of individuals ‘to benefit from the protection of the moral and material interests resulting from’ creating such works. Arguably, article 15 of the *International Covenant on Economic, Social and Cultural Rights* creates a tension between access to artistic, cultural and scientific works and the right of people to restrict access for exploitative purposes. Article 15 illustrates how human rights laws accepted the notion that rightsholders should be entitled to set the terms on which people could exercise their right to access cultural materials.

The *CRPD* adopts a transformational approach to the interaction between intellectual property and the human rights of persons with disabilities. Article 30 of the *CRPD* directly addresses the right to participate in culture, recreation and leisure. Article 30(1) entitles persons with disabilities to ‘take part on an equal basis with others in cultural life’, and requires that member states ‘shall take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats’. ‘Cultural material’ is defined widely in *CRPD* article 30(1) to include literature, artefacts, radio, screen and television productions, performance and visual arts. The wide concept of ‘culture’ can be illustrated by analysing scholarship on this right in other conventions. The 2009 General Comment on ‘the right to take part in cultural life’, issued by the United Nations Committee on Economic, Social and Cultural Rights, provided a very wide definition of ‘culture’:

[Culture] encompasses, inter alia ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environment, food, clothing and shelter, the arts, customs and traditions, through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.

Culture is not static and develops as society and technology changes. Anthropologists and cultural studies scholars explain that a society’s culture is made up of all human endeavours, including art, music, scholarship, education, work, philosophies, religion, family and social structures. Even if cultural materials are read narrowly, the obligation on states to provide persons with disabilities access to cultural materials will require significant efforts to achieve the substantive equality envisaged by the *CRPD*.

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88 *CRPD*, art 30(1).
92 Clifford Geertz was a key figure in establishing the interpretivist approach to culture. See Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (1973) Basic books.
The duty in the CRPD to provide persons with disabilities access to cultural material can create the situation where copyright interests may be impacted. Providing persons with disabilities access to artistic works, film, science and books will almost certainly require dealing with copyright protected materials in ways that the copyright owner may resist. Article 30(3) specifically considers how the potential conflicts between access to culture and intellectual property should be resolved. The article addresses the manner in which member states balance the potential conflict with intellectual property:

States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

In this way the CRPD continues and further entrenches access to cultural materials as a human right in international law, as first codified in article 15 of the International Covenant on Economic, Social and Cultural Rights.

The term ‘intellectual property’ incorporates a range of laws which restrict the use of information and ideas. These intellectual property laws include copyright, trademarks, patents, industrial design rights, trade dress, and trade secrets. The primary legal doctrine that is relevant for this submission is the law of copyright. Copyright entitles rightsholders, often creators, to restrict the use of information they own the rights in, such as books or computer software programs. Other intellectual property doctrines include patent law, which protects inventions and certain discoveries, trademark law, which protects words and symbols used for identification, trade-secret law, which protects commercially valuable information, and the right of publicity, which protects the profile of certain people in society. Each of these informational goods has their own market and unique characteristics.

During the sessions of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities the wording of article 30(3) was discussed. During the sixth session a proposal to replace ‘intellectual property rights’ with ‘copyright’ received strong support, but there was no general agreement. Accordingly the scope of CRPD article 30(3) includes the interaction between disability and copyright, but the use of the term ‘intellectual property’ means that this provision has much wider application.

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Article 30 of the *CRPD* imposes a strong positive obligation on member states to ensure that persons with disabilities enjoy access to culture and knowledge on an equal basis, including to material protected by copyright.\(^{96}\) Article 30 in particular is an extremely important provision that provides for a potential paradigm shift in the balance between intellectual property and disability rights. For many years the *Berne Convention* and other related agreements (discussed in chapter 3), have marked the minimum standard of copyright protection. Copyright industry groups have vehemently opposed suggestions that international treaties should require a maximum limit to the strength of copyright. But this is exactly what the *CRPD* requires. The *CRPD* provides that copyright can exist up to the point at which it creates a conflict with persons with disabilities’ access to cultural material. In effect, this creates a ‘ceiling’ on international intellectual property law in the context of disability access rights.\(^{97}\)

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\(^{96}\) Archbishop Silvano Tomasi, the Vatican’s permanent observer to UN agencies has cited both the *CRPD* and Blessed John Paul II’s encyclical *Laborem Exercens* to support calls for copyright reforms to address the book famine. See Clare Myers, ‘Blind People are Suffering from “book famine”, says Vatican official’, *Catholic Herald* (online), 21 June 2013 <http://www.catholicherald.co.uk/news/2013/06/21/blind-people-are-suffering-from-book-famine-says-vatican-un-envoy/>.

Consultation Question 2. Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for persons with disabilities?

How do the print disabled consume digital content?

As a group, persons with print disabilities consume information differently from those without any impairments. In addition, persons with print disabilities may consume content differently from each other depending on their attributes. Technology can be used to enable persons with various disabilities to communicate and consume content to enable them to exercise their rights.\(^98\) To enhance social inclusion hardware and software are increasingly including universal design features so that disability specific technology is not required. In addition to universally designed products, persons with print disabilities may utilise adaptive technology to consume content. Examples include:

- For the vision impaired and the blind – screen readers that provide an audio description of the text content (but not images or complex graphs) of computer screens, and screen magnification which enables people with low vision to read content;\(^99\)
- For persons unable to physically handle books, such as people with quadriplegia or tetraplegia, robotic devices which enable movement and use of computers;\(^100\)
- For people with cognitive impairments, the inclusion of images and multi-media that can aid in understanding, as well as screen readers that assist users with low vision.\(^101\)

While such technologies enable people with print disabilities to consume digital content, disability adaptive technologies can be prohibitively expensive and not work on certain devices.\(^102\) Even where persons with disabilities can utilise adaptive technologies or universally designed products, not all E-Books or E-libraries are in accessible formats and many books remain solely in standard formats printed on paper. This denial of the right to read is why there is said to be a book famine.\(^103\)


Laws and institutions recognised that persons with print disabilities could not read standard books printed on paper. This gave rise to an exemption in copyright laws that is analysed in chapter 5 of *Discrimination, Copyright and Equality*. Predominantly, charities that assist the blind have utilised these exemptions to provide persons with print disabilities a library of books in alternative or accessible formats. Charities, such as the Canadian National Institute for the Blind, the National Library Service for the Blind and Physically Handicapped, the Royal National Institute of Blind People, and Vision Australia, have impressive catalogues of books in Braille, large print and audio cassette. Most of these works have been created by volunteers reading books onto tape, as well as scanning, editing and printing books into alternative formats.

Persons with print disabilities can consume books in digital formats using screen readers, such as Non-Visual Desktop Access (‘NVDA’) and Job Access With Speech (‘JAWS’). The emergence of screen reading software and other adaptive technologies led to the creation of E-Books in disability specific formats, such as the Daisy format. Disability specific formats were created in part to enable persons with print disabilities to use their adaptive technology more effectively, and in part to reduce concerns from rightsholders that there would be leakage from the special case of print disabled readers to the wider population. Formats, such as Braille Ready Format (‘BRF’) are only usable by people using specialised devices created for persons with print disabilities. While it is possible to convert a BRF document to a PDF or rich text format (‘RTF’), the conversion will result in disability specific formatting being converted. The time taken to remove this coding and format it for a sighted person acts as a safeguard against leakage. Even if the book was successfully edited and formatted, the end product would not contain the graphics and appearance of a digital file that was ripped using a multi-feed scanner. Essentially it is quicker for a sighted person to rip a print book using a multi-feed scanner than try to convert a BRF file.

While the growth of the mainstream E-Book market is altering existing practices, currently persons with print disabilities lawfully obtain E-books through one of two means. The first example is where a charity or educational institution provides the person with a print disability a copy of the book using a copyright exemption (analysed in chapter 5 of *Discrimination, Copyright and Equality*). The second method is where E-Libraries have been developed, and which operate to provide persons with print disabilities books in accessible formats. There are substantial limitations with the interactions between copyright laws and the exemptions which regard persons with print disabilities as special cases.

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Delays and difficulties: educators and charities providing accessible E-Books under an exception to copyright

Research demonstrates that the exemption to copyright that regards persons with print disabilities as a special case is no answer to the book famine. The limitations with the current model can be illustrated by analysing how a student with a print disability obtains access to a textbook in a format they can consume. Students with print disabilities have more support than the wider print disabled population, yet even this group are experiencing a book famine in an information rich educational environment.

The exemption to copyright analysed in chapter 5 of Discrimination, Copyright and Equality has resulted in a cumbersome and inefficient process for securing an accessible version of a textbook for a student with a print disability. Rather thanrequiring the publisher to provide a digital copy of the textbook, this exemption results in the following process:

1. The student decides what classes they will take and enrolls in those classes.
2. The student contacts the professor to obtain a final reading list. This can occur in some institutions in the first week of class.
3. The student contacts the disability support officer for help in obtaining their textbooks in accessible formats. In many situations the student must first purchase a print copy of the textbook and provide evidence of this purchase.
4. Providing the student has already provided medical evidence attesting to their disability and has a disability access plan, the disability support officer will search a range of databases to determine if the book has already been scanned into an accessible format, and will contact the publisher. If this fails he/she will start scanning the book.
5. Finally, the accessible book is edited and provided to the student.\(^\text{106}\)

This approach of relying on educational institutions and charities to source accessible copies or convert standard books into alternative formats is simply not achieving reading equality.\(^\text{107}\)

The author and Dr Rebecca Loudoun have published primary research on the experiences of university students with print disabilities in Australia.\(^\text{108}\) This research involved analysing the websites of all Australian universities to ascertain how they describe their services to students and staff with print disabilities. In addition, this research involved qualitative and quantitative research with 56.4 per cent of Australia’s universities. This research found that 40% of Australian universities indicated that they had no formal policy on assisting students with print disabilities. Whether or not they had a policy, all universities participating in the research

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indicated that they provided students with print disabilities support in obtaining textbooks in accessible formats.

The nature of support varied considerably across universities and depended on whether the book was prescribed as mandatory reading, or was only recommended by the professor to assist with enhancing understanding. All universities provided support to students to obtain their prescribed readings. If the instructional material was only recommended, then 14% of universities said they required the student to manage the process of sourcing accessible versions of that content. To assist students in obtaining recommended readings and for research purposes, 96% of universities would provide assistance in gathering textbooks from shelves of libraries, while only 74% would provide assistance in photocopying textbooks, and only 51% would provide assistance in scanning parts of textbooks into digital formats.

Where universities did provide their students access to essential or prescribed readings, students with print disabilities were overwhelmingly obtaining the readings late. Only 50% indicated that first year students with print disabilities were provided with access to prescribed textbooks before the semester started. The majority of students with print disabilities obtained the full set of their readings when 14%, or about 1.9 weeks, of a 14-week semester was over. Some students however obtained their readings much later. Two universities reported that students with print disabilities did not receive all their essential readings in accessible formats until week 5 of a 12-week semester. This means some students with print disabilities were obtaining their material after 42% or more of the semester was already over. In the worst case scenario one university reported that they provided a student the last of their essential readings in week 11 of a 13 week semester. Students with print disabilities at this university received the last of their essential readings after 85% of the teaching period was concluded.

The potential for equal access: E-Books enter the mainstream market

The digital age is transforming how people consume books. While standard books remain a feature of library and personal collections, there is an increasing trend to eschew standard books in favour of E-Books. Around the start of the 21st century universities started exploring the possibilities of purchasing limited numbers of E-books.\textsuperscript{109} The popularity of E-Books is continuing to increase. In 2008 E-Book sales were about 0.6% of the US market, in 2010 about 6.4%, and in 2011 about 13.6%.\textsuperscript{110} Their comparative cost advantages in purchase and storage are making E-Books especially popular in the educational sector.\textsuperscript{111} One major Australian


university library in a 2015 purchasing period acquired 26 times more E-Books than print books.\textsuperscript{112}

Whether it is for education, work or pleasure, E-Books are cheaper than standard books, and entire E-Libraries can be contained on a smart phone or E-Reader. Whereas print books are only available from the physical library, E-books can be downloaded while a user is in their office, in a coffee shop, on the bus or while lying in bed. This makes E-Books especially attractive for people that are unable due to time restraints, geographic location or disability, to visit a bricks and mortar library to obtain a standard book.\textsuperscript{113} E-books are of course far from perfect for persons with or without disabilities. Some E-Books can be difficult to navigate or make notations on, and some people simply prefer to read paper rather than a screen.\textsuperscript{114}

No longer just a digital representation of a print book: E-Books as a multi-media experience

Some E-Books mirror the content and publishing processes of standard paper books. Other E-books utilise the potential of the digital environment. They may contain audio, images, moving images and video multi-media content, and may alter this content on a rolling basis.\textsuperscript{115} This additional content alters the meaning and consumption practices of readers.\textsuperscript{116} Instructional materials, for example, often use multi-media in E-Books to enhance the learning experience.\textsuperscript{117} The inclusion of multi-media content may create challenges for some people with print disabilities.\textsuperscript{118} This is not to say multi-media content is inherently disabling. The inclusion of this medium creates positive educational opportunities for people with print disabilities that are associated with learning disabilities.\textsuperscript{119}
When is an E-Book accessible and usable by the print disabled?

This submission argues that people with print disabilities should be able to access E-Books, E-Libraries and E-Readers on the same basis as the wider population. Equality of access exists when everyone in the community, regardless of their abilities, can consume the same information, at the same time, for the same price and at the same quality. This approach to access combines technical disability accessibility standards and a consideration of practical usability.

Further research, development and implementation of technical disability accessibility standards are critical to promoting internet and E-Book accessibility for persons with the full range of abilities within the community. A number of technical disability accessibility standards have been developed to help determine whether an E-Book is accessible to persons with print disabilities or not. Some of these standards have been developed specifically for a regulatory scheme. An example of this is the National Instructional Materials Access Standard developed for digital files of books uploaded to the National Instructional Materials Access Centre as discussed in chapter 11 of Discrimination, Copyright and Equality. Other standards have been developed with the intention of applying across the entire industry. The most relevant technical disability accessibility standards include:

Accessibility Screening Guidelines and Checklist (developed by the DAISY Consortium in collaboration with Tech For All).

- These disability accessibility guidelines provide clear testing and evaluating criteria to judge reading systems against.

Web Content Accessibility Guidelines (WCAG) 2.0

- A person with a print disability can only access the E-Book if they can navigate the E-Library. This requires the E-Library platform to be accessible. Persons across a range of impairments, with vision, hearing, and cognitive conditions, have reported problems with E-Library websites. All websites, including E-Libraries, should seek to embrace universal design principles. The leading authority on ensuring persons with disabilities' (2006) 8(4) Special Education Technology Practice 18; Michael Kennedy and Donald D Deshler, ‘Literacy Instruction, Technology, and Students with Learning Disabilities: Research we have, Research we need’ (2010) 33(4) Learning Disability Quarterly 289; Jacqueline Norman, Belva C Collins and John W Schuster, ‘Using an Instructional Package Including Video Technology to Teach Self-Help Skills to Elementary Students with Mental Disabilities’ (2001) 16(3) Journal of Special Education Technology 5.

disabilities can access websites, and by extension E-Libraries, is the Web Content Accessibility Guidelines. The current version of this at the time of publishing is the WCAG 2.0. These guidelines provide technical details on how to design features which maximise the usability of websites for people with blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity, and combinations of these.

The EPUB 3.01 Standard.\textsuperscript{124}

\begin{itemize}
\item The EPUB Standard provides technical guidance on how digital files, including E-Books, can maximise disability access. These standards provide technical guidance on how content should be represented, packaged and encoded. Through technical design and managing digital layouts, rich media, and interactivity and global typography features, the EPUB Standard embraces universal design.
\end{itemize}

While these technical disability accessibility standards play an important role, on a more practical level what end users desire is the capacity to consume the E-Book. There are numerous examples of digital spaces complying with accessibility guidelines but being completely unusable.\textsuperscript{125}

\section*{Equal access not realised: E-Books in the mainstream market}

To test the extent to which E-Libraries subscribed to by a major university were accessible to persons with print disabilities, the author, along with Dr Nicolas Suzor, developed a practical guide of what is required for meaningful access. The guide was created by focusing on the information that a university student or academic would need to extract from an E-Book.\textsuperscript{126} Following discussions with academics and university graduates the following criteria were developed:

(1) Is the text formatted so that it can be read using a screen reader?

\begin{itemize}
\item (a) Can a screen reader read the content of the E-Book? Security settings on some E-Books ensure content cannot be copied, but can also prevent screen readers and other adaptive technologies from enabling persons with print disabilities to consume the content of the E-Book.\textsuperscript{127}
\item (b) Is line spacing correct or are paragraphs or lines not formatted with hard returns in correct positions?
\item (c) Are tables and graphics described in prose?
\end{itemize}

(2) Is it possible to navigate the E-Book?

(a) Are contents and index pages available? If yes, do they have links that work?
(b) Is it possible to search for keywords in the book?
(c) Is it possible to move to particular pages in the book?

(3) Is the E-Book formatted to enable a user to cite according to leading citation styles?

(a) Are there page numbers in the E-Book, and do the page numbers of the E-Book correspond to the print version?

(b) Are the references in footnotes and reference lists accessible?

The study then applied these criteria to a random selection of E-Books on 12 E-Libraries. The study found that some E-Libraries were usable but some contained irritating barriers. The security settings on some sites required a user to respond to a visual or audio challenge, but these were extremely difficult to complete.

Once the E-Book was opened the most substantial barrier was caused by security settings that entirely prevented adaptive technology from reading the content of the E-Book. On these E-Libraries the E-Books were entirely inaccessible to people with print disabilities. While not preventing access, the requirement to read the E-Book online page-by-page represented an extreme usability problem. On one E-Library each page for the E-Book was under 300 words. The user was also required to navigate around approximately 1,000 words of random information to find the button to turn the page and the footnotes. On this E-Library 2/3 of the time spent reading was not related to book content.

While some E-Libraries permitted full-text downloads of E-Books, even on these E-Libraries access issues arose. Most E-Books had formatting problems relating to line spacing, paragraph spacing, referencing or issues with headings. Visual representations of information, such as graphs, tables or images, were poorly described or not described in most situations. Overall, the research concluded that the numbers and content of E-Books was helping to combat the book famine, but much more was required to achieve reading equality.

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Consultation Question 3. How should Australian law protect human rights in the development, use and application of new technologies? Consultation Question 3. How should Australian law protect human rights in the development, use and application of new technologies?

Anti-discrimination laws in Australia

Australia has had some form of anti-discrimination statutes on the books for over 30 years, which culminated in the passage of the first federal protection in the Disability Discrimination Act 1992 (Cth). Similar to the ADA, Australia’s Disability Discrimination Act 1992 (Cth) was amended in 2009 to reverse judicial hostility to equality that resulted in the statute being read down and distorted. An interesting difference in the reading down of disability discrimination laws between Australia and the United States is that in Australia the definition of disability has always been read widely. Australian courts read down the operation of anti-discrimination laws through a range of other technical steps in the application of the prohibitions against discrimination analysed below.

The relationships selected for regulation: The adoption of a limited social model approach

Anti-discrimination laws are failing to regulate situations that impact on the digital disablement of persons with print impairments. In order to promote digital equality regulatory interventions must target those parties who have the capacity to significantly influence levels of digital disablement in the community. As anti-discrimination laws are one of the primary vehicles to promote an inclusive society, it is critical for these laws to impose duties on parties who have the capacity to impact on digital disablement.

Anti-discrimination laws do not create general obligations to reduce discrimination in society. Instead, anti-discrimination laws identify a range of relationships as triggers for intervention, and require parties in those relationships to reduce, subject to a range of technical exceptions, discrimination based on a person’s disability. The trigger for attracting obligations not to discriminate is actual or potential contact with persons with a protected attribute; in this case a person with a disability. If a person is not in a relationship regulated by anti-discrimination laws, then that person has no duty arising from anti-discrimination laws to avoid, or even consider, when asking how their actions may have a discriminatory impact. Excluding classes

of people from legislative equality duties creates the possibility that the law may fail to regulate parties who can have a significant impact on the causes of disablement.

Before analysing whether anti-discrimination laws adequately regulate the right to read digital content, it is first important to consider the parties who impact on the capacity of persons with print disabilities to read the digital content on E-Books, E-Libraries and E-Readers. In chapter 1 this book analysed the range of parties who impact on digital disablement related to E-Books. Broadly, the parties who can impact on the capacity of persons with print disabilities to read content-books can be segmented into groups associated with:

- Authorship of the manuscript - Whether or not the author employs graphics or visual displays in presenting text impacts on disability accessibility.
- Copyright holders – Whether or not copyright holders restrict the manuscript from being published in accessible formats impacts on disability access.
- Publishing of the manuscript – Whether or not digital rights management settings prevent adaptive technology from effectively working, or whether graphics are labelled into an E-Book, impacts on disability accessibility.
- E-book libraries – Whether or not the library interface complies with web accessibility guidelines impacts on disability accessibility.
- Design and manufacture of E-Reader hardware devices – Whether or not devices include disability accessibility features or enable adaptive technology to be installed impacts on disability accessibility.
- If the person with a disability sources the E-Book through another entity, such as an educational institution, employer or public library, the approach of that other entity to the right to read impacts on disability accessibility.

Where classes of people are exempted from anti-discrimination laws, then arguably law makers have determined that people in that class either lack the capacity to reduce the digital disablement of people with impairments, or that it is unreasonable to expect them to avoid engaging in discriminatory conduct. If laws fail to regulate people who impact on equality then essentially this is a route of no accommodation. The route of no accommodation permits parties with power to act in their own interests and disregard how their conduct might exclude some people from full and equal participation in society. If people who have a material impact on social inclusion are not subject to anti-discrimination laws, and if other regulatory interventions fail to achieve meaningful levels of digital inclusion, then this is arguably a regulatory position which does not advance the human rights paradigm posited in the CRPD.

**Relationships regulated by anti-discrimination laws**

Similar to the *Canadian Human Rights Act* and the *Equality Act 2010* (UK), the Australian *Disability Discrimination Act 1992* (Cth), contains anti-discrimination duties which regulate a prescribed range of relationships. The relationships regulated in the Australian, Canadian

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and United Kingdom regimes, but for limited circumstances, centre on parties who may have direct contact with persons with disabilities. The relationships that attract regulation in Australia, Canada and the United Kingdom include employers for potential and actual employees, educators for students, principles for contractors, providers of goods and services for customers, operators of public premises for visitors, and managers of sporting activities for participants.

There is wide support for the fact that disability anti-discrimination laws have helped reduce overt forms of discrimination. At a minimum, disability anti-discrimination laws empower aggrieved parties to seek redress against people who breach anti-discrimination duties. The problem is that many of the parties who contribute to digital disablement do not attract duties under anti-discrimination laws. While educators, employers, retailers and the like contribute to digital disablement by purchasing access to E-Book libraries with disability access barriers, in most situations the parties who have direct contact with a person with a print disability have limited power to promote universal design. As will be discussed in chapter 11 in respect of the National Instructional Access Center, it is possible to use anti-discrimination laws to motivate educators to pressure E-Book publishers to provide disability accessibility in limited situations. Beyond the limited situation where an existing duty holder has the legal duty and practical capacity to ensure universal design, anti-discrimination laws have limited application in online environments.

E-Book libraries as on-line relationships that attract anti-discrimination duties in Australia and the United Kingdom

E-Book publishers control how E-Books and library platforms are designed. A person with a print disability only has access to E-Books where they can navigate the E-Library and use the E-Books hosted on that library platform. This submission will now analyse the extent to which anti-discrimination laws extend their operation to E-Book libraries and the E-Books on those platforms. In many situations people with print disabilities will not have a direct contract with E-Book libraries. The fact educators, employers and public libraries are the paying customers of the E-Libraries impacts on persons with disabilities’ legal and negotiating position, as the person with a disability often has no privity of contract with the digital platform and thus limited legal rights.

132 Disability Discrimination Act 1992 (Cth) s 15; Canadian Human Rights Act, RSC 1985, c H-6, s 7 and 8; Equality Act 2010 (UK) s 39.


134 Disability Discrimination Act 1992 (Cth) s 17; Equality Act 2010 (UK) s 41.

135 Disability Discrimination Act 1992 (Cth) s 24; Canadian Human Rights Act, RSC 1985, c H-6, s 5; Equality Act 2010 (UK) s 29.


137 Disability Discrimination Act 1992 (Cth) s 28; Equality Act 2010 (UK) ss 29, 195.

Regulating digital spaces and E-Libraries in Australia

Australia was one of the first jurisdictions to have a judicial determination that anti-discrimination laws applied to websites. Even though s 24 of the Disability Discrimination Act 1992 (Cth) does not mention the provision of digital goods and services, Australian law provides that goods and services applies to both physical and non-physical provision of goods and services. The allegation of discrimination in Maguire v Sydney Organising Committee for the Olympic Games (‘Maguire’) concerned claims that the Olympic Games ticketing system was inaccessible to persons with vision impairments that used screen readers. The then Human Rights and Equal Opportunity Commission held that it did not impose an unjustifiable hardship to require the website to be rendered accessible for people with disabilities. Thus the website was deemed unlawful and was required to be altered.

The Maguire decision by the then Human Rights and Equal Opportunity Commission, now the Australian Human Rights Commission, is an administrative tribunal and not a judicial court, and thus the precedent value of this decision is limited. There has not been subsequent judicial acceptance of the Maguire judgment in Australia. Scholars have however operated on the basis that the ratio decidendi in the Maguire decision is settled law in Australia. The Australian Human Rights Commission has provided guidance on how the Disability Discrimination Act 1992 applies to internet based relationships. The Australian Human Rights Commission can release guidelines to reduce the instances of discrimination in the community. While these guidelines have no legal force, they can assist in understanding what the Disability Discrimination Act 1992 requires of parties.


The provision of information and online services through the web is a service covered by the DDA. Equal access for people with a disability in this area is required by the DDA where it can reasonably be provided. This requirement applies to any individual or organisation developing a website or other web resource in Australia, or placing or


141 Disability Discrimination Act 1992 (Cth) s 67(1)(k).
maintaining a web resource on an Australian server. This includes web pages and other resources developed or maintained for purposes related to employment, education, provision of services including professional services, banking, insurance or financial services, entertainment or recreation, telecommunications services, public transport services, or government services, sale or rental of real estate, sport, activities of voluntary associations, or administration of Commonwealth laws and programs. In addition to these specific areas, provision of any other information or other goods, services or facilities through the internet is in itself a service, and as such, discrimination in the provision of this service is covered by the DDA.\textsuperscript{142}

Accordingly, despite the lack of judicial attention, it appears well settled in Australia that the parties who provide goods and services via the internet, including E-Libraries, are regulated by Australian anti-discrimination laws.

**Introducing the disparate impact doctrine**

People with print disabilities are disabled when books are not published in digital formats, or when E-Books are published in formats that do not follow disability accessibility guidelines. The creation of facially neutral systems, which through indifference or ignorance have a discriminatory impact, are the type of inequality that the disparate impact doctrine was developed to combat.

There are four core requirements to proving a suit of indirect discrimination or disparate impact:\textsuperscript{143}

1. Equal treatment: The defendant must impose a requirement, condition, policy or practice on the plaintiff.

2. Impact of the requirement or condition: the treatment impacts on the defendant’s group less favourably than people without the prescribed attribute.

3. There must be unfavourable treatment that is detrimental.

4. The disparate impact cannot be justified. The discriminatory treatment is lawful where it is reasonable or would impose an unjustifiable hardship.

The concept of what level of disadvantage should enliven anti-discrimination laws goes to the heart of the issue of the struggle for substantive equality.

To require a person with a disability to prove that they have suffered a certain level of harm to have their denial of rights labelled as discrimination operates on the premise that persons with disabilities are not entitled to exercise their rights on an equal basis as others. Essentially this legislative approach provides that it is not discrimination unless the denial of rights cannot be overcome by the person with a disability. The below analysis demonstrates that the United


States adopts the approach which most strongly rejects the notion that persons with disabilities should cope with disadvantage in society. The Australian and United Kingdom positions, in contrast, expect persons with disabilities to be substantially disabled by society before indirect discrimination provisions are enlivened.

Requiring a person with a disability to prove harm, and requiring them to prove they are sufficiently unable to cope with breaches of their human rights, violates the concept of equality posited in the CRPD. The focus here is not on what it is reasonable to expect the duty holder to do to enable access, but instead on what harm is acceptable. Put another way: the question is what denial of human rights is acceptable.

The requirement for a person with a disability to suffer a certain level of harm to qualify for protection is not reflected in the CRPD. The definition of disability discrimination in Article 2 of the CRPD provides that any distinction based on disability that reduces a person’s capacity to fully exercise their human rights constitutes discrimination:

> Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field …

There is arguably no justification for including hardship as a requirement for establishing whether or not disability discrimination has occurred.

There is a limit to the resources of the state and private actors. The CRPD recognises that there is a limit on what can be done to reduce disability discrimination in society. States are required to combat discrimination that reduces persons with disabilities’ capacity to exercise their economic, social and cultural rights ‘to the maximum of [their State’s] available resources …’ The assessment of what expenditure and steps are reasonable should consider the degree of harm experienced by persons with disabilities as one factor in determining what is reasonable to expect of duty holders. Harm in itself should not be elevated to a requirement of enlivening the disparate impact doctrine.

A legislative approach that performs the reasonableness test only where a disabling practice causes substantial harm seems to provide that it is reasonable to adopt discriminatory practices if the harm is calculated as slight or moderate. The approach in the CRPD does not expect states to devote substantial resources to reduce a very small barrier. The approach in the CRPD, however, would expect states to adopt laws which compel duty holders to remove disabling barriers that create moderate harm, where the removal of such barriers requires insignificant cost or effort. The problem with elevating harm caused by the practices to a threshold issue

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146 CRPD art 4(2).
potentially means that many disabling barriers which could easily be removed remain as a cause of inequality, as the focus is not on removing barriers but on what harm should be endured.

The Australian position arguably is the approach which least reflects the notion of equality posited in the CRPD. Whereas the United Kingdom position focuses on how the practices in society disadvantage and disable people with impairments, the Australian approach turns the focus onto how the person who has been disabled by the practice manages to cope with that barrier to equality. A practice will only breach Australian indirect discrimination laws where the person with a disability is sufficiently unable to cope with the denial of their human rights.

The coping test has resulted in negative outcomes for persons with disabilities in Australia. The test has reduced students with print disabilities’ capacity to obtain essential readings in the formats that best promote equality. For example, in Hinchliffe v University of Sydney the coping test was applied to a university student with a print disability desiring to access essential course readings. The university provided the student with the reading material in a printed format which only provided her partial access. The university remedied their error and provided the students the material in the required format after class had commenced. In assessing whether the university had breached the indirect discrimination provisions the court considered whether the student coped with the disadvantage. In this case the student scanned papers and obtained assistance from her mother and grandmother to read documents onto tape. The court held that ‘[g]enerally, it was possible for the applicant to comply with the university’s requirement. She could make use of course material provided to her in a standard format by converting it to a different format.’ As the student had some eyesight, had a strong support network and was prepared to work exceptionally hard, the court held there was insufficient harm caused to amount to a breach of the indirect discrimination provisions.

The coping test essentially authorises any practice that causes discriminatory harm, providing that a person with a disability can find a strategy to sufficiently cope with that harm. This requires courts to decide when coping strategies are sufficiently unsuccessful to enliven protection. The Full Court of the Federal Court of Australia performed such an analysis in Hurst v State of Queensland. In this case a student was fluent in one form of sign language, but was required to receive education in another form of sign language that she was less familiar with. Even though the student received reasonable grades she was not able to function to her full potential. The court held that ‘[a] hearing impaired child may well be able to keep up with the rest of the class, or ‘cope’, without Auslan. However, that child may still be seriously disadvantaged if deprived of the opportunity to reach his or her full potential and, perhaps, to excel.’

Courts accept that students with disabilities will experience disablement, but that this often does not constitute sufficient harm to justify intervention. In Clarke v Catholic Education Office the court held an inability to comply was held to require a ‘serious disadvantage’ with the result that the student could not ‘meaningfully participate in classroom instruction’ without

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149 Hurst v State of Queensland [2006] FCAFC 100.
150 [2006] FCAFC 100, [125].
the accommodation. On appeal the Full Court adopted a similar approach through holding that the question of whether or not a student could comply should be decided by asking whether the student was ‘able to receive the full benefit of [their] education.’ The Full Court of the Federal Court of Australia has accepted that persons with disabilities have a right to access education but no equivalent right to access employment. Accordingly, the level of disadvantage that a person with a disability is expected to cope with outside the educational sector is significantly higher.

There are arguably many situations where persons with print disabilities can cope with reading disablement through the support of friends and family and expenditure of resources. There is a substantial gap between coping with reading disablement and the equality envisaged by the CRPD. In the United States case of Enyart v National Conference of Bar Examiners the capacity to cope was not addressed. If Enyart v National Conference of Bar Examiners was brought in Australia under the Disability Discrimination Act 1992 (Cth) then it is possible the court would have determined that Enyart could have sufficiently coped with the disadvantage such that she had no remedy. The coping test means that discrimination in society is deemed not to amount to disability discrimination simply because persons who are disabled by barriers find mechanisms to cope with inequalities. Coping with disadvantage is a long way from the capacity to exercise rights on an equal basis as others as envisaged by the CRPD.

The retrofitting focus of anti-discrimination laws

One of the primary limitations with the disparate impact doctrine in Australia, the United Kingdom and the United States is the capacity of duty holders to pay scant attention to equality issues when adopting practices. Once a practice has been created it may be difficult to make the environment accessible, thus enabling the duty holder to justify the existence of the inequality. Even if macro issues were considered, the reasonable accommodation model responds after systems are created. The exceptionalist approach does not challenge the imbalances of power or discourse of dominance. Under this paradigm the underlying disabling structures in society which lead to exclusion remain in place. Discussing the United States regime, Dr Beth Ribet has criticised how anti-discrimination laws ignore employers’ conduct in creating barriers to employment: ‘[t]he culpability of the employer or entity in the production of the disability itself is not conceived within the terrain of the law, when considering or weighing what its burden should be.’ Similarly, Professor Sandra Fredman observes that

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[t]his calls into question the dominance of the ‘merit’ principle. The latter ‘assumes that the individual should fit the job, rather than that the job should be adjusted to fit the worker’.\textsuperscript{156} The retrofitting focus of anti-discrimination laws means many barriers to inclusion are created which anti-discrimination laws do not require removed.

It is often difficult or impossible to retrofit systems to render them accessible. Arguably, a system which focuses on retrofitting will not create an accessible society. The CRPD calls upon states to promote universal design where possible. Under this approach reasonable adjustments and accommodations operate where it is difficult or expensive to implement universal design. This paper argues that relying on systems that permit barriers to be created and then seek to retrofit access can reduce many barriers to inclusion, but it is a considerable distance from creating equality. Equality can only be achieved where states do more to promote universal design, and embrace reasonable accommodations and adjustments where inclusive design is impractical.

**Persons with disabilities have limited resources to combat digital disablement**

Most of the population has limited emotional, financial and time resources to pursue every grievance they experience. People who are categorised as disabled have additional limitations as they are disabled by society. People with disabilities are often impoverished,\textsuperscript{157} discriminated against in employment\textsuperscript{158} and rely upon welfare.\textsuperscript{159} Accordingly, people with disabilities are in the unfortunate position of having fewer resources to pursue grievances, while having more grievances that they need to pursue simply to have equal treatment.

The emotional strain on people with disabilities to continually fight for their rights has been described as advocacy fatigue. Dr Carrie Basas defines advocacy fatigue to mean ‘the increased strain on emotional, physical, material, social, and wellness resources that comes from continued exposure to system inequities and inequalities and the need to advocate for the preservation and advancement of one’s rights and autonomy.’\textsuperscript{160} The intersection of limited resources, experiencing disablement and the traumas that come from reliving discrimination creates significant pressures on the decision to self-advocate for one’s rights. Accordingly, persons with disabilities need to carefully consider what grievance they will devote their limited resources to pursuing.

the notion that society has a significant disabling impact on persons with different abilities remains an unfortunate reality. Some barriers by themselves will have a significant impact on the person with an impairment, and in other situations the collective impact of many small barriers to equality, which while individually are more irritating than disabling, when experienced together can have a significant disabling impact.

As discussed in chapters 1 and 7 of *Discrimination, Copyright and Equality*, there are a range of parties who may contribute to the existence of digital content that is not usable by persons with disabilities. These parties include authors, publishers, libraries, designers and manufacturers of hardware, amongst others. The difficulty in determining who should be held legally responsible is illustrated by analysing the range of parties who contribute to the barriers represented by multi-media content in an E-Book which does not include disability accessibility features. The creation of such an E-Book could occur where an author utilises information technology support at their university to assist them in designing the multi-media content. The author’s publisher, who receives the E-Book, may decide not to embrace inclusive design as it might impact on the copyright of the author and others. This E-Book is then published and E-Libraries host the E-Book with multi-media content that is not accessible for persons with print disabilities. Finally, educational institutions purchase access to the E-Book and their students, including those with print disabilities, consume the E-Book on university hardware. Some hardware devices can have software settings that reduce levels of disability accessibility. With so many parties contributing to their digital disablement, how does the person with a print disability decide who to request assistance from or who may have breached anti-discrimination duties? If a person with a disability does identify the main cause of their digital disablement, has there been a legal breach where there is sufficient evidence to put before a court?

The limitations with relying on victim enforcement to combat digital disablement can be demonstrated by analysing the application of anti-discrimination laws to the above hypothetical example of an E-book with multi-media content. It is reasonable to assume that a student with a print disability would be aware that students without a disability can utilise all the features of E-Books, while such content is not accessible to persons with print disabilities. As this digital disablement can negatively impact on their education, it is probable that most students with print disabilities would identify that they have experienced an injury. While a student (or their parents) with a print disability may name their treatment as an injury, accurately attributing blame and advocating for this injury is far more complex.\(^\text{161}\) The blame attribution process requires a full understanding of the actual causes of the accessibility barrier. Most persons with print disabilities are not information technology experts and could not readily understand how different pieces of hardware and software interact to reduce disability access. Even if a person identified the access problem, then they would need to attribute blame to a particular party who attracts a legal duty.\(^\text{162}\) Establishing that technology has caused discrimination can be especially challenging.\(^\text{163}\) An additional complication in the above example is that the author, copyright holder, publisher, E-Library and educational institution

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could all be in different jurisdictions or even countries and be difficult or impossible to contact (if the work is an orphan work).164

In addition to complicated evidential and legal issues, persons with disabilities are often vulnerable and may even require support to lodge a grievance.165 Where a grievance is lodged, then power relations can result in authorities discounting the voice of the person with a disability.166 To effectively agitate for their rights, persons with disabilities often require support from an advocate with disability law expertise. It can, however, be difficult to obtain the assistance of a disability rights advocate.

Furthermore, the disability rights movement has been comparatively less effective in developing strategic litigation to agitate for rights. For example, professors Michael Waterstone, Michael Ashley Stein and David Wilkins have identified the limited role of disability cause lawyers in taking key precedents to the United States Supreme Court.167

Disability rights advocacy is expensive. Lawyers are expensive and there is limited funding for individuals pursuing disability discrimination public interest law suits.168 One avenue to reduce costs for individuals is to pursue a class action. It is, however, increasingly difficult to have class actions certified, which reduces the potential of this option for persons with disabilities.169 Disability person organisations have a history of assisting in public interest litigation.170 Public interest litigation is also expensive and there is a trend to reduce public funding to support such litigation. Indeed, the seven year battle against Canada's national passenger rail provider VIA Rail nearly bankrupted the national organisation representing Canadians with disabilities.171 Following this litigation the level of support for disability person organisations was reduced which meant similar litigation would not be possible in the future.172 Another option would be for the state anti-discrimination commissions to be provided increased funding and to become more active. Such calls have been made before, though an increase in state enforcement has not materialised.173

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164 See chapter 4 of this monograph for a discussion of orphan works.
172 Ibid 72.
Introducing the concept of positive duties

The realisation that a new approach was required to advance the struggle for equality resulted in calls for new regulatory approaches. Where the traditional anti-discrimination model largely required duty holders to refrain from conduct, positive duties focus on duty holders taking proactive action to reduce the creation of inequalities in society. Positive duties do not focus on attributing blame, but on identifying what parties in society can help reduce inequalities and requiring them to take action. Positive duties embrace a significantly different regulatory approach than that reflected in traditional negative duties. This different approach has arguably resulted in improved equality outcomes.

The resilience of inequalities has led to a body of scholarship which argues that positive duties are required to enable everyone in society to fully exercise their human rights. How these positive duties should be operationalised has attracted a rich body of scholarship. Professor Susan Sturm has argued that a structural approach is required to reduce more subtle forms of discrimination. Sturm argues that the structuralism approach requires a regulatory ‘approach that encourages the development of institutions and processes to enact general norms in particular contexts.’ Professor Sandra Fredman has argued that equality laws should focus on all parties who impact on inclusion rather than focusing on defined relationships. The concept of positive duties reflects a market-based management response to addressing inequalities in society.

Arguably one of the most effective processes to achieve continuous change is through management systems. In their seminal work, Professors Cary Coglianese and David Lazer explained the regulatory criteria for effective systems-based regulation. An effective management-based process will contain processes to identify hazards, processes to mitigate the hazards identified, procedures for monitoring and correcting problems, training policies for


Ibid 463.


implementation and measures for evaluating and refining the system. Legislative reforms and scholarship that embraces positive duties to combat inequalities in society embrace the concept that the regulatory focus should move away from the state prohibiting conduct, and instead turn to finding vehicles to empower and motivate parties to find strategies to achieve equality outcomes.

An effective equality intervention should find strategies to motivate regulated parties to be actively involved with increasing levels of compliance. Once the cause of disablement is identified, then the question should be who has the capacity, directly or indirectly, to help reduce that barrier. Traditional anti-discrimination duties prohibit parties in prescribed relationships from engaging in discrimination. While these duties required duty holders to make reasonable adjustments to enable access once systems were established, chapter 8 identified that this did not always result in equal access.

Under the management-based approach equality issues are not addressed after a system is created, but instead during the planning, implementation and operation of the system. This means duty holders are more likely to identify and manage barriers to equality throughout the process. For example, suppose there were two E-Book platforms which provided access to the same titles for the same cost, but one embraced universal design and the other was not accessible for persons with disabilities. Under the traditional anti-discrimination model a duty holder generally could purchase either system and would then need to consider disability access once the system was in place. The management-based approach, in contrast, would include disability accessibility as a factor in the decision making process when determining which E-Book platform to purchase. While this process will not guarantee equality, there is an increased probability that the E-Book platform which embraced universal design would be purchased.

\[181\] Ibid. 